Opinions of the Supreme Court of Texas

Fiscal Year 2012

(September 1, 2011 – August 31, 2012)

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FISCAL YEAR 2012 OPINIONS

(SEPTEMBER 1, 2011 – AUGUST 31, 2012)

IN THE SUPREME COURT OF TEXAS

NO. 06-1084

BISON BUILDING MATERIALS, LTD., PETITIONER,

v.

LLOYD K. ALDRIDGE, RESPONDENT

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

Argued January 16, 2008

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

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

We deny the motion for rehearing of Bison Building Materials, Ltd. We withdraw our opinion of April 20, 2012 and substitute the following in its place.

The issue in this case is whether an appellate court has jurisdiction over an appeal from a trial court order confirming an arbitration award in part and vacating the award in part based on the existence of unresolved questions of law or fact necessary to a ruling, yet the trial court did not expressly direct a rehearing.[1] We agree with the court of appeals that it does not have jurisdiction over the appeal, but for different reasons.

[1] Bison Building filed for bankruptcy in 2009 under Chapter 11 of the United States Bankruptcy Code. The bankruptcy court lifted the automatic stay to allow Aldridge's claim to proceed and we lifted our stay on September 2, 2011. *See* TEX. R. APP. P. 8.2, 8.3.

I. Factual and Procedural Background

Lloyd K. Aldridge was employed as a truck driver by Bison Building Materials, Ltd. As a condition of his employment, Aldridge signed a Mutual Agreement to Arbitrate Claims (arbitration agreement) in which he agreed to resolve any claims for "work-related illness or injuries" by arbitration. The arbitration agreement provided that "the Federal Arbitration Act shall govern interpretation, enforcement, and all proceedings pursuant to this Agreement. To the extent that the Federal Arbitration Act (FAA) is inapplicable, state law pertaining to agreements to arbitrate shall apply." The parties agree that the FAA, rather than the Texas Arbitration Act (TAA), governs the substance of the agreement.

After he was injured on the job, Aldridge signed a two-page "Post Injury Waiver and Release" (release) as consideration for receiving benefits under Bison's "Workplace Injury Plan" (plan). The release stated in pertinent part, "I am aware that . . . I could file a legal action against [Bison but] . . . . I understand and agree to give up the right to file a legal action against [Bison] . . . for any and all damages sustained by me because of my injury." Bison accordingly paid Aldridge approximately $80,000 in medical and wage replacement benefits under the plan.

Aldridge subsequently filed a demand for arbitration seeking to recover damages for lost wages, medical expenses, pain and suffering, mental anguish, and loss of earning capacity. During the arbitration proceedings, Bison moved to dismiss Aldridge's claim, raising waiver and release. Aldridge provided an affidavit averring that he did not remember signing the release or, in the alternative, that he did not understand the consequences of signing the release. The arbitrator found that Aldridge signed the release and waived his right to arbitrate his personal injury claim against Bison. Accordingly, the arbitrator dismissed Aldridge's claim with prejudice. Based on the

enforcement clause in the arbitration agreement, Aldridge petitioned the trial court to set aside the award and remand the matter to the arbitrator, and Bison moved to confirm the award.

After the hearing on the arbitrator's award and in light of a new opinion from this Court (cited in the order below), the trial court confirmed the award in part and vacated it in part, concluding that residual "fact questions" precluded confirmation of the arbitrator's take-nothing award. The order provides:

> [T]he Court determines that the motions should be GRANTED in part and DENIED in part as follows.
>
> The Court finds that, as a matter of first impression, that both the Texas Supreme Court decision *Storage & Processors, Inc. v. Reyes,* 134 S.W.3d 190 (Tex. 2004) (holding that Texas' strong public policy for Workers' Compensation favors even a radical extension of the doctrine to less-than-total-exculpation waivers where workers are involved) and the fair notice requirements described therein are properly applied to a post-injury waiver. The Court further finds that the post-injury waiver is ambiguous as to whether the right to arbitration is forfeited. Thus, the Final Award of dismissal is VACATED in PART, solely as to the arbitrator's finding that the post-injury waiver precludes arbitration <u>because there are fact questions</u> on:
>
> > (1) Is the post-injury waiver enforceable. That is, (a) does the waiver satisfy the fair notice requirements and, if not, (b) did both parties have actual knowledge of the terms of the waiver agreement. If the answer to these questions is "no," the waiver is unenforceable. Even if the waiver is enforceable, there is a fact question on:
> >
> > (2) Do the ambiguous terms of the waiver preclude this action seeking arbitration.
>
> The arbitration award is CONFIRMED as to the finding that Aldridge signed the post-injury waiver.

(Emphasis supplied.) Although the trial court confirmed the arbitrator's finding that Aldridge signed the release, the trial court vacated the arbitrator's finding that the post-injury waiver precluded arbitration because of unresolved fact questions.

The trial court confirmed the arbitrator's determination that Aldridge signed the post-injury waiver and vacated the arbitrator's holding that the waiver barred Aldridge's arbitration claims. The order did not explicitly direct a rehearing before the arbitrator, but the trial court held that the post-injury waiver was ambiguous and indicated that the arbitrator needed to consider fact questions (or mixed questions of law and fact) concerning the post-injury waiver provision.[2] Both parties appealed the trial court's order.

After the parties filed their initial briefs, the court of appeals requested supplemental briefing on the issue of appellate jurisdiction. 263 S.W.3d 69, 72. A divided court of appeals held that the trial court's order was not appealable as either a final judgment or an interlocutory order. *Id.* at 76. The court determined that the judgment is not final because it does "not contain finality language or otherwise state that it is a final judgment" and "necessarily contemplates resolution of [the remaining] issues by way of a rehearing," making the appeal interlocutory. *Id.* at 73, 74. After examining the relevant portions of the FAA and TAA, the court of appeals concluded that no statute permitted an appeal in this case. *Id.* at 76. The court therefore dismissed the appeal for want of jurisdiction without reaching the merits of the case.

On appeal to this Court, Bison argues that the trial court's order was appealable because it confirmed part of the award and vacated part of the award, but did not explicitly or implicitly direct a rehearing. Aldridge contends that we should dismiss the appeal for want of jurisdiction because the trial court's order does not dispose of all issues and contemplates further resolution of fact issues.

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[2] The dissent writes that the trial court "dismissed, with prejudice" Aldridge's claims. ___ S.W.3d ___ (Hecht, J., dissenting). That is a difficult conclusion to draw from the language of the order. The trial court found an ambiguity in the release and unresolved fact questions in the dispute. Under the arbitration agreement, only the arbitrator could decide these unresolved, substantive issues.

Neither party suggested that the interlocutory appeal sections of the TAA were inapplicable due to the nature of the arbitration agreement at issue here.

II. Law and Analysis

We must address whether the trial court's judgment is appealable, either as a final judgment or as an interlocutory order. Unless specifically authorized by statute, Texas appellate courts only have jurisdiction to review final judgments. TEX. CIV. PRAC. & REM. CODE § 51.014; *see also Stary v. DeBord*, 967 S.W.2d 352, 352–53 (Tex. 1998). A judgment is final for purposes of appeal "if and only if either it actually disposes of all claims and parties then before the court, regardless of its language, or it states with unmistakable clarity that it is a final judgment as to all claims and all parties." *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 192–93 (Tex. 2001). Bison contends that the order is final and appealable because the parties' competing motions were completely resolved by the trial court, with nothing left for the trial court to do. We disagree.

The order is not final because it does not contain finality language, state that it is a final order, or dispose of all claims and parties. 263 S.W.3d at 73. Instead, the order states that questions of fact remain which must be resolved before the award may be confirmed, if at all. Specifically, the order confirmed the arbitrator's finding that Aldridge signed the post-injury waiver. That was a disputed question of fact in the arbitration. However, the order vacated the arbitrator's finding that the post-injury waiver precludes arbitration because "fact questions" remained on whether the waiver satisfies the common law fair notice requirements for work-related liability waivers and, if not, whether both parties had actual knowledge of the waiver agreement. The order also bases its partial vacatur on the need for findings of fact on the issue of whether "the ambiguous terms of the waiver

preclude this action." Because the order leaves significant factual and legal issues open for further determination, it is interlocutory and not appealable unless authorized by statute.

Although the FAA governs the dispute, "federal procedure does not apply in Texas courts, even when Texas courts apply the [FAA]." *Jack B. Anglin Co., Inc. v. Tipps*, 842 S.W.2d 266, 272 (Tex. 1992) (orig. proceeding). Because appellate jurisdiction is procedural, we look to Texas procedural law to determine whether the court of appeals has jurisdiction over the interlocutory appeal in this case. The only applicable Texas statute that could make the trial court's interlocutory order appealable is section 171.098 of the TAA. TEX. CIV. PRAC. & REM. CODE § 171.098(a)(3) (permitting interlocutory appeal over a trial court order "confirming or denying confirmation of an award" under the TAA); *Id.* § 171.098(a)(5) (permitting interlocutory appeal over a trial court order "vacating an award without directing a rehearing"). However, the TAA does not apply to this dispute. Section 171.002(a) of the TAA states that Chapter 171 "does not apply to . . . a claim for personal injury," unless the agreement is signed by both parties' attorneys. TEX. CIV. PRAC. & REM CODE § 171.002(a)(3), (b)(2). The arbitration agreement here was not signed by the parties' attorneys. Thus, Chapter 171 does not apply, as a matter of Texas procedure, and subsections 171.098(a)(3) and (a)(5), on which both parties rely in determining appellate jurisdiction, cannot apply either. *Jack B. Anglin Co.*, 842 S.W.2d at 272.

Because the TAA previously did not provide an avenue for interlocutory appeals of FAA arbitrations, this Court held that it would entertain appeals otherwise permitted under the FAA through a petition for writ of mandamus. *Jack B. Anglin Co.*, 842 S.W.2d at 272. In the past, when a party to a dispute sought to appeal an interlocutory order adverse to arbitration under the TAA and FAA, the party was required to file both a petition for writ of mandamus and interlocutory appeal.

See id. The Legislature amended the Civil Practice and Remedies Code to permit interlocutory appeals "to the court of appeals from the judgment or interlocutory order of a district court . . . 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; *CMH Homes v. Perez,* 340 S.W.3d 444, 448 (Tex. 2011). However, this act is applicable only to appeals of an interlocutory order in an action filed on or after September 1, 2009. Act of June 19, 2009, 81st Leg., R.S., ch. 820, § 2, 2009 Tex. Gen. Laws 2061. Therefore, section 51.016 is inapplicable to this case.

The TAA does not provide jurisdiction over this interlocutory appeal. However, even if the TAA did apply to this matter, our conclusion regarding lack of appellate jurisdiction is consistent with our reasoning in this area. In *East Texas Salt Water Disposal Co., Inc. v. Werline*, this Court held that a trial court's order denying confirmation and re-submitting the case to arbitration was subject to appellate jurisdiction. 307 S.W.3d 267, 270 (Tex. 2010). We held that the order fit squarely within the section of the TAA allowing for appeal of the confirmation or denial of an award. *Id*.; TEX. CIV. PRAC. & REM. CODE § 171.098(a)(3). In denying the request for confirmation at issue in *Werline*, the district court "made clear that it rejected the award and all bases on which it rested." *Werline*, 307 S.W.3d at 270. We also reasoned that a limited rehearing to correct a problem —such as an instance in which "an arbitration award is unclear or *incomplete* or contains an obvious error"—is not a final decision on the issue "but merely a deferral of final ruling until the arbitration was complete." *Id*. at 270–71 (emphasis added). *Werline* relied largely on the reasoning in *Forsythe Int'l S.A. v. Gibbs Oil Co. of Tex.*, 915 F.2d 1017, 1020 (5th Cir. 1990), which explained there is no jurisdiction over arbitration awards that are incomplete.

The trial court order at issue in this case is readily distinguishable from the order in *Werline*, but fits squarely within *Werline*'s rationale for rehearing. First, in *Werline*, the trial court's judgment denied confirmation and vacated the award because the arbitrator's material factual findings in the award were "'so against the evidence . . . that they manifest gross mistakes in fact and law.'" *Id*. at 269. Second we also noted that the trial court "went so far as to hold that the material facts the parties had vigorously disputed in the first arbitration should all be established against Werline in the second arbitration" in effect rendering a final judgment, even if not by such nomenclature. *Id*. at 270. The order in the matter before us is distinguishable and fits within neither section 171.098(a)(3) nor 171.098(a)(5) of the TAA. TEX. CIV. PRAC. & REM. CODE § 171.098(a)(3), (a)(5). Here, the trial court vacated in part and confirmed in part. While the order confirms that Aldridge signed the post-injury waiver, it does not dispose of the substance of the claims, but instead explicitly identifies unresolved issues and, in essence, remands the case to the same arbitrator to complete its fact finding and legal determinations. *See In re Serv. Corp. Int'l*, 355 S.W.3d 655, 659 (Tex. 2011) (per curiam) (holding that, ordinarily, the trial court did not have the authority to override the parties' selection of an arbitrator). *Forsythe*'s reasoning squarely supports holding a lack of appellate jurisdiction here:

> Had the district court remanded to the same arbitration panel for clarification of its award, the policies disfavoring partial resolution by arbitration would preclude appellate intrusion until the arbitration was complete.

915 F.2d at 1020 n.1. The trial court did not remand the dispute to a different arbitrator and the trial court's order identified unresolved questions of fact that the arbitrator needed to answer. In the words of *Werline* and *Forsythe*, the Bison arbitration was not "complete." *Id*.

Policies disfavoring partial resolution by arbitration preclude appellate intrusion until the arbitration is complete. *Id.* Due to the arbitrator's failure to resolve multiple issues of fact or law, the order cannot be considered a confirmation or a denial of an arbitration award under section 171.098(a)(3) or a vacatur of an award without directing a rehearing under section 171.098(a)(5).

We observed in *Werline* that, because Texas law favors arbitration, the scope of judicial review of an arbitration award is narrow. *Id.* at 271 (citing *CVN Group, Inc. v. Delgado*, 95 S.W.3d 234, 238 (Tex. 2002) (stating the presumption favoring an arbitral award)). *CVN Group* discouraged subjecting arbitration awards to judicial review because it "adds expense and delay, thereby diminishing the benefits of arbitration as an efficient, economical system for resolving disputes." 95 S.W.3d at 238. We decline to expand the narrow scope of judicial review of arbitration awards, especially where they are incomplete.

The limited rights of appeal provided in section 171.098(a) of the Civil Practice and Remedies Code act as a limitation on the authority of trial courts to order the re-arbitration of matters that should, under the statute, be subject to interlocutory appeal. Those limitations circumscribe the ability of the trial court to prolong arbitration and thereby delay resolution of the matter. Under circumstances in which the TAA does not provide appellate jurisdiction, a trial court unreasonably delaying the proceedings by ordering re-arbitration for arbitrary or unsupported reasons may be the proper subject of a writ of mandamus. There is no indication in the present case, however, that the order serves any purpose other than to resolve legitimate factual and legal issues. Importantly, the parties have not sought review of the issue by mandamus. *Cf. In re Chevron U.S.A., Inc.*, No. 08-08-00083-CV, 2010 WL 299149, at *3, 7 (Tex. App.—El Paso, Jan. 27, 2010, no pet.) (not designated for publication) (holding that the interlocutory appeal provisions of the TAA do not apply

to a review of the trial court's order confirming or denying an award, but granting relief through mandamus). While the Legislature has corrected the arbitration appeal two-step, the correction is not applicable here. Therefore, the court of appeals, and this Court, have no jurisdiction over this interlocutory appeal. Although neither party raised this issue before the court of appeals or before this Court, we consider our jurisdiction *sua sponte*. *See Univ. of Tex. Sw. Med. Ctr. v. Loutzenhiser*, 140 S.W.3d 351, 358 (Tex. 2004).

Finally, we should retain some measure of symmetry.[3] Granting appellate review of an incomplete FAA arbitration by mandamus would likely grant the FAA matter a greater scope of review in Texas courts than it would receive in a federal appellate court. As we explained in *In re Palacios*,

> There is little friction between the FAA and Texas procedures when state courts review by mandamus an order that the federal courts would review by interlocutory appeal . . . . But it is *quite another matter* for state courts to review by mandamus an order that the federal courts could not review at all. Such review would create tension with the legislative intent of the FAA . . . .

221 S.W.3d 564, 565 (Tex. 2006) (per curiam) (emphasis added). The case before us is "quite another matter." *Id*. There does not appear to be a strong consensus among federal courts on this question, but federal cases indicate that the FAA would not allow an interlocutory appeal in federal court of a district court's order determining that an arbitration is not final but is incomplete. *See* discussion of federal case law *infra*.

This line of reasoning applies in the context of court review of arbitration awards, where there is a "strong presumption in favor of enforcing arbitration awards" and the role the federal

[3] As pointed out, section 51.016 does not govern this appeal as it was not yet effective at the time of this suit.

courts generally take in reviewing arbitration awards is "extremely limited." *Wall St. Assoc., L.P. v. Becker Paribas, Inc*., 27 F.3d 845, 849 (2nd Cir. 1994) (citation omitted). For example, in *Rich v. Spartis*, the Eighth Circuit recently concluded that an arbitration award that was indefinite, incomplete, and ambiguous would not be vacated on the grounds that the arbitrators had exceeded their authority. 516 F.3d 75, 82 (2nd Cir. 2008). Because an essential assessment by the arbitrators allowing the court to determine the award's validity was missing, the order was not complete and was instead a source of "confusion." *Id*. This "lack of clarity" in the award precluded a ruling by the Court as to whether the arbitrators exceeded their authority; instead a remand to the arbitration panel was necessary for clarification. *Id*. at 83–84. In *Landy Michaels Realty Corp.* v. *Local 32B-32J, Service Employees International Union, AFL-CIO*, the Second Circuit held that appellate jurisdiction was lacking. 954 F.2d 794, 797 (2d Cir. 1992). In that case, the arbitrator ruled in favor of a trade union and awarded substantial damages. *Id*. at 795. The district court vacated the award as to damages and remanded for reconsideration. *Id*. Because the district court ordered the same arbitrator to make a further determination with respect to the content of the award, the court of appeals held that remand is outside its appellate jurisdiction. *Id*. at 797. The order at issue before us seeks completion of an arbitration and sends the dispute to the same arbitrator. It would most likely be viewed by a federal appellate court today as outside its jurisdiction due to the lack of finality of its terms.

The dissent concludes that the trial court's order was final and that it fully and finally resolved Aldridge's claims. ___ S.W.3d___ (Hecht, J., dissenting). Understandably, the dissent's case law supports the established rule that a district court order calling for re-evaluation of the entire controversy is appealable. *Id*. (citing, *e.g*., *HCC Aviation Ins. Group, Inc. v. Emp'rs Reinsurance*

Corp., 243 F. App'x 838, 842 n.5 (5th Cir. 2007) (concluding that an order vacating an entire arbitration award is appealable, despite being remanded to the same panel); *Bull HN Info. Sys., Inc. v. Hutson*, 229 F.3d 321, 327 (1st Cir. 2000) (construing as appealable part of a district court order remanding the "entire matter" to a new arbitrator); *Jay Foods, L.L.C. v. Chem. & Allied Prod. Workers Union, Local 20, AFL–CIO*, 208 F.3d 610, 613 (7th Cir. 2000) (noting that appeal is available from an order of remand, unless the purpose of the remand was "was merely to enable the arbitrator to clarify his decision in order to set the stage for informed appellate review"); *Virgin Islands Hous. Auth. v. Coastal Gen. Constr. Servs. Corp*., 27 F.3d 911, 914 (3rd Cir. 1994) (concluding an order remanding the case to a new arbitration hearing was subject to appeal, but under facts in which "the District Court did not simply request clarification, but instead directed a re-evaluation of the entire controversy . . . .")). Orders that direct a re-evaluation of a completed arbitration are appealable. However, orders that defer a final ruling until the arbitration is complete are not appealable. *Werline*, 307 S.W.3d at 270–71. We conclude that the order in this case is not the type of appealable order described in the dissent's authorities.

III. Conclusion

For the aforementioned reasons, we affirm the court of appeals' judgment and, for different reasons, dismiss the appeal for want of jurisdiction. TEX. R. APP. P. 60.2(a).

Dale Wainwright
Justice

OPINION DELIVERED: August 17, 2012

IN THE SUPREME COURT OF TEXAS

NO. 06-1084

BISON BUILDING MATERIALS, LTD., PETITIONER,

v.

LLOYD K. ALDRIDGE, RESPONDENT

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

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

As the Court acknowledges,[1] when the Federal Arbitration Act[2] ("the FAA") affords appellate review that Texas law does not, state-court review may be available by mandamus.[3] The Court holds that the FAA would not allow an appeal from the trial court's order in this case. I disagree and therefore respectfully dissent.

[1] *Ante* at ___.

[2] 9 U.S.C. §§ 1-16.

[3] *See In re Gulf Exploration, LLC*, 289 S.W.3d 836, 841-843 (Tex. 2009) (in conditionally granting relief, the Court concluded that the court of appeals erred in granting mandamus relief to a party complaining of a trial court order compelling arbitration because that party failed to establish that it had an inadequate remedy by appeal; the Court distinguished *In re Poly-America*, 262 S.W.3d 337, 352 (Tex. 2008), in part because it involved conflicting legislative mandates); *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 271-273 (Tex. 1992).

Bison Building Materials, Ltd., a non-subscriber, paid Aldridge, its employee, medical and wage replacement benefits under its insurance plan in exchange for Aldridge's written waiver of his "right to file a legal action . . . for any and all damages sustained" because of his injury. After receiving some $80,000 in benefits, Aldridge asserted damage claims against Bison and demanded arbitration, having agreed under the FAA to arbitrate claims for work-related injuries. In the arbitration, Bison argued that the post-injury waiver barred Aldridge's claims. Aldridge alleged that he did not recall signing the waiver, but if he did sign it, he did not understand it. The arbitrator found that Aldridge signed the waiver and so dismissed, with prejudice, his attempt to arbitrate a claim for common law damages.

Aldridge then sued Bison to have the arbitration award set aside. Aldridge moved for summary judgment, and in response, Bison moved for confirmation. They both argued for a standard of review — "that applied by an appellate court reviewing a decision of a trial court sitting without a jury" — provided for in their arbitration agreement but not in the FAA.[4] The trial court apparently applied that standard in issuing the following order:

ORDER

> Pending before the Court are the motion for summary judgment in action to set aside arbitration award filed by plaintiff Lloyd K. Aldridge ("Aldridge") and the motion to confirm arbitration award filed by defendant Bison Building Materials, Ltd. ("Bison"). By these motions, the parties ask this Court to review the arbitrator's August 24, 2004, Final Award which grants Bison's motion to dismiss arbitration. By the arbitrator's award, he concluded that (1) the post-injury waiver at issue

[4] The United States Supreme Court has since held that the FAA's grounds for vacating or modifying an arbitration award cannot be enlarged by agreement. *Hall St. Assocs., L.L.C. v. Mattel, Inc*., 552 U.S. 576, 578 (2008).

precluded Aldridge from pursuing a common law negligence claim for damages resulting from his on-the-job accident; and (2) Aldridge did sign the post-injury waiver.

Having considered the submissions and the applicable law, the Court determines that the motions should be GRANTED in part and DENIED in part as follows.

The Court finds that, as a matter of first impression, that both the Texas Supreme Court decision *Storage & Processors, Inc. v. Reyes*, 134 S.W.3d 190 (Tex. 2004) (holding that Texas' strong public policy for Workers' Compensation favors even a radical extension of the doctrine to less-than-total-exculpation waivers where workers are involved) and the fair notice requirements described therein are properly applied to a post-injury waiver. The Court further finds that the post-injury waiver is ambiguous as to whether the right to arbitration is forfeited. Thus, the Final Award of dismissal is VACATED in PART, solely as to the arbitrator's finding that the post-injury waiver precludes arbitration because there are fact questions on:

(1) Is the post-injury waiver enforceable. That is, (a) does the waiver satisfy the fair notice requirements and, if not, (b) did both parties have actual knowledge of the terms of the waiver agreement. If the answer to these two questions is "no," the waiver is unenforceable. Even if the waiver is enforceable, there is a fact question on:

(2) Do the ambiguous terms of the waiver preclude this action seeking arbitration.

The arbitration award is CONFIRMED as to the finding that Aldridge signed the post-injury waiver.

The record does not reflect what further proceedings, if any, the trial court contemplated, or whether either party requested clarification.

Instead, both appealed. A divided court of appeals dismissed the case for want of jurisdiction.[5] The court held that the appealed order contemplated rehearing by the arbitrator[6] and therefore was not final,[7] that the Texas Arbitration Act ("the TAA") did not provide for interlocutory appeal,[8] and that any right of appeal provided by the FAA was irrelevant because "'federal procedure does not apply in Texas courts, even when Texas courts apply the [FAA].'"[9]

Irrespective of whether the court of appeals' construction of the TAA was correct, it does not allow an appeal in this case because, as the Court holds, it is inapplicable.[10] An agreement to arbitrate a claim for personal injury, like Aldridge's, is outside the scope of the TAA unless the agreement is made on advice of counsel and signed by the parties' attorneys.[11] That did not happen here. But the court of appeals neglected to consider whether the FAA would allow an appeal of a

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[5] 263 S.W.3d 69, 76 (Tex. App.–Houston [1st Dist.] 2006).

[6] *Id*. at 74 ("Though the Order does not expressly direct a rehearing, by identifying remaining issues, it necessarily contemplates resolution of those issues by way of a rehearing.").

[7] *Id*. at 73 ("The Order here does not contain finality language or otherwise state that it is a final judgment. Nor does it dispose of all claims and parties. In fact, it does the exact opposite — it states that 'fact questions' remain regarding whether the post-injury waiver is enforceable and whether the ambiguous terms of the waiver preclude the arbitration. Thus, the Order does not dispose of all the parties' claims; rather, it contemplates continuing resolution through the arbitration process and is interlocutory per se under [*Lehmann v. Har-Con Corp.*, 39 S.W.3d 191 (Tex. 2001)]. " (citation, internal quotation marks, and brackets omitted)).

[8] *Id*. at 74-76.

[9] *Id*. at 73 (quoting *Jack B. Anglin Co. v. Tipps,* 842 S.W.2d 266, 272 (Tex. 1992)).

[10] *Ante* at ___.

[11] TEX. CIV. PRAC. & REM. CODE § 171.002(a)(3), (4), (c).

federal court's order like the one in this case. If so, a Texas state court would allow review by mandamus.[12]

The FAA states that "[a]n appeal may be taken from . . . an order . . . confirming or denying confirmation of an award or partial award, or . . . modifying, correcting, or vacating an award . . . ."[13] The order in this case expressly confirms the arbitration award "as to the finding that Aldridge signed the post-injury waiver" and vacates it "in part, solely as to the arbitrator's finding that the post-injury waiver precludes arbitration". The confirmation is insignificant; a finding that Aldridge signed the waiver does not, by itself, support dismissal of his claim. On the other hand, the vacatur "in part" is effectively in full; the arbitrator's award dismissing Aldridge's claim is reversed. The order denies confirmation of the award and vacates it. Thus, the order is one that may be appealed under the FAA.

The Court reaches the contrary conclusion because the order "seeks completion of an arbitration and sends the dispute to the same arbitrator",[14] but this is simply not true. The order does not "seek" to have the arbitration completed. It does not remand the dispute to the same arbitrator (if he is still available), or for that matter, to any arbitrator. The order does not suggest, much less direct, rehearing, and the record does not reflect that any further arbitration proceedings have been conducted or even requested in the nearly six years since the order was signed.

The Court bases its conclusion on three cases. The first, *Wall Street Associates, L.P. v.*

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[12] *Jack B. Anglin*, 842 S.W.2d at 271-273.

[13] 9 U.S.C. § 16(a)(1)(D)-(E).

[14] *Ante* at ___.

Becker Paribas Inc., has nothing to say about the appealability of post-award orders.[15] In *Rich v. Spartis*, the Second Circuit, without questioning its jurisdiction over an appeal from an order confirming an arbitration award in part and vacating it in part, remanded the case to the district court with directions to order the arbitration panel to state the basis for its award.[16] The district court complied and reinstated its original decision,[17] and the Second Circuit.[18] In the third case, *Landy Michaels Realty Corp. v. Local 32B-32J*, an arbitrator found that an employer had breached a collective bargaining agreement and awarded the union substantial damages.[19] The employer sued to vacate the award.[20] The district court confirmed the award's determination of breach, but the parties agreed that damages had been miscalculated, and the court remanded the dispute for the arbitrator to redetermine damages.[21] The Second Circuit dismissed the appeal for want of jurisdiction, indicating that the FAA does not permit appeal of an "order remanding a case to the

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[15] 27 F.3d 845 (2d Cir. 1994).

[16] 516 F.3d 75, 78-84 (2d Cir. 2008) (the district court vacated the damages part of the award; the court of appeals remanded to the district court with directions to order the arbitration panel "to specify whether the Worldcom trading losses . . . represented in all, part, or none of the lump-sum Award . . . .").

[17] *Rich v. Salomon Smith Barney, Inc. (In re WorldCom, Inc. Sec. Litig.)*, Nos. 02 Civ. 3288(DLC), 05 Civ. 3913(DLC), 2008 U.S. Dist. LEXIS 104440 (S.D.N.Y. Aug. 11, 2008) (the district court issued orders requiring the arbitration panel to specify the basis for its damages award and, after a show cause order, the panel responded that compensatory award was solely for Worldcom losses; the district court therefore reinstated its original decision vacating in part and confirming in part the arbitration panel's award).

[18] *Rich v. Spartis*, 307 F. App'x 475, 476-478 (2d Cir. 2008) (affirming, on appeal after the remand, the district court's reinstatement of its original decision).

[19] 954 F.2d 794, 795 (2d Cir. 1992).

[20] *Id.*

[21] *Id.*

same arbitration panel for clarification of its award".[22] The court noted that the Fifth Circuit had made the same observation in *Forsythe International, S.A. v. Gibbs Oil Co.*[23] But the order appealed in *Forsythe* had vacated an award and remanded the dispute for arbitration before a different panel, and the court allowed the appeal, explaining:

> While the district court's order commanded further arbitration, it also nullified the decision of an arbitration panel. If an order remanding the case to a different arbitration panel renders a vacatur unreviewable, parties to arbitration could never determine whether the district court acted within the narrow statutory limits governing vacatur of the original award. Such a result would disserve the policies that promote arbitration and restrict judicial review of awards.[24]

More recently, in *Bull HN Information Systems, Inc. v. Hutson*, the First Circuit first noted that the appeal from the district court's order denying confirmation of the arbitrator's "Phase 1" award fell squarely within FAA § 16(a)(1)(D), which permits an appeal from an order "'denying an award or *partial* award,'"[25] before addressing whether a remand – in that part of the district court's order vacating the award and remanding the entire matter to a new arbitrator – would nonetheless render the order a nonappealable interlocutory order. The First Circuit rejected that idea, observing that courts "'routinely assume . . . that an order vacating an arbitrator's decision but remanding for

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[22] *Id.* at 797 (emphasis in original).

[23] 915 F.2d 1017, 1020 n.1 (5th Cir. 1990).

[24] *Id.* at 1020.

[25] 229 F.3d 321, 327-328 (1st Cir. 2000) (quoting 9 U.S.C. § 16(a)(1)(D) (emphasis added)) (the court observed that the arbitrator's "Phase 1 Award could be characterized as a partial order because it contemplates further arbitration proceedings in Phase 2").

additional arbitration is appealable under [FAA] § 16(a)(1)(E) . . . .'"[26]

> The reasoning of those courts is persuasive, and we hold that an order of the district court which vacates and remands an arbitral award is not thus made an interlocutory order. Allowing the appeal furthers the "pro-arbitration policy designed to expedite confirmation of arbitration awards" articulated by Congress when it amended the FAA to allow appeal from certain orders concerning arbitration. This is not like an order remanding to the arbitrator merely for clarification. A remand for a new arbitration proceeding, unlike an unappealable interlocutory order within the scope of § 16(b), does not offend "the policies disfavoring partial resolution by arbitration," but instead encourages finality and completeness. [27]

The rule from these cases is that an order remanding a dispute to an arbitrator for clarification of his award is not appealable, but an order remanding a dispute for a new arbitration before a new arbitrator is. The cases do not specifically consider the appealability of an order remanding for a new arbitration before the same arbitrator, though the *Hutson* analysis implies that such an order would also be appealable. Other cases have reached that conclusion.[28] The Court tries to shoehorn this case into the latter category, but it can do so only by rewriting the trial court's order

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[26] *Id.* at 328 (quoting *Perlman v. Swiss Bank Corp. Comprehensive Disability Prot. Plan*, 195 F.3d 975, 980 (7th Cir. 1999), and citing *Jays Foods, L.L.C. v. Chem. & Allied Prod. Workers Union, Local 20*, 208 F.3d 610, 613 (7th Cir. 2000), *Virgin Islands Hous. Auth. v. Coastal Gen. Constr. Servs. Corp.*, 27 F.3d 911, 914 (3d Cir. 1994), and *Forsythe*, 915 F.2d at 1020). In *Virgin Islands Housing Authority*, 27 F.3d at 914, the district court's order did not specify whether the hearing on remand was to be conducted by the original arbitrator, but, even if it had, the court would not have deemed the order interlocutory within the scope of 9 U.S.C. § 16(b); the court was "not convinced by the dictum in *Forsythe* that appealability in situations of this nature should be determined by whether the remand is to the original or a new arbitrator. Rather, the distinction is whether the additional hearing is ordered merely for purposes of clarification – an order that would not be appealable – or whether the remand constitutes a re-opening that would begin the arbitration all over again."

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

[28] *HCC Aviation Ins. Grp., Inc. v. Emp'r Reinsurance Corp.*, 243 F. App'x 838, 842 & n.5 (5th Cir. 2007); *see also Jays Foods*, 208 F.3d at 612-613 (the court, to cut the procedural knot that it had created, explained that it was wrong, given the 1988 changes to the FAA, when it concluded that a trial court order vacating the arbitrator's decision was not immediately appealable because the order remanded the case to the arbitrator; the same arbitrator on remand, emphasizing that he disagreed, bowed to what he thought was the district court's implicit command to rule for the company).

to direct a remand to the same arbitrator, something it simply does not do. Even if the shoe fit, the cases cited do not deny appealability to an order requiring an arbitration Mulligan, even before the same arbitrator.

I would hold that an order like the one in this case can be appealed under the FAA and thus can be reviewed by mandamus in Texas courts. Had the trial court applied the restrictive standard of review prescribed by the FAA as it should have,[29] confirmation would have been required. I would therefore direct the trial court to vacate its order and instead confirm the arbitration award. Because the Court does not do so, I respectfully dissent.

Nathan L. Hecht
Justice

Opinion delivered: August 17, 2012

[29] *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 578 (2008).

IN THE SUPREME COURT OF TEXAS

NO. 07-0288

CITY OF DALLAS, PETITIONER,

v.

DAVID S. MARTIN AND GEORGE G. PARKER, 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 CHIEF JUSTICE JEFFERSON, JUSTICE HECHT, JUSTICE WAINWRIGHT, JUSTICE MEDINA, JUSTICE GREEN, JUSTICE GUZMAN, and JUSTICE LEHRMANN joined.

JUSTICE WILLETT filed a dissenting opinion.

This appeal involves issues of governmental immunity from suit. With the exception that this matter is a class action, which does not affect our analysis or conclusions, and one argument that we address separately, the material facts, procedural background, issues, and arguments presented are similar to those we considered in *City of Dallas v. Albert*, ___ S.W.3d ___ (Tex. 2011). Thus, our conclusions and holdings are the same as those in *Albert*.

The matter[1] arises out of a dispute over whether the City of Dallas paid its firefighters and police officers in accordance with a 1979 ordinance adopted pursuant to a voter-approved

[1] This appeal involves two petitions, *City of Dallas v. Martin* (No. 07-0288) and *City of Dallas v. Parker* (No. 07-0289), which we consolidated.

referendum.[2] Claiming the City had not properly paid them, some firefighters and police officers (collectively, the Officers) brought a class action asserting breach of contract claims and seeking a declaratory judgment.

As it did in *Albert*, the City filed a counterclaim, later filed a plea to the jurisdiction based on governmental immunity, and then dismissed its counterclaim. 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 appeal was pending at the court of appeals, the Legislature amended the Local Government Code to provide for a limited, retroactive waiver of certain local governmental entities' immunity from suit. *See* TEX. LOC. GOV'T CODE § 271.152.[3] In light of judicial[4] and

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[2] 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).

[3] 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.

[4] More specifically, we decided *Tooke v. City of Mexia*, 197 S.W.3d 325 (Tex. 2006) and *Reata Construction Corp. v. City of Dallas*, 197 S.W.3d 371 (Tex. 2006). In *Tooke* we held that the phrases "sue and be sued" and "plead and implead" do not constitute clear and unambiguous waivers of governmental immunity. 197 S.W.3d at 342. In *Reata* we held that a governmental entity does not have immunity from monetary claims against it that are "germane to, connected with, and properly defensive to" affirmative claims made by the entity, to the extent the claims against the entity offset the entity's claims. 197 S.W.3d at 378.

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 638, 644.

For the reasons set out in *Albert* we conclude that: (1) the ordinance's adoption by means of referendum did not result in the City's loss of immunity from suit; ___ S.W.3d at ___; (2) the City has immunity from suit as to the declaratory judgment action; ___ S.W.3d at ___; (3) by non-suiting its counterclaim the City did not reinstate immunity from suit as to the Officers' claims that were pending against the City when it non-suited the counterclaim; ___S.W.3d at ___; and (4) the case must be remanded for the trial court to consider whether the Legislature waived the City's immunity by amending the Local Government Code. ___ S.W.3d at ___.

In addition to arguments made in *Albert* and addressed above, the Officers in this case assert that the City's immunity from suit is waived because the suit implicitly involves the validity of pay resolutions adopted by the city council. *See* TEX. CIV. PRAC. & REM. CODE § 37.006(b) ("In any proceeding that involves the validity of a municipal ordinance . . . the municipality must be made a party . . . ."). However, the Officers' pleadings do not support this contention. Their pleadings reference the ordinance as having become a term of their employment contracts and two resolutions as possible bases for calculating their damages. They do not question the validity of either the ordinance or a resolution.

We reverse the judgment of the court of appeals and remand the case to the trial court for further proceedings.

Phil Johnson
Justice

OPINION DELIVERED: December 16, 2011

IN THE SUPREME COURT OF TEXAS

NO. 07-0288

CITY OF DALLAS, PETITIONER,

v.

DAVID S. MARTIN AND GEORGE G. PARKER, ET AL., RESPONDENTS

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

Argued December 17, 2009

JUSTICE WILLETT, dissenting.

For the reasons stated in my dissent in *Albert*, ___ S.W.3d at ___, I would decline to reach the issues decided by the Court, and would instead remand to the trial court to consider first whether amendments to Chapter 271 of the Local Government Code effect a waiver of the City's immunity.

_____
Don R. Willett
Justice

OPINION DELIVERED: December 16, 2011

IN THE SUPREME COURT OF TEXAS

NO. 07-1011

KEITH LOWELL, ET AL., PETITIONERS,

v.

CITY OF BAYTOWN, TEXAS, RESPONDENT

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

PER CURIAM

Petitioners are firefighters for the City of Baytown. They sued the City, claiming that it improperly calculated pay for certain assignments in violation of the Firefighter and Police Civil Services Act. The firefighters sought declaratory and injunctive relief, as well as "all pay and benefits lost as a result of Defendant's failure to properly pay Plaintiffs during temporary assignment of higher-classified duties." The firefighters also requested prejudgment interest on back pay, attorney's fees, costs, and postjudgment interest. The City filed a jurisdictional plea asserting governmental immunity, which the trial court granted.

The court of appeals affirmed the trial court's judgment as to the firefighters' back pay claims, holding that *City of Houston v. Williams*, 216 S.W.3d 827 (Tex. 2007)(per curiam), and *City of Sweetwater v. Waddell*, 218 S.W.3d 80 (Tex. 2007)(per curiam),[1] "foreclose any award of money

[1] In *Waddell*, firefighters sued the City of Sweetwater for failure to promote and failure to pay each firefighter the same base salary as required by statute. *City of Sweetwater v. Waddell*, 218 S.W.3d 80, 80 (Tex. 2007)(per curiam). The firefighters sought a declaration that the City's actions were unlawful, an order that one firefighter be promoted,

damages under the Civil Service Act unless the Legislature gives to firefighters and police officers, for whose benefit this act was passed, permission to sue." 264 S.W.3d 31, 36.

In *Williams*, we held that retired firefighters could not pursue a declaratory judgment action against the City to recover amounts allegedly withheld from lump-sum termination payments in violation of the Local Government Code. *Williams*, 216 S.W.3d at 828. We applied the rule set out in *Texas Natural Resource Conservation Commission v. IT-Davy*, 74 S.W.3d 849, 856 (Tex. 2002), that the Declaratory Judgment Act cannot be used to circumvent immunity. *Id*. at 829. We noted that "[t]he only injury the retired firefighters allege has already occurred, leaving them with only one plausible remedy–an award of money damages." *Id*.

More recently, in *City of El Paso v. Heinrich*, 284 S.W.3d 366, 380 (Tex. 2009), we dismissed claims for retrospective relief for pension payments alleged to have been reduced in violation of state law. We made clear that while "a claimant who successfully proves an *ultra vires* claim is entitled to prospective injunctive relief, as measured from the date of injunction," retrospective monetary remedies are generally barred by governmental immunity. *Heinrich*, 284 S.W.3d at 376. Even if a suit seeking to require state officers to comply with statutory provisions may be brought, its remedy may implicate immunity. *See id.* at 374 (noting the "curious situation" that "the basis for the *ultra vires* rule is that a government official is not following the law, so that immunity is not implicated, but because the suit is, for all practical purposes, against the state, its remedies must be limited"). Recognizing that drawing the line for permissible remedies at monetary

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attorney's fees, costs, and monetary damages. *Id*. *Waddell* does not address whether a back pay award is barred by governmental immunity. The trial court dismissed on the basis of governmental immunity. The court of appeals reversed, holding that the City's immunity from suit was waived by a "sue and be sued" clause in its charter. *Id*. at 81. We reversed based on *Tooke v. City of Mexia*, 197 S.W.3d 325 (Tex. 2006). *Id.*

relief is "problematic," we concluded that a "compromise between prospective and retroactive relief, while imperfect, best balances the government's immunity with the public's right to redress in cases involving *ultra vires* actions." *Id*. at 374–75. Applying this rule, we dismissed Heinrich's retrospective claims for pension benefits allegedly withheld in violation of the statute governing the pension fund. *Id*. at 380.

Here, the firefighters' claims for back pay and related damages for improper calculation of pay for assignments performed in the past are the type of retrospective relief that we held barred by governmental immunity in *Heinrich* and *Williams*. In *Heinrich* we noted, however, that the Legislature can authorize retrospective relief. The firefighters assert that the Legislature has done so with Local Government Code sections 271.151–.160, enacted during the pendency of this appeal.[2] The firefighters urge us to remand this case to the trial court so that they may replead in light of Chapter 271, as we have done in numerous, similar cases (including *Williams*). *See City of Dall. v. Albert*, ___ S.W.3d ___, ___ (Tex. 2011) (plaintiff firefighters and police officers sought declaratory relief and damages for breach of contract); *Williams*, 216 S.W.3d at 829; *see also City of Dall. v. Dequire*, 249 S.W.3d 428, 428–29 (Tex. 2008) (per curiam)(plaintiff police officers sought declaratory relief and damages for failure to promote); *Dall. Fire Fighters Ass'n v. City of Dall.*, 231 S.W.3d 388, 388–89 (Tex. 2007) (per curiam) (plaintiff firefighters sought declaratory relief, injunctive relief, damages, and attorney's fees for breach of contract and for violation of the city's charter and civil service board rules); *City of Dall. v. Saucedo-Falls*, 218 S.W.3d 79, 79–80 (Tex. 2007) (per curiam) (plaintiff police officers and firefighters sued for back pay, interest, attorney's

[2] The firefighters acknowledge that section 180.006 of the Local Government Code, which applies only to claims "initially asserted on or after the effective date [June 15, 2007] of this Act," Act of May 22, 2007, 80th Leg., R.S., ch 1200, § 3, 2007 Tex. Gen. Laws 4071, 4072, is inapplicable here.

fees, and alternatively for declaratory relief). We agree with the firefighters that a remand is appropriate here.

The court of appeals also reversed the trial court's judgment dismissing the firefighters' claims for prospective declaratory and injunctive relief, holding that such claims did not implicate governmental immunity. Although the court of appeals correctly concluded that immunity does not preclude certain prospective claims, we recently held that such actions must be brought against the relevant government officials, rather than the governmental entity itself. *See Heinrich*, 284 S.W.3d at 373 (observing that "these suits cannot be brought against the state, which retains immunity, but must be brought against the state actors in their official capacity. This is true even though the suit is, for all practical purposes, against the state."). Here, the firefighters named the City rather than city officials in their official capacity as *Heinrich* requires, but their pleading predated *Heinrich*. In addition to remanding to permit the firefighters to replead in light of chapter 271, our remand will also permit the firefighters to replead in light of *Heinrich* and seek appropriate relief, if any, against the relevant city officials.

Accordingly, we grant the firefighters' 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 consistent with this opinion. TEX. R. APP. P. 59.1, 60.2(d).

OPINION DELIVERED: December 16, 2011

IN THE SUPREME COURT OF TEXAS

NO. 08-0591

ROLLING PLAINS GROUNDWATER CONSERVATION DISTRICT, PETITIONER,

v.

CITY OF ASPERMONT, TEXAS, RESPONDENT

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

PER CURIAM

Rolling Plains Groundwater Conservation District sued the City of Aspermont for water transportation fees and for a declaration that the City must comply with the District's rules. The court of appeals held that governmental immunity barred the District's claim for payment but not its declaratory judgment action. 258 S.W.3d 231, 236. While this appeal was pending, we decided *City of El Paso v. Heinrich*, 284 S.W.3d 366, 368-69 (Tex. 2009), which is consistent with the court of appeals' ultimate holding with respect to the District's claim for past due fees, penalties, and costs. Consequently, we reject the District's arguments to the contrary. The City did not seek review of the court of appeals' declaratory judgment holding. Accordingly, we affirm the court of appeals' judgment.

The City, located in Stonewall County, operates water wells that are outside city limits but within the District boundaries of Haskell, Knox, and Baylor counties.[1] The wells supply roughly two-thirds of the City's water, which the City transports from the District to Stonewall County. The wells were exempt from regulation until 2003, when the Legislature authorized the District to assess limited export fees or production fees for water transported outside District boundaries.[2] Act of May 28, 2003, 78th Leg., R.S., ch. 992, § 1, 2003 Tex. Gen. Laws 2896. Accordingly, the District amended its rules and adopted such fees.

The District sued after the City refused to pay export fees for water it transported outside the District. In addition to the export fees, the District sought late payment fees, civil penalties,[3] attorney's fees, and costs. The District also sought a declaration "that as an owner or operator of groundwater wells located within the District and as a transporter of groundwater outside of the

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[1] The District was created pursuant to article XVI, section 59 of the Texas Constitution and chapter 36 of the Texas Water Code. TEX. CONST. art. XVI, § 59; TEX. WATER CODE ch. 36; *see also* Act of May 26, 1993, 73rd Leg., R.S., ch. 1028, 1993 Tex. Gen. Laws 4435, *amended by* Act of April 20, 2001, 77th Leg., R.S., ch. 38, 2001 Tex. Gen. Laws 68, *and* Act of May 28, 2003, 78th Leg., R.S., ch. 992, 2003 Tex. Gen. Laws 2896.

[2] The Water Code exempts from regulation

> a well and any water produced or to be produced by a well that is located in a county that has a population of 14,000 or less if the water is to be used solely to supply a municipality that has a population of 121,000 or less and the rights to the water produced from the well are owned by a political subdivision that is not a municipality, or by a municipality that has a population of 100,000 or less, and that purchased, owned, or held rights to the water before the date on which the district was created, regardless of the date the well is drilled or the water is produced. The district may not prohibit the political subdivision or municipality from transporting produced water inside or outside the district's boundaries.

TEX. WATER CODE § 36.121.

[3] Water Code section 36.102(b) provides that the board of a groundwater district "by rule may set reasonable civil penalties for breach of any rule of the district not to exceed $10,000 per day per violation, and each day of a continuing violation constitutes a separate violation." TEX. WATER CODE § 36.102(b).

District, Aspermont is bound by and must comply with" the District's enabling act, chapter 36 of the Water Code, and the District's rules.

The City filed a plea to the jurisdiction on the basis of governmental immunity. The trial court denied the plea, and the City appealed. Relying on *City of Houston v. Williams*, 216 S.W.3d 827, 829 (Tex. 2007), the court of appeals held that the City is immune from suit as to the District's enforcement action seeking past due fees, penalties, and costs, and rendered judgment dismissing those claims. 258 S.W.3d at 236. The court of appeals affirmed the trial court's judgment denying the City's plea as to the District's declaratory judgment action. *Id*. The District petitioned this Court for review of the immunity question; the City has not petitioned this Court to review the court of appeals' declaratory judgment holding.

The City, as a political subdivision of the state, is entitled to governmental immunity[4] from a suit for money damages unless it has been waived. *Tex. Nat. Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 853 (Tex. 2002). The District alleges that the Water Code waives immunity. The court of appeals concluded that it does not. 258 S.W.3d at 235. We agree with the court of appeals.

Section 36.102(a) of the Water Code provides: "[a] district may enforce this chapter and its rules by injunction, mandatory injunction, or other appropriate remedy in a court of competent jurisdiction." TEX. WATER CODE § 36.102(a). The court of appeals concluded that section 36.102 "does not specifically authorize a suit against a political subdivision or a municipality; nor, for that

[4] Sovereign immunity refers to the State's immunity from suit and liability and protects the State and its divisions, while governmental immunity protects political subdivisions of the State, including counties, cities, and school districts. *See Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 694 n.3 (Tex. 2003).

matter, does it specifically authorize the assessment of penalties against a political subdivision or municipality." 258 S.W.3d at 234. To waive immunity, the statute at issue must contain a clear and unambiguous expression of waiver. TEX. GOV'T CODE § 311.034; *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 696 (Tex. 2003). The District contends that the court of appeals erred in failing to consider chapter 36 as a whole. The District argues that section 36.115 of the Water Code, which provides that no "person" may take certain actions without obtaining a permit from the District, waives immunity because under the Code Construction Act, a "person" includes a "governmental subdivision or agency." TEX. WATER CODE § 36.115; TEX GOV'T CODE § 311.005(2). However, the Government Code provides:

> In order to preserve the legislature's interest in managing state fiscal matters through the appropriations process, a statute shall not be construed as a waiver of sovereign immunity unless the waiver is effected by clear and unambiguous language. In a statute, the use of "person," as defined by Section 311.005 to include governmental entities does not indicate legislative intent to waive sovereign immunity unless the context of the statute indicates no other reasonable construction.

TEX. GOV'T CODE § 311.034.

Here, section 36.115 can be reasonably construed as consistent with governmental immunity. The Water Code applies to private individuals and governmental entities alike, so the Code is not without meaning when construed against an asserted waiver of immunity. *See City of Midlothian v. Black*, 251 S.W.3d 791, 798 (Tex. App.—Waco 2008, no pet.). Even if the incorporation of the Code Construction Act's definition of "person" into the Water Code created an ambiguity, we must construe ambiguities in a manner that retains immunity. *Taylor*, 106 S.W.3d at 701. Thus, we agree with the court of appeals that the legislation does not clearly and unambiguously waive immunity.

Aside from its textual argument, the District urges that legislative policy will be adversely affected if the City cannot be sued for its alleged noncompliance with Code provisions. If municipalities are immune from suit, it argues, then the District will be unable to effectively manage its aquifers. But "[a]s we have repeatedly noted, the Legislature is best positioned to waive immunity, and it can authorize retrospective relief if appropriate." *Heinrich*, 284 S.W.3d at 377.

Even though governmental immunity has not been waived, under *Heinrich*, "suits to require state officials to comply with statutory or constitutional provisions are not prohibited by sovereign immunity, even if a declaration to that effect compels the payment of money." *Id*. at 372. Generally, however, only prospective relief is available; retroactive relief dictated by a court is not. *Id*. at 376-77. The court of appeals held that *City of Houston v. Williams*, 216 S.W.3d 827, 829 (Tex. 2007), "controls the outcome of this case to the extent that Rolling Plains seeks a judgment for money damages for injuries that have already occurred, i.e., the past due fees, penalties, and other costs." 258 S.W.3d at 235. This remains true under *Heinrich*; thus, to the extent the District seeks retroactive relief, including past due fees, penalties, and costs, we affirm the court of appeals' judgment.

In addition to past due fees, penalties, and costs, the District sought a declaration "that as an owner and operator of groundwater wells located within the District and as a transporter of groundwater outside of the District, Aspermont is bound by and must comply with" the District's enabling act, Chapter 36 of the Texas Water Code, and the District's Rules. The court of appeals held that the City "is not immune from the causes of action asserted by Rolling Plains for the construction of the applicable legislation and for a declaration regarding whether Aspermont is

subject to and must comply with the rules and regulations of Rolling Plains." 258 S.W.3d at 236. The City has not challenged that part of the court of appeals' judgment and in fact urges us to allow the trial court to decide the District's declaratory judgment action. Thus, that part of the court of appeals' judgment is not before us. *Turtle Healthcare Group, L.L.C. v. Linan*, 337 S.W.3d 865, 869 (Tex. 2011).

Because the District's claim for past due fees, penalties, and costs would result in the payment of retroactive monetary damages, the court of appeals correctly concluded that governmental immunity bars the claim. Accordingly, without hearing oral argument, we grant the petition for review and affirm the court of appeals' judgment. TEX. R. APP. P. 59.1, 60.2(a).

OPINION DELIVERED: October 21, 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

Argued April 14, 2010

Rehearing Granted February 17, 2012

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

JUSTICE WILLETT filed a concurring opinion.

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

We grant the parties' motions for rehearing. We withdraw our opinion of August 26, 2011, and substitute the following in its place.

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.

We also overrule *Aranda*, 748 S.W.2d 210. We hold that an injured employee may not assert a common-law claim for breach of the duty of good faith and fair dealing against a workers' compensation carrier.

We reverse the judgment of the court of appeals and render judgment for Texas Mutual Insurance Company.

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. 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[1] and discontinued temporary income benefit payments after

[1] 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).[2] 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.* § 409.021(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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[2] 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 BRC 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 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,[3] breach of the common law duty of good faith and fair dealing, and violations of the DTPA. TEX. BUS. & COMM. CODE §§

[3] 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.

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 DTPA.

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. 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;[4] (6) there is no evidence that TMIC knowingly

[4] 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.

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.[5]

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.[6]

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.

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

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[5] 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.

[6] 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.

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 that the trial court had jurisdiction.

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, 410.151, 410.202, 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 CCH "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 CCH 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, and as to the date when he became disabled from the injury.

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 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.

Ruttiger exhausted his administrative remedies as to his claims that TMIC delayed in paying income benefits and the Commission's approval of the benefit dispute agreement was a determination of specific dates for which income benefits were payable. Accordingly, the trial court had jurisdiction over the claims for delayed payment of income benefits.[7]

We next consider TMIC's contentions relating to the Insurance Code.

[7] 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, specifically the surgery he received. TMIC claims Ruttiger could have presented, but did not, a dispute to the Commission at or before the January 2005 BRC and obtained a determination that surgery was necessary in July 2004. Ruttiger asserts that the benefit dispute agreement did not need to address medical benefits because the medical necessity of the surgery was not in dispute and any administrative option became moot when TMIC paid for Ruttiger's medical treatment. Because the trial court had jurisdiction over Ruttiger's claims for TMIC's delay in paying income benefits and in light of our disposition of TMIC's remaining issues, we need not determine whether the trial court lacked jurisdiction over Ruttiger's claim for delayed surgery.

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:
>
> (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.

[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.

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 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

[9] Act of Apr. 25, 1957, 55th Leg., R.S., ch. 198, § 1, 1957 Tex. Gen. Laws 401.

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 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

[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.

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 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.*

[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.

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 153-54.

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.* at 154; *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 resolved either 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). 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(h).

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 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 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 officer is final absent timely appeal for judicial review. *Id.* §§ 410.204, 410.205(a). And just as the decision of the CCH 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(b). 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 violations 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 an administrative violation subject to monetary penalties up to $25,000 per day. *Id.* §§ 409.021(e), 415.021. 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 income 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 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

[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(a)(11); by refusing to pay benefits without having reasonable grounds, *see id.* § 409.022(c); or by terminating benefits absent substantiating evidence that doing so was reasonable and authorized by law. *See id.* § 415.002(a)(2).

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 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)–(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 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

[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).

[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.

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) (providing that 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.* § 409.021(c) (providing that a carrier waives its right to contest compensability if it does not contest compensability within sixty days of receiving notice of injury); *id.* § 409.022 (providing that 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.* § 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 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

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 we 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*, we 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). We 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 we explain in more detail below, those reforms and subsequent amendments to the Act addressed the three deficiencies underlying *Aranda*—and much more.[15]

In *Aranda* we 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

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[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 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.

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. Sec. Ins. Co.*, 491 S.W.2d 100, 103-04 (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.*; 1 MONTFORD, at 6-33. 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—a de novo trial when the IAB award was 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, we 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 which is subject to a penalty of up to $25,000 per day. *Id.* §§ 409.021(e), 415.021. 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

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 provisions 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, reflect 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). We 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. 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 demonstrates 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 to 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, we conclude that *Aranda* should be, and is, overruled.

VI. Response to the Dissent

A. The Common Law *Aranda* Claim

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 Co. v. Scoggin Constr. Co.*, 292 S.W.3d 650, 660 (Tex. 2009), 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 we 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 we. 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 we agree the Legislature did not intend to abolish the *Aranda* action, we disagree that whether it did is the question that must be answered. As we 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); *Tex. Dep't 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 we 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. We 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 (providing that impairment income benefits are not recoverable unless based on an objective clinical or laboratory finding); *id.* § 408.124 (providing that 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]

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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

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 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 Legislature determines, in its role of managing

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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) (holding 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) (concluding limitations provision of art. 4590i § 10.01 unconstitutional under open courts provision); *Nelson v. Krusen*, 678 S.W.2d 918, 922-23 (Tex. 1984) (deciding 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) (concluding 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.

[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. N. H. Ins. Co.*, 689 P.2d 837, 840 (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*

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, we have confidence that legislators will exercise their prerogative to explicitly provide one.

Finally, we disagree with the dissent's statement that we are "replacing the Legislature's judgment with [our] own." ___ S.W.3d at ___ (Jefferson, C.J., dissenting). Contrary to the dissent's assertion, our decision shows deference to and respect for the Legislature's position—and judgment—as the body that created, monitors, and maintains equilibrium in the workers' compensation system by its enactments.

B. The Insurance Code Claims

The dissent argues that because the Legislature recognized extra-contractual common law claims in chapter 416, "it did not intend to preclude all claims against carriers for proven misconduct" and that the Insurance Code provisions still apply to workers' compensation insurers. ___ S.W.3d at ___ (Jefferson, C.J., dissenting). We agree that the new Act's language does not purport to preclude all types of claims against workers' compensation insurers. For example, Insurance Code section 541.061 applies to them. And the Act itself contains provisions for additional claims against insurers. However, for the reasons we have explained above, sections 541.060 and 542.003 of the Insurance Code simply are not compatible with amended detailed procedural and substantive provisions of the new Act.

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v. Am. Mut. Liab. Ins. Co., 468 F. Supp. 470, 475 (D.S.C. 1977) (applying South Carolina law).

VI. Conclusion

The judgment of the court of appeals is reversed. We render judgment that Ruttiger take nothing.

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Phil Johnson
Justice

OPINION DELIVERED: June 22, 2012

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, concurring.

I join the Court's opinion but write separately on Part V to emphasize this overlooked truism: It is principally the judiciary's role to define and delimit common-law causes of action. In our constitutional design, the judicial branch is a partner, but not a junior partner[1]—and shaping Texas common law is fundamentally a judicial prerogative.

* * *

Today the Court overrules *Aranda v. Insurance Co. of North America*[2] and holds a common-law action for bad faith is no longer warranted in the workers' compensation context. I agree. The dissent avers the proper inquiry is whether the Legislature intended to abrogate extra-statutory *Aranda* claims when it amended the Workers' Compensation Act in 1989. Respectfully, this focus

[1] *In re Allcat Claims Serv., L.P.*, 356 S.W.3d 455, 475 (Tex. 2011) (Willett, J., concurring in part and dissenting in part).

[2] 748 S.W.2d 210 (Tex. 1988).

on legislative action is misplaced, at least in this case. To be sure, the Legislature has some power to override or otherwise limit common-law remedies.[3] However, this is a high hurdle, one clearly uncleared here.[4] As such, the search for some *legislative* suggestion on whether *Aranda* should survive—an inquiry both the majority and the dissent eventually entertain—is at best fruitless, and at worst, dangerously speculative.[5] The more proper inquiry, respectfully, is whether the Court believes *Aranda* still has a place, not whether the Legislature believes so.

Statutory abrogation is not the sole way to re-think a common-law cause of action. In determining the continued vitality of the bad-faith remedy in workers' compensation cases, I would pivot on something simpler: this Court's nonpareil role as arbiter of the common law. It is the duty of the *judicial* branch to declare what the common law is: "The law is not static; and the courts, whenever reason and equity demand, have been the primary instruments for changing the common law through a continual re-evaluation of common law concepts in light of current conditions."[6] This charge is indeed an ongoing one: "[T]he common law is not frozen or stagnant, but evolving, and

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[3] *See Middleton v. Tex. Power & Light Co.,* 185 S.W. 556, 560–61 (Tex. 1916).

[4] *See Cash Am. Int'l Inc. v. Bennett*, 35 S.W.3d 12, 16 (Tex. 2000).

[5] The separate writings here demonstrate—again—the perils of consulting legislative history. The Court criticizes the dissent for relying on changes made to a bill during the legislative process, calling it "illogical speculation." *Ante* at __. But one sentence later, the Court posits an alternate explanation for the same legislative history, declaring it "[m]ore logical speculation." *Id.* Though the Court rightly dismisses both arguments as inappropriate, this is yet another reminder that legislative history, often turbid and thus prone to contrivance, serves as an ever-present judicial mercenary, embraced when helpful and ignored when not. As Justice Robert Jackson wryly observed, "It is a poor cause that cannot find some plausible support in legislative history." Robert H. Jackson, *Problems of Statutory Interpretation*, 8 F.R.D. 121, 125 (1948); *see also Exxon Mobil Corp. v. Allapattah Servs.*, 545 U.S. 546, 568 (2005) (repeating Judge Leventhal's memorable phrase that rummaging around in legislative minutiae resembles "looking over a crowd and picking out your friends" (internal citations omitted)).

[6] *Whittlesey v. Miller*, 572 S.W.2d 665, 668 (Tex. 1978).

it is the duty of this [C]ourt to recognize that evolution."[7] Accordingly, we are called upon to re-evaluate common-law rules, giving deference to *stare decisis* when warranted, but departing when the prior rule no longer furthers the interests of efficiency, fairness, and legitimacy.[8] As we noted 142 years ago, "When the reason of the rule fails, the rule itself should cease. *Cessante ratione legis, cessat ipsa lex.*"[9]

This axiom is sufficient to resolve today's case because, as the Court so ably details, the "reason" behind *Aranda* is no more. When we extended the duty of good faith and fair dealing to workers' compensation carriers in *Aranda*, we did so because of the "special trust relationship" between a carrier and an employee.[10] This relationship does not exist in every contractual agreement, but we recognized it in the workers' compensation context because of employees' particular vulnerability. Under the pre-1989 comp system, there was a tremendous disparity of bargaining power, leaving employees with little to no recourse against arbitrary payment decisions.[11] Concerned with such inadequacies, we allowed a common-law remedy for bad faith to fill the gap.

A year later, the gap was made less gaping. Observers may dispute whether the Legislature's 1989 overhaul *eliminated* the bargaining disparity between carriers and employees, but it is indisputable that the top-to-bottom reforms enacted then (and since) have *lessened* the concerns that

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[7] *El Chico Corp. v. Poole*, 732 S.W.2d 306, 310 (Tex. 1987).

[8] *See Sw. Bell Tel. Co. v. Mitchell*, 276 S.W.3d 443, 447 (Tex. 2008).

[9] *Wright's Adm'x v. Donnell*, 34 Tex. 291, 306 (1870).

[10] *Aranda*, 748 S.W.2d at 212.

[11] *Id.* at 212–13.

animated *Aranda*. By providing a strict dispute resolution timeline, a mechanism for interlocutory benefits, penalties for myriad carrier misdeeds, assistance for injured workers, and a litany of other protections throughout the Labor and Insurance Codes, the Legislature has endeavored to occupy the realm of claims handling and reduce the inequities that drove us to announce a common-law duty. My review today of the Legislature's pervasive workers' comp regime convinces me that (1) *Aranda*'s concerns with carrier misbehavior have been addressed, and therefore (2) *Aranda*'s cumulative extra-statutory remedy should now recede.

Otherwise, there is a very real possibility that the continued existence of bad-faith claims will subvert the Legislature's meticulous soup-to-nuts system, one augmented by an immense regulatory and adjudicatory framework that, taken together, now regulates virtually every aspect of how a carrier handles a workers' comp matter. In the past, this Court has been hesitant to extend common-law causes of action into fields where a pervasive regulatory scheme controls, specifically because of this potential for interference.[12] We should exercise similar deference when considering whether to draw back an extra-statutory remedy in light of legislative changes.

The Legislature's radical 1989 restructuring certainly made room for our 1988 *Aranda* decision, but that to me suggests not affirmation but accommodation. In any case, whether lawmakers acknowledged *Aranda* out of politeness (the Supreme Court says bad-faith claims must

[12] *See Waffle House, Inc. v. Williams*, 313 S.W.3d 796, 804 (Tex. 2010) (noting that an extra-statutory negligence claim would "collide with the elaborately crafted statutory scheme" covering workplace harassment); *City of Midland v. O'Bryant*, 18 S.W.3d 209, 216 (Tex. 2000) (declining to impose a duty of good faith and fair dealing on the employment relationship because that "would tend to subvert those [statutes regulating the employment relationship] by allowing employees to make an end-run around the procedural requirements and specific remedies the existing statutes establish").

exist) or deliberateness (the Legislature agrees such claims must exist), it is *our* decision whether the bad-faith remedy retains any role as a leveler or equalizer within a pervasive statutory scheme that controls claims handling in minute detail and bears little resemblance to the inequitable pre-*Aranda* landscape.

Our 2010 *Waffle House* decision is instructive. There, we considered whether the plaintiff could bring a common-law negligence claim against her employer in light of the TCHRA's "unique set of substantive rules and procedures" governing sexual harassment.[13] We answered that she could not after determining that the differences between the two causes of action—in procedure, and standards, and remedies—were "manifold."[14] Because of those differences, we rejected the common-law claim for fear of circumventing the "meticulous legislative design."[15] We could apply the same analysis here because the inherently fuzzy nature of the bad-faith tort has a tendency to produce conflicting liability standards inconsistent with the Legislature's statutory approach to carrier malfeasance and accountability.[16] I think it unwise to invite these potential complications, particularly in an area so imbued with public policy trade-offs, and where the Legislature has specifically addressed our concerns over how comp claims are processed.

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[13] *See Waffle House*, 313 S.W.3d at 803–04.

[14] *Id.* at 805–07.

[15] *Id.* at 805.

[16] *See Universal Life Ins. Co. v. Giles*, 950 S.W.2d 48, 62–65 (Tex. 1997) (Hecht, J., concurring) (observing that bad-faith actions are often seen as "the judicial equivalent of the Wheel of Fortune" because the jury determines the facts *and* the standards to be applied on an *ad hoc* basis); *see also Waffle House*, 313 S.W.3d at 804 (noting that the workers' compensation scheme incorporates a legislative attempt to balance the various interests and concerns of employees and employers).

* * *

Aranda was rooted in specific claims-handling inequities in the pre-1989 comp system, inequities the Legislature has re-balanced. Accordingly, in light of the Legislature's hermetic workers' compensation regime, the time has come for the Court—exercising *its* authority to define and delimit common-law remedies—to overrule *Aranda*, a judicial gap-filler whose underlying rationale no longer exists.

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Don R. Willett
Justice

OPINION DELIVERED: June 22, 2012

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 MEDINA, 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. The Court also eliminates Ruttiger's common law good-faith-and-fair-dealing claim. The Court makes persuasive policy arguments to support its decision, replacing the Legislature's judgment with its own. I would hold 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 Cas. & Sur. 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 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]

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[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.").

[2] The language limiting *Aranda* was codified as chapter 416 of the Labor Code.

III. The Common Law Claims

The Court'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 Court asks whether the extra-contractual claims fit with the statutory scheme. This is the wrong inquiry entirely. 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 Am. 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 statutory remedy, and we "decline[] to construe statutes to deprive citizens of common-law rights unless the Legislature clearly expressed that intent."[3] *Id.*

[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

We must decide, then, whether there is "clear legislative intent," *Dealers Elec. Supply Co. v. Scoggin Constr. Co.*, 292 S.W.3d 650, 660 (Tex. 2009), 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* 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]

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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.*, *Emps. 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).

[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*:

The inquiry ends there. If the Legislature limited *certain Aranda*-type claims, it could not logically have also intended to eliminate *all of 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 conduct arises out of the contractual relationship between the carrier and the employee and is sustained after the job-related injury.").

> 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).

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 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 have been no need for the Legislature to enact chapter 416. *Cf. Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 540 (Tex. 1981) ("[I]f the Act already excluded [the] defendants who do not

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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).

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 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

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[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.* R. 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 argued only 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 were 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.

common law claims in chapter 416 makes clear that it did not intend to preclude all claims against carriers for proven misconduct. *See City of Waco v. Lopez*, 259 S.W.3d 147, 153 (Tex. 2008) (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." *Marshall*, 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]

[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.

V. Conclusion

Whether allowing extra-contractual claims makes sense is a different question than whether the laws, as written, permit their pursuit. The Court correctly observes that the Act carefully balances competing interests. The Legislature struck that balance by acknowledging and limiting the common law claims the Court abolishes today. In doing so, the Court disrupts the statutory equilibrium and substitutes its judgment for the Legislature's. The concurrence agrees that *Aranda* should be overruled because "there is a very real possibility that the continued existence of bad-faith claims will subvert the Legislature's meticulous soup-to-nuts system." ___ S.W.3d at ___ (Willett, J., concurring). But it cannot be "subversion" to recognize the continued vitality of a remedy that the Legislature took into account when creating that system. The Legislature's comprehensive overhaul used *Aranda* as its foundation, and *Aranda* has coexisted with the "new" Act during the twenty-three years since its passage. Stare decisis does not interfere with the statutory scheme—overruling the case does. Because the Legislature has not made the Act exclusive with respect to extra-contractual claims, I would not eliminate Ruttiger's claims 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: June 22, 2012

IN THE SUPREME COURT OF TEXAS

NO. 08-0943

TEXAS DEPARTMENT OF TRANSPORTATION, PETITIONER,

v.

ROGER SEFZIK, RESPONDENT

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

PER CURIAM

JUSTICE JOHNSON did not participate in the decision.

At issue in this case is whether sovereign immunity bars Roger Sefzik's lawsuit seeking declaratory relief under the Uniform Declaratory Judgments Act (UDJA) against the Texas Department of Transportation (TxDOT). In *City of El Paso v. Heinrich*, we dismissed claims seeking declaratory and injunctive relief against governmental entities as barred by sovereign immunity. 284 S.W.3d 366, 380 (Tex. 2009). The court of appeals relied on our pre-*Heinrich ultra vires* precedent to conclude that declaratory judgment actions do not implicate sovereign immunity. We reverse and hold that state agencies, like TxDOT here, are immune from suits under the UDJA unless the Legislature has waived immunity for the particular claims at issue. However, because Sefzik's claim was filed pre-*Heinrich*, we remand the case to the trial court so that Sefzik has a reasonable opportunity to assert an *ultra vires* claim against state officials.

In March 2005, Sefzik filed a permit application with TxDOT to erect an outdoor advertising sign along Interstate 30. A few weeks later, another company filed a similar application, seeking to create a sign in the same area. After reviewing the conflicting applications, TxDOT found that Sefzik's permit was invalid. Under former section 21.142 of the Texas Administrative Code, applicants for sign permits were required to verify that a sign would be near adjacent commercial or industrial activities that had been open for at least ninety days. *See* 43 TEX. ADMIN. CODE § 21.142(2)(K), (30) (2008) (Tex. Dep't of Transp., Definitions) *repealed* 36 Tex. Reg. 2418 (2011) (proposed Dec. 2, 2010). When TxDOT received Sefzik's application, one of the businesses he listed was only open for seventy-eight days. TxDOT denied Sefzik's application and approved the competing bid.

Sefzik appealed to TxDOT's Executive Director, Michael Behrens, and requested an oral hearing. Behrens denied Sefzik's appeal without holding a hearing, and explained that TxDOT had discretion to deny Sefzik's invalid permit application. Sefzik filed a motion for rehearing, arguing, *inter alia*, that he was entitled to a hearing under the Administrative Procedure Act's (APA) "contested case" procedures. *See* TEX. GOV'T CODE § 2001.051. TxDOT did not respond, and the motion was eventually overruled by operation of law.

Sefzik then filed suit against TxDOT but did not join Behrens or any other TxDOT official. Sefzik sought relief under the UDJA, requesting that the district court declare the APA's "contested case" procedures entitled him to a hearing.[1] TxDOT filed a plea to the jurisdiction, arguing that

[1] Sefzik also alleged that TxDOT's actions violated his due process and equal protection rights under the United States and Texas Constitutions. The court of appeals ultimately affirmed the district court's dismissal on those issues, 267 S.W.3d at 135–38, and Sefzik did not petition this Court to review that decision.

sovereign immunity barred Sefzik's suit. The district court granted the plea to the jurisdiction and denied Sefzik's motion for a new trial. Sefzik appealed.

A divided court of appeals reversed, holding that declaratory judgment claims do not implicate sovereign immunity and thus TxDOT was a proper party to the UDJA action. 267 S.W.3d 127, 132–34 ("[W]hen a private plaintiff merely seeks a declaration of his or her rights under a statute, such an action is not subject to a sovereign immunity defense, and a waiver or consent to suit is unnecessary."). Having concluded that the UDJA does not implicate sovereign immunity, the court of appeals did not decide whether the UDJA or the APA waives immunity.

Reviewing the immunity question de novo, *see Harris County Hosp. Dist. v. Tomball Reg'l Hosp.*, 283 S.W.3d 838, 842 (Tex. 2009), we conclude that, under *Heinrich*, sovereign immunity bars UDJA actions against the state and its political subdivisions absent a legislative waiver. *Heinrich* clarified an area of the law that had been unclear, namely, the intersection between the doctrine of sovereign immunity and the *ultra vires* exception to it. While the doctrine of sovereign immunity originated to protect the public fisc from unforeseen expenditures that could hamper governmental functions, *see Tex. Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 854 (Tex. 2002), it has been used to shield the state from lawsuits seeking other forms of relief, *see, e.g., W.D. Haden Co. v. Dodgen*, 308 S.W.2d 838, 839 (Tex. 1958) ("[T]he rule of state immunity from suit without its consent applies to suits under the Uniform Declaratory Judgments Act . . . ."). Concomitant to this rule, however, is the *ultra vires* exception, under which claims may be brought against a state official for nondiscretionary acts unauthorized by law. *See, e.g., Fed. Sign v. Tex. S.*

Univ., 951 S.W.2d 401, 404 (Tex. 1997). Such lawsuits are not against the state and thus are not barred by sovereign immunity. *Id.*

In *Heinrich*, we addressed which governmental entities—the state, its subdivisions, or the relevant government actors in their official capacities—are proper parties to a suit seeking declaratory relief for an *ultra vires* action. 284 S.W.3d at 371–73. Heinrich sued the City of El Paso and various government officials, claiming the defendants violated her statutory rights when they altered her pension benefits. *Id.* at 369–70. She asked the courts to declare that the defendants acted without authority in taking such action. *Id.* Our precedent made clear that "suits to require state officials to comply with statutory or constitutional provisions are not prohibited by sovereign immunity." *Id.* at 372. While we recognized that these suits are against the state for all practical purposes, we held that they "cannot be brought against the state, which retains immunity, but must be brought against the state actors in their official capacity." *Id.* at 373. Thus, we allowed Heinrich to pursue claims for prospective relief against the state officials, but we dismissed the claims against the city and the other governmental entities. *Id.* at 379–80.

Two points from *Heinrich* are relevant here. First, *Heinrich* held that the proper defendant in an *ultra vires* action is the state official whose acts or omissions allegedly trampled on the plaintiff's rights, not the state agency itself. *Id.* at 372–373. Sefzik did not sue any state official.[2] Instead, he argues that the court of appeals correctly exempted UDJA actions seeking a declaration

[2] Although Sefzik refused to apply the *ultra vires* label to his suit below, that is the underlying nature of his claim. The relief he seeks—a declaration that he is entitled to a hearing—is directly related to whether Behrens acted outside the scope of his authority in denying a hearing. That is, Sefzik ultimately wishes to compel a government official (Behrens) to perform some act that he considers to be nondiscretionary (holding a hearing). That relief falls within the *ultra vires* rationale.

of rights from the application of the sovereign immunity doctrine. The second point from *Heinrich* dictates otherwise. As noted, we dismissed Heinrich's claims seeking declaratory and injunctive relief against governmental entities, brought under the UDJA, because the entities were immune. In so doing, we necessarily concluded that the UDJA does not waive the state's sovereign immunity when the plaintiff seeks a declaration of his or her rights under a statute or other law. Very likely, the same claim could be brought against the appropriate state official under the *ultra vires* exception, but the state agency remains immune. *See id.* at 372–73. As we have consistently stated, the UDJA does not enlarge the trial court's jurisdiction but is "merely a procedural device for deciding cases already within a court's jurisdiction." *Tex. Parks & Wildlife Dep't v. Sawyer Trust*, __ S.W.3d __, __ (2011) (quoting *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993)). Accordingly, the underlying action, if against the state or its political subdivisions, must be one for which immunity has expressly been waived.

Although the UDJA waives sovereign immunity in particular cases, Sefzik's claim does not fall within the scope of those express waivers. For example, the state may be a proper party to a declaratory judgment action that challenges the validity of a statute. *Heinrich*, 284 S.W.3d at 373 n.6 (citing TEX. CIV. PRAC. & REM. CODE § 37.006(b)); *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 697–98 (Tex. 2003); *Tex. Educ. Agency v. Leeper*, 893 S.W.2d 432, 446 (Tex. 1994).[3]

[3] We have recognized this waiver because the UDJA expressly requires joinder of the governmental unit. *See* TEX. CIV. PRAC. & REM. CODE § 37.006(b) ("In any proceeding that involves the validity of a municipal ordinance or franchise, the municipality must be made a party . . . and if the statute, ordinance, or franchise is alleged to be unconstitutional, the attorney general of the state must also be served with a copy of the proceeding and is entitled to be heard."); *Leeper*, 893 S.W.2d at 446 ("The DJA expressly provides that . . . governmental entities must be joined or notified."). This reasoning is consistent with the requirement that the Legislature expressly waive immunity with "clear and unambiguous" language. TEX. GOV'T CODE § 311.034; *Taylor*, 106 S.W.3d at 696.

But Sefzik is not challenging the validity of a statute; instead, he is challenging TxDOT's actions under it, and he does not direct us to any provision of the UDJA that expressly waives immunity for his claim.[4]

Sefzik also suggests that the APA provides a guide for analyzing the application of sovereign immunity to his case. The APA's declaratory judgment provision allows a plaintiff to challenge the validity or applicability of a rule. *See* TEX. GOV'T CODE § 2001.038(a), (c) ("The validity or applicability of a rule . . . may be determined in an action for declaratory judgment if it is alleged that the rule or its threatened application interferes with or impairs . . . a legal right or privilege of the plaintiff. . . . The state agency must be made a party to the action."). While the APA may waive sovereign immunity, an issue we do not decide here, Sefzik does not challenge the validity or applicability of any agency *rule*. Instead, he challenges the application of the APA's contested case procedures, which are established by *statute*. As noted in his brief, Sefzik's claim is broader than the APA's scope. Moreover, the APA's mechanism for seeking a declaration of rights does not trump *Heinrich*'s conclusion that the state is generally immune from declaratory actions brought under the UDJA. Accordingly, section 2001.038 does not carry Sefzik's claim over the hurdle of sovereign immunity.

In the event that we reverse the court of appeals' judgment, Sefzik urges this Court to remand the case so that he can replead an *ultra vires* claim within the trial court's jurisdiction. If given that opportunity, Sefzik asserts he would plead a claim against TxDOT officials for improperly denying

[4] On "rare occasions," we may recognize a waiver absent explicit language. *Taylor*, 106 S.W.3d at 697. Sefzik has not argued that we should infer a waiver of immunity under the UDJA, so we do not consider that possibility.

his permit. As mentioned previously, under the former Administrative Code provisions governing this case, applicants for sign permits were required to verify that a sign would be near adjacent commercial or industrial activities which had been open for at least ninety days. *See* 43 TEX. ADMIN. CODE § 21.142(2)(K), (30) (2008) (Tex. Dep't of Transp., Definitions) *repealed* 36 Tex. Reg. 2418 (2011) (proposed Dec. 2, 2010). The Administrative Code went on to provide that "[p]ermits will be considered on a first-come, first-serve basis." *Id.* § 21.150 (2008) (Tex. Dep't of Transp., Permits) *repealed* 36 Tex. Reg. 2418 (proposed Dec. 2, 2010). If the first application was denied, the Administrative Code specified that other applications would be considered "between the time a denied application is returned to the applicant and the time it is resubmitted." *Id.* Sefzik contends that his application was the only one on file on the 90th day; thus, in denying his permit, TxDOT officials failed to perform a purely ministerial duty.

When this Court upholds a plea to the jurisdiction on sovereign immunity grounds, we allow the plaintiff the opportunity to replead if the defect can be cured. *See, e.g.*, *Sawyer* Trust, __ S.W.3d. at __ (citing *Tex. A&M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 840 (Tex. 2007)). As mentioned, Sefzik did not sue any state officials; however, Sefzik brought his claim pre-*Heinrich*. As we have observed, our decisions prior to *Heinrich* were "less than clear" as to who the proper party was in a suit for declaratory remedy, as well as the parameters of the *ultra vires* exception to the doctrine of sovereign immunity. *See Heinrich*, 284 S.W.3d at 373. In light of our clarifications to this area of the law in *Heinrich*, Sefzik should have an opportunity to replead in an attempt to cure the jurisdictional defects in his petition. We thus remand the case to allow Sefzik this opportunity without expressing any opinion on the merits of such a claim. *See Sawyer Trust*, __ S.W.3d at __.

Accordingly, without hearing oral argument, TEX. R. APP. P. 59.1, we reverse in part the court of appeals' judgment, and remand the case to the trial court in accordance with this opinion.

OPINION DELIVERED: October 21, 2011

IN THE SUPREME COURT OF TEXAS

NO. 08-0964

THE EDWARDS AQUIFER AUTHORITY
AND THE STATE OF TEXAS, PETITIONERS,

v.

BURRELL DAY AND JOEL MCDANIEL, RESPONDENTS

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

Argued February 17, 2010

JUSTICE HECHT delivered the opinion of the Court.

We decide in this case whether land ownership includes an interest in groundwater in place that cannot be taken for public use without adequate compensation guaranteed by article I, section 17(a) of the Texas Constitution.[1] We hold that it does. We affirm the judgment of the court of appeals[2] and remand the case to the district court for further proceedings.

I

In 1994, R. Burrell Day and Joel McDaniel (collectively, "Day") bought 381.40 acres on

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

[2] *Edwards Aquifer Auth. v. Day*, 274 S.W.3d 742 (Tex. App.–San Antonio 2008).

which to grow oats and peanuts and graze cattle. The land overlies the Edwards Aquifer, "an underground layer of porous, water-bearing rock, 300-700 feet thick, and five to forty miles wide at the surface, that stretches in an arced curve from Brackettville, 120 miles west of San Antonio, to Austin."[3] A well drilled in 1956 had been used for irrigation through the early 1970s, but its casing collapsed and its pump was removed sometime prior to 1983. The well had continued to flow under artesian pressure, and while some of the water was still used for irrigation, most of it flowed down a ditch several hundred yards into a 50-acre lake on the property. The lake was also fed by an intermittent creek, but much of the water came from the well. Day's predecessors had pumped water from the lake for irrigation. The lake was also used for recreation.

To continue to use the well, or to drill a replacement as planned, Day needed a permit from the Edwards Aquifer Authority. The Authority had been created by the Edwards Aquifer Authority Act ("the EAAA" or "the Act") in 1993, the year before Day bought the property.[4] The Edwards Aquifer is "the primary source of water for south central Texas and therefore vital to the residents,

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[3] *Edwards Aquifer Auth. v. Chem. Lime, Ltd.*, 291 S.W.3d 392, 394 (Tex. 2009).

[4] Act of May 30, 1993, 73d Leg., R.S., ch. 626, 1993 Tex. Gen. Laws 2350, amended by Act of May 16, 1995, 74th Leg., R.S., ch. 524, 1995 Tex. Gen. Laws 3280; Act of May 29, 1995, 74th Leg., R.S., ch. 261, 1995 Tex. Gen. Laws 2505; Act of May 6, 1999, 76th Leg., R.S., ch. 163, 1999 Tex. Gen. Laws 634; Act of May 25, 2001, 77th Leg., R.S., ch. 1192, 2001 Tex. Gen. Laws 2696; Act of May 28, 2001, 77th Leg., R.S., ch. 966, §§ 2.60-.62 and 6.01-.05, 2001 Tex. Gen. Laws 1991, 2021-2022, 2075-2076; Act of May 25, 2001, 77th Leg., R.S., ch. 1192, 2001 Tex. Gen. Laws 2696; Act of June 1, 2003, 78th Leg., R.S., ch. 1112, § 6.01(4), 2003 Tex. Gen. Laws 3188, 3193; Act of May 23, 2007, 80th Leg., R.S., ch. 510, 2007 Tex. Gen. Laws 900; Act of May 28, 2007, 80th Leg., R.S., ch. 1351, §§ 2.01-2.12, 2007 Tex. Gen Laws 4612, 4627-4634; Act of May 28, 2007, 80th Leg. R.S., ch. 1430, §§ 12.01-12.12, 2007 Tex. Gen. Laws 5848, 5901-5909; Act of May 21, 2009, 81st Leg., R.S., ch. 1080, 2009 Tex. Gen. Laws 2818 [hereinafter "EAAA"]. Citations are to the EAAA's current sections, without separate references to amending enactments. The EAAA remains uncodified, but an unofficial compilation can be found on the Authority's website, at http://www.edwardsaquifer.org/files/EAAact.pdf.

industry, and ecology of the region, the State's economy, and the public welfare."[5] The Legislature determined that the Authority was "required for the effective control of the resource to protect terrestrial and aquatic life, domestic and municipal water supplies, the operation of existing industries, and the economic development of the state."[6]

The Act "prohibits withdrawals of water from the aquifer without a permit issued by the Authority".[7] The only permanent exception is for wells producing less than 25,000 gallons per day for domestic or livestock use.[8] The Act gives preference to "existing user[s]" — defined as persons who "withdr[ew] and beneficially used underground water from the aquifer on or before June 1, 1993"[9] — and their successors and principals. With few exceptions, water may not be withdrawn from the aquifer through wells drilled after June 1, 1993.[10] Each permit must specify the maximum rate and total volume of water that the water user may withdraw in a calendar year,[11] and the total of all permitted withdrawals per calendar year cannot exceed the amount specified by the Act.[12]

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[5] *Chem. Line*, 291 S.W.3d at 394.

[6] EAAA § 1.01.

[7] *Chem. Line*, 291 S.W.3d at 394 (citing EAAA § 1.15(b) ("Except as provided by Sections 1.17 ['Interim Authorization'] and 1.33 [wells producing less than 25,000 gallons per day for domestic or livestock use] of this article, a person may not withdraw water from the aquifer or begin construction of a well or other works designed for the withdrawal of water from the aquifer without obtaining a permit from the authority.") and EAAA § 1.35(a) ("A person may not withdraw water from the aquifer except as authorized by a permit issued by the authority or by this article.")).

[8] *Id*. at 394 n.10.

[9] *Id.* at 395 (quoting EAAA § 1.03(10)).

[10] EAAA § 1.14(e).

[11] EAAA § 1.15(d).

[12] EAAA 1.14(c) (formerly EAAA 1.14(b)); *see also Chem. Line*, 291 S.W.3d at 395 n.8 (providing the history of 1.14(b) and (c)).

A user's total annual withdrawal allowed under an "initial regular permit" ("IRP") is calculated based on the beneficial use of water without waste during the period from June 1, 1972, to May 31, 1993.[13] The Act, like the Water Code, defines beneficial use as "the use of the amount of water that is economically necessary for a purpose authorized by law, when reasonable intelligence and reasonable diligence are used in applying the water to that purpose."[14] Although other provisions of the Water Code governing groundwater management districts define beneficial use more broadly and include recreational purposes,[15] they also state that "any special law governing a specific district shall prevail".[16] "Waste" is broadly defined.[17]

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[13] EAAA § 1.16(a) ("An existing user may apply for an initial regular permit by filing a declaration of historical use of underground water withdrawn from the aquifer during the historical period from June 1, 1972, through May 31, 1993."); *id.* § 1.16(e) ("To the extent water is available for permitting, the board shall issue the existing user a permit for withdrawal of an amount of water equal to the user's maximum beneficial use of water without waste during any one calendar year of the historical period. If a water user does not have historical use for a full year, then the authority shall issue a permit for withdrawal based on an amount of water that would normally be beneficially used without waste for the intended purpose for a calendar year.").

[14] EAAA § 1.03(4); *see also* TEX. WATER CODE § 11.002(4) ("'Beneficial use' means use of the amount of water which is economically necessary for a purpose authorized by this chapter, when reasonable intelligence and reasonable diligence are used in applying the water to that purpose and shall include conserved water.").

[15] TEX. WATER CODE § 36.001(9) ("'Use for a beneficial purpose' means use for: (A) agricultural, gardening, domestic, stock raising, municipal, mining, manufacturing, industrial, commercial, recreational, or pleasure purposes; (B) exploring for, producing, handling, or treating oil, gas, sulphur, or other minerals; or (C) any other purpose that is useful and beneficial to the user.").

[16] *Id.* § 36.052(a).

[17] EAAA § 1.03(21) ("'Waste' means: (A) withdrawal of underground water from the aquifer at a rate and in an amount that causes or threatens to cause intrusion into the reservoir of water unsuitable for agricultural, gardening, domestic, or stock raising purposes; (B) the flowing or producing of wells from the aquifer if the water produced is not used for a beneficial purpose; (C) escape of underground water from the aquifer to any other reservoir that does not contain underground water; (D) pollution or harmful alteration of underground water in the aquifer by salt water or other deleterious matter admitted from another stratum or from the surface of the ground; (E) willfully or negligently causing, suffering, or permitting underground water from the aquifer to escape into any river, creek, natural watercourse, depression, lake, reservoir, drain, sewer, street, highway, road, or road ditch, or onto any land other than that of the owner of the well unless such discharge is authorized by permit, rule, or order issued by the commission under Chapter 26, Water Code; (F) underground water pumped from the aquifer for irrigation that escapes as irrigation tailwater onto land other than that of the owner of the well unless permission has been granted by the occupant of the land receiving

A user's total permitted annual withdrawal cannot exceed his maximum beneficial use during any single year of the historical period, or for a user with no historical use for an entire year, the normal beneficial use for the intended purpose.[18] But the total withdrawals under all permits must be reduced proportionately as necessary so as to not exceed the statutory maximum annual withdrawal from the aquifer.[19] An "existing user" who operated a well for three or more years during the historical period is entitled to a permit for at least the average amount of water withdrawn annually.[20] And every "existing irrigation user shall receive a permit for not less than two acre-feet a year for each acre of land the user actually irrigated in any one calendar year during the historical period."[21]

For various reasons, the Authority did not become operational until 1996, and all IRP applications were required to be filed before December 30, 1996.[22] Day timely applied for authorization to pump 700 acre-feet of water annually for irrigation. Attached to the application was a statement by Day's predecessors, Billy and Bret Mitchell, that they had "irrigated approximately 300 acres of Coastal Bermuda grass from this well during the drought years of 1983 and 1984." The

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the discharge; or (G) for water produced from an artesian well, "waste" has the meaning assigned by Section 11.205, Water Code.").

[18] EAAA § 1.16(e).

[19] *Id.* ("If the total amount of water determined to have been beneficially used without waste under this subsection exceeds the amount of water available for permitting, the authority shall adjust the amount of water authorized for withdrawal under the permits proportionately to meet the amount available for permitting.").

[20] *Id.*

[21] *Id.* One acre-foot of water, enough to cover one acre one foot deep, is equal to 43,560 cubic feet or 325,851.43 gallons, slightly less than half the volume of an olympic-size swimming pool (660,430 gallons).

[22] *Edwards Aquifer Auth. v. Chem. Lime, Ltd.*, 291 S.W.3d 392, 396, 402 (Tex. 2009).

application's request for 700 acre-feet appears to have been based on two acre-feet for the total beneficial use of irrigating the 300 acres plus the recreational use of the 50-acre lake.

In December 1997, the Authority's general manager wrote Day that the Authority staff had "preliminarily found" that his application "provide[d] sufficient convincing evidence to substantiate" the irrigation of 300 acres in 1983-1984 and thus an average annual beneficial use of 600 acre-feet of water during the historical period. The letter invited Day to submit additional information, but he did not respond. In December 1999, the Authority approved Day's request to amend his application to move the point of withdrawal from the existing well to a replacement well to be drilled on the property. Although the Authority cautioned that it still had not acted on the application, Day proceeded to drill the replacement well at a cost of $95,000. In November 2000, the Authority notified Day that, "[b]ased on the information available," his application would be denied because "withdrawals [from the well during the historical period] were not placed to a beneficial use".

Day protested the Authority's decision, and the matter was transferred to the State Office of Administrative Hearings for hearing. During discovery, Billy Mitchell testified at his deposition that in 1983 and 1984, an area totaling only about 150 acres had been irrigated, that this had been done using an agricultural sprinkler system that drew water from the lake, and that no more than seven acres had been irrigated with water directly from the well. Day offered no other evidence of beneficial use during the historical period.[23] The administrative law judge concluded that water from

[23] Day offered a record of the United States Geological Survey Department to show that the well had pumped 39 million gallons in 1972 and 13.l million gallons in 1973, but the mere fact that water may have been pumped from the well does not prove beneficial use, and in any event, Day did not base his application on any such use of water in

the lake, including the well water that had flowed into it, was state surface water, the use of which could not support Day's application for groundwater, and that the recreational use of the lake was not a beneficial use as defined by the EAAA. The ALJ found that the maximum beneficial use of groundwater shown by Day during the historical period was for the irrigation of seven acres of grass and concluded that Day should be granted an IRP for 14 acre-feet of water. The Authority agreed.

Day appealed the Authority's decision to the district court and also sued the Authority for taking his property without compensation in violation of article I, section 17(a) of the Texas Constitution, and for other constitutional violations. The Authority impleaded the State as a third-party defendant, asserting indemnification and contribution for Day's taking claim.[24] The court granted summary judgment for Day on his appeal, concluding that water from the well-fed lake used to irrigate 150 acres during the historical period was groundwater, and that Day was entitled to an IRP based on such beneficial use. The court granted summary judgment for the Authority on all of Day's constitutional claims, including his takings claim. The court remanded the case to the Authority for issuance of a new IRP.

1972-1973.

[24] The State argues for the first time in this Court that only the Authority, an independent political subdivision, can be liable to Day on his takings claim, and therefore the State is immune from the Authority's third-party suit. The Authority responds that it was required by state law to act as it did and that it is the EAAA itself, rather than the Authority's actions under it, that resulted in any taking liability. Because the issue was not developed below and has not been fully briefed in this Court, we decline to address it.

Day and the Authority appealed. The court of appeals agreed with the Authority that groundwater from the well became state surface water in the lake and could not be considered in determining the amount of Day's IRP.[25] Thus, the court affirmed the Authority's decision to issue Day a permit for 14 acre-feet. But the court held that "landowners have some ownership rights in the groundwater beneath their property . . . entitled to constitutional protection",[26] and therefore Day's takings claim should not have been dismissed. Rejecting Day's other constitutional arguments, the court remanded the case to the district court for further proceedings.

The Authority, the State, and Day each petitioned for review. We granted all three petitions.[27] We begin by considering whether, under the EAAA, the Authority erred in limiting Day's IRP to 14 acre-feet and conclude that it did not. Next, we turn to whether Day has a constitutionally protected interest in the groundwater beneath his property and conclude that he does. We then consider whether the Authority's denial of an IRP in the amount Day requested constitutes a taking and conclude that the issue must be remanded to the trial court for further proceedings. We end with Day's other constitutional arguments, concluding that they are without merit.

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[25] *Edwards Aquifer Auth. v. Day*, 274 S.W.3d 742, 753-755 (Tex. App.–San Antonio 2008).

[26] *Id*. at 756.

[27] 53 Tex. Sup. Ct. J. 230 (Jan. 15, 2010). The following have filed amici curiae briefs in support of the Authority and the State: Alliance of EAA Permit Holders; Angela Garcia and Environmental Defense Fund, Inc.; City of San Antonio by and through the San Antonio Water System; Harris-Galveston Subsidence District; Medina County Irrigators Alliance; and Texas Alliance of Groundwater Districts. The following have filed amici curiae briefs in support of Day: Glenn and JoLynn Bragg; Canadian River Municipal Water Authority; City of Amarillo; City of El Paso; Anne Windfohr Marion and the Tom L. and Anne Burnett Trust; Mesa Water, L.P.; Pacific Legal Foundation; Texas Cattle Feeders Association; Texas Farm Bureau; Texas Landowners Council; Texas and Southwestern Cattle Raisers Association; and Texas Wildlife Association. The following have also filed amici curiae briefs: City of Victoria; the Texas Comptroller of Public Accounts; and Senator Robert Duncan.

II

Day contends that the Authority was required to base his IRP on his predecessors' beneficial use of water drawn from the lake, supplied in part by the well, to irrigate 150 acres for two years during the historical period. The Authority counters that the lake water, whatever its origin, was state surface water and could not be considered in determining the amount of the IRP.

The Water Code defines state water — water owned by the State — as "[t]he water of ordinary flow, underflow, and tides of every flowing river, natural stream, and lake, and of every bay or arm of the Gulf of Mexico, and the storm water, floodwater, and rainwater of every river, natural stream, canyon, ravine, depression, and watershed in the state".[28] Day argues that because groundwater — defined by the Code as "water percolating below the surface of the earth"[29] — is not included in this list, it can never be state water. But the character of water as groundwater or state water can change. The Code recognizes this reality, providing, for example, that storm water or floodwater — state water — when "put or allowed to sink into the ground, . . . loses its character and classification . . . and is considered percolating groundwater."[30] By the same token, irrigation runoff draining into a stream or other watercourse wholly loses its character as groundwater and becomes state water.

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[28] TEX. WATER CODE § 11.021(a). Such water "is the property of the state." *Id.*; *see also Goldsmith & Powell v. State*, 159 S.W.2d 534, 535 (Tex. Civ. App.–Dallas 1942, writ ref'd).

[29] TEX. WATER CODE § 35.002(5).

[30] *Id.* § 11.023(d).

There is an exception. Groundwater can be transported through a natural watercourse without becoming state water. The Code specifically allows the Water Commission to authorize a person to discharge privately owned groundwater into a natural watercourse and withdraw it downstream.[31] But this exception proves the rule. The necessary implication is that when the water owner has not obtained the required authorization for such transportation, the water in the natural watercourse becomes state water. Before such authorization was required,[32] we, too, acknowledged the propriety of transporting non-state-owned water by natural watercourse, but only when the water owner controls the discharge and withdrawal so that the water moves directly from the source to use.[33]

In this case, Day's predecessors did not measure the amount of water flowing from the well to the lake or the amount pumped from the lake into the irrigation system. There was no direct transportation from source to use; the flow into the lake was as constant as the artesian pressure allowed, except when water was diverted to irrigate the seven acres, while withdrawal was only periodic as needed to irrigate the 150 acres. Nor does it appear that the lake was used to store water for irrigation. While the water remained in the lake, it was used for recreation, and since most of

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[31] *Id.* § 11.042(b) ("A person who wishes to discharge and then subsequently divert and reuse the person's existing return flows derived from privately owned groundwater must obtain prior authorization from the commission for the diversion and the reuse of these return flows. The authorization may allow for the diversion and reuse by the discharger of existing return flows, less carriage losses, and shall be subject to special conditions if necessary to protect an existing water right that was granted based on the use or availability of these return flows. Special conditions may also be provided to help maintain instream uses and freshwater inflows to bays and estuaries. A person wishing to divert and reuse future increases of return flows derived from privately owned groundwater must obtain authorization to reuse increases in return flows before the increase.").

[32] Section 11.042(b) was adopted by Act of June 1, 1997, 75th Leg., R.S., ch. 1010, § 2.06, 1997 Tex. Gen. Laws 3610, 3620.

[33] *City of Corpus Christi v. City of Pleasanton*, 276 S.W.2d 798, 802-803 (Tex. 1955).

the water in the lake came from the well, that appears to have been its principal purpose. Indeed, there is no evidence that lake water was used for irrigation during the historical period other than in 1983 and 1984, while the lake was used constantly for recreation. This was substantial evidence to support the Authority's finding that the groundwater became state water in the lake. We do not suggest that a lake can never be used to store or transport groundwater for use by its owner.[34] We conclude only that the Authority could find from the evidence before it that that was not what had occurred on Day's property.

Day having offered no other evidence of beneficial use during the historical period, the Authority's decision to issue an IRP for 14 acre-feet must be affirmed.

III

Whether groundwater can be owned in place is an issue we have never decided. But we held long ago that oil and gas are owned in place, and we find no reason to treat groundwater differently.

A

We agree with the Authority that the rule of capture does not require ownership of water in place, but we disagree that the rule, because it prohibits an action for drainage, is antithetical to such ownership.

We adopted the rule of capture in 1904 in *Houston & T.C. Railway v. East*.[35] A well on East's homestead, five feet in diameter and thirty-three feet deep, had long supplied him with water for household purposes. But the Railroad dug a well nearby, twenty feet in diameter and sixty-six

[34] A lake was used for part of the groundwater transportation in *City of Corpus Christi*, 276 S.W.2d at 799.

[35] 81 S.W. 279 (Tex. 1904).

feet deep, from which it pumped 25,000 gallons a day for use in its locomotives and machine shops, and East's well dried up. East sued the Railroad for the destruction of his well. After a bench trial, the trial court found that the Railroad's use of water was unreasonable under riparian law, but concluded it was not actionable,[36] and rendered judgment for the Railroad. The court of appeals reversed and rendered judgment for East for the damages claimed, $206.25.[37] The Railroad appealed.

"Under the common law . . . , a riparian use must be a reasonable one, and . . . [a] use which works substantial injury to the common right as between riparians is an unreasonable use . . . ."[38] The issue before us was whether this law applied. The same issue had been considered by the English Court of the Exchequer in *Acton v. Blundell*.[39] As in *East*, a landowner had sued for damage to his well from wells dug nearby,[40] and the question was "whether the right to the enjoyment of an underground spring, or of a well supplied by such underground spring, is governed by the same rule

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[36] *Id.* at 280 ("I further find that the use to which defendant puts its well was not a reasonable use of their property as land, but was an artificial use of their property, and if the doctrine of reasonable use, as applicable to defined streams, is applied to such cases, this was unreasonable.").

[37] *Id.*

[38] *Motl v. Boyd*, 286 S.W. 458, 470 (Tex. 1926) (internal citations omitted).

[39] (1843) 152 Eng. Rep. 1123 (Exch.); 12 Mees & W. 324.

[40] *Id*. at 1232-1233 ("At the trial the plaintiff proved that, within twenty years before the commencement of the suit, viz., in the latter end of 1821, a former owner and occupier of certain land and a cotton-mill, now belonging to the plaintiff, had sunk and made in such land a well for raising water for the working of the mill; and that the defendants, in the year 1837, had sunk a coal-pit in the land of one of the defendants, at about three quarters of a mile from the plaintiff's well, and about three years after sunk a second, at a somewhat less distance; the consequence of which sinking was, that by the first the supply of water was considerably diminished, and by the second was rendered altogether insufficient for the purposes of the mill.").

of law as that which applies to, and regulates, a watercourse flowing on the surface."[41] That rule was "well established":

> each proprietor of the land has a right to the advantage of the stream flowing in its natural course over his land, to use the same as he pleases, for any purposes of his own, not inconsistent with a similar right in the proprietors of the land above or below; so that, neither can any proprietor above diminish the quantity or injure the quality of the water which would otherwise naturally descend, nor can any proprietor below throw back the water without the license or the grant of the proprietor above.[42]

After considering the basis for the rule, the consequences of applying it to groundwater, and such authorities as it could find, the court concluded that the law governing the use of groundwater should be different.[43] The court stated the applicable rule as follows:

> That the person who owns the surface may dig therein and apply all that is there found to his own purposes, at his free will and pleasure; and that if, in the exercise of such right, he intercepts or drains off the water collected from the underground springs in his neighbor's well, this inconvenience to his neighbor falls within the description of damnum absque injuria, which cannot become the ground of an action.[44]

This Court, noting that arguments regarding the applicable law had been "thoroughly presented" in *Acton*,[45] and believing that the English court's rule had been "recognized and followed . . . by all the

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[41] *Id.* at 1233.

[42] *Id.*

[43] *Id*. ("But we think, on considering the grounds and origin of the law which is held to govern running streams, the consequences which would result if the same law is made applicable to springs beneath the surface, and, lastly, the authorities to be found in the books, so far as any inference can be drawn from them bearing on the point now under discussion, that there is a marked and substantial difference between the two cases, and that they are not to be governed by the same rule of law.").

[44] *Id.* at 1235.

[45] *Houst. & T.C. Ry. v. East*, 81 S.W. 279, 280 (Tex. 1904) ("The arguments in favor of the application to such cases [involving groundwater] of the doctrines applicable to defined streams of water were thoroughly presented at the bar in Acton v. Blundell, and the reasons for the conclusion of the court against such application were carefully stated

courts of last resort in this country before which the question has come, except the Supreme Court of New Hampshire",[46] adopted the rule for Texas. We later came to refer to the rule as the "rule or law of capture."[47]

Under that rule, we held that the Railroad's conduct was not actionable. "The practical reasons" for the rule, we explained, had been summarized by the Ohio Supreme Court in *Frazier v. Brown*:[48]

> In the absence of express contract and a positive authorized legislation, as between proprietors of adjoining land, the law recognizes no correlative rights in respect to underground waters percolating, oozing, or filtrating through the earth; and this mainly from considerations of public policy: (1) Because the existence, origin, movement, and course of such waters, and the causes which govern and direct their movements, are so secret, occult, and concealed that an attempt to administer any set of legal rules in respect to them would be involved in hopeless uncertainty, and would, therefore, be practically impossible. (2) Because any such recognition of correlative rights would interfere, to the material detriment of the commonwealth, with drainage and agriculture, mining, the construction of highways and railroads, with sanitary regulations, building, and the general progress of improvement in works of embellishment and utility.[49]

By "correlative rights", we referred specifically to the right East claimed: to sue for damages from a loss of water due to subsurface drainage by another user for legitimate purposes. The reasons the law did not recognize that right — the "hopeless uncertainty" involved in its enforcement and the

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in the opinion.").

[46] *Id.*

[47] *Elliff v. Texon Drilling Co.*, 210 S.W.2d 558, 561 (Tex. 1948). The historical origins and development of the rule are thoroughly examined in Dylan O. Drummond, Lynn Ray Sherman & Edmond R. McCarthy, Jr., *The Rule of Capture in Texas — Still So Misunderstood After All These Years*, 37 TEX. TECH L. REV. 1, 15-41 (2004).

[48] 12 Ohio St. 294 (1861), *overruled by Cline v. Am. Aggregates Corp.*, 474 N.E.2d 324 (Ohio 1984).

[49] *East*, 81 S.W. at 280-281 (quoting *Frazier*, 12 Ohio St. at 311).

material interference with public progress — did not preclude all correlative rights in groundwater. On the contrary, we noted that East had made "no claim of malice or wanton conduct of any character, and the effect to be given to such a fact when it exists is beside the present inquiry",[50] suggesting at least the possibility that an action for damages might lie in such circumstances, despite difficulty in proof. Malice and wanton conduct were only examples. *Acton*'s rule of non-liability, we said, was a "general doctrine".[51]

The effect of our decision denying East a cause of action was to give the Railroad ownership of the water pumped from its well *at the surface*. No issue of ownership of groundwater *in place* was presented in *East*, and our decision implies no view of that issue. Riparian law, which East invoked, governs users who do not own the water. Under that law, the Railroad would have been liable even if East did not own the water in place. The Railroad escaped liability, certainly not because East did own the water in place, but irrespective of whether he did. Our quote from the New York Court of Appeals' decision in *Pixley v. Clark*[52] must be read in this context:

> An owner of soil may divert percolating water, consume or cut it off, with impunity. It is the same as land, and cannot be distinguished in law from land. So the owner of land is the absolute owner of the soil and of percolating water, which is a part of, and not different from, the soil. No action lies against the owner for interfering with or destroying percolating or circulating water under the earth's surface.[53]

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[50] *Id.* at 282.

[51] *Id.*

[52] 35 N.Y. 520 (1866).

[53] *East*, 81 S.W. at 280-281 (quoting *Pixley*, 35 N.Y. at 527).

Whatever the New York court may have intended by this statement,[54] we could have meant only that a landowner is the absolute owner of groundwater flowing at the surface from its well, even if the water originated beneath the land of another.

In four cases since *East*, we have considered the rule of capture as applied to groundwater. In none of them did we determine whether the water was owned in place. In *City of Corpus Christi v. City of Pleasanton*,[55] the parties all owned wells pumping from the same sands. The City of Corpus Christi was using natural watercourses — the Nueces River and Lake Corpus Christi — to transport its water 118 miles from its wells to the point where it withdrew the water for use. The other well owners complained that the loss of water along the way to evaporation, transpiration, and seepage was waste, and that water reserves for all the wells were being depleted unnecessarily because the City was taking much more water than it used. We reaffirmed that, under the rule of capture, "percolating waters are regarded as the property of the owner of the surface",[56] but as in *East*, the water ownership to which we referred was at the surface, not in place. "The precise question" in *East*, we said, was "whether the Railway Company was liable in damages to East" for

[54] The issue in *Pixley* was whether landowners who raised their dam on a creek were liable for flooding other landowners adjacent the creek. The court held they were, applying the law governing riparian use, not the law governing the use of groundwater. *Pixley*, 35 N.Y. at 531-532. The statement quote is dicta apparently meant to distinguish between the two.

[55] 276 S.W.2d 798 (Tex. 1955).

[56] *Id.* at 800.

its use of water.[57] *East* established

> that an owner of land had a legal right to take all the water he could capture under his land that was needed by him for his use, even though the use had no connection with the use of the land as land and required the removal of the water from the premises where the well was located.[58]

Just as the Railroad was not liable to East, the City was not liable to other well owners for the loss of water involved in its transportation. But as we had suggested in *East*, the rule of capture was not absolute. "Undoubtedly," we noted, "the Legislature could prohibit the use of any means of transportation of percolating or artesian water which permitted the escape of excessive amounts, but it has not seen fit to do so."[59]

In *Friendswood Development Co. v. Smith-Southwest Industries, Inc.*,[60] the Court held that a landowner pumping water from wells on its property was not liable for the resulting subsidence in neighboring property. This result, the Court concluded, was necessitated by *East*, which had "adopted the absolute ownership doctrine of underground percolating waters."[61] But without overruling *East*, the Court held that prospectively, a landowner could be liable for subsidence caused by removing groundwater.[62] Avoiding the tension in these seemingly inconsistent views of *East*, Justice Pope argued convincingly in dissent that the rule of capture was irrelevant to the case and

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[57] *Id.* at 801.

[58] *Id.* at 800.

[59] *Id.* at 803.

[60] 576 S.W.2d 21 (Tex. 1978).

[61] *Id.* at 25.

[62] *Id.* at 29-30.

that the Court had based its decision on "the mistaken belief that the case is governed by the ownership of ground water."[63] *East* was about liability for a loss *of* water, not liability for a loss *from* water. In any event, no claim of right to groundwater in place was made or decided.

In *City of Sherman v. Public Utility Commission*,[64] a water utility petitioned the PUC to prohibit the City of Sherman from drilling wells in the utility's service area to obtain water for the City's needs outside the area. The Court concluded that the City's activities were permitted by *East*, which had adopted an "absolute ownership theory regarding groundwater", to which "[a] corollary . . . is the right of the landowner to capture such water."[65] The PUC, we held, had no statutory authority "to regulate groundwater production or adjudicate correlative groundwater rights."[66] Rather, the Legislature had chosen to regulate groundwater use and production through groundwater districts under the Water Code.[67] The issues in the case did not implicate ownership of groundwater in place.

Finally, in *Sipriano v. Great Spring Waters of America, Inc.*,[68] we revisited the rule of capture in a factual setting virtually identical to that in *East*: landowners sued their neighbor for

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[63] *Id.* at 31 (Pope, J., dissenting).

[64] 643 S.W.2d 681 (Tex. 1983).

[65] *Id.* at 686.

[66] *Id.*

[67] *Id.*

[68] 1 S.W.3d 75 (Tex. 1999).

pumping so much water (90,000 gallons a day) that their wells were depleted. Once again, we explained:

> The rule of capture answers the question of what remedies, if any, a neighbor has against a landowner based on the landowner's use of the water under the landowner's land. Essentially, the rule provides that, absent malice or willful waste, landowners have the right to take all the water they can capture under their land and do with it what they please, and they will not be liable to neighbors even if in so doing they deprive their neighbors of the water's use.[69]

The right to capture was not unfettered; it precluded the plaintiffs' suit but not legislative regulation, which we expressly recognized and encouraged.[70] The concern was that with no common law liability for a landowner's unlimited pumping, legislators had inadequately provided for the protection of groundwater supplies.[71] No issue regarding the ownership of groundwater in place was involved.

But while the rule of capture does not entail ownership of groundwater in place, neither does it preclude such ownership. Although we have never discussed this issue with respect to groundwater, we have done so with respect to oil and gas, to which the rule of capture also applies. In *Stephens County v. Mid-Kansas Oil & Gas Co.*,[72] Mid-Kansas, the assignee of an oil and gas lease, argued that its interest in the minerals was not taxable because, by the rule of capture, they

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[69] *Id.* at 76.

[70] *Id.* at 79 ("Today, again, we reiterate that the people have constitutionally empowered the Legislature to act in the best interest of the State to preserve our natural resources, including water. We see no reason . . . for the Legislature to feel constrained from taking appropriate steps to protect groundwater. Indeed, we anticipated legislative involvement in groundwater regulation in *East*: [']*In the absence . . . of positive authorized legislation*, as between proprietors of adjoining lands, the law recognizes no correlative rights in respect to underground waters percolating, oozing, or filtrating through the earth.[']" (quoting *Houst. & T.C. Ry. v. East*, 81 S.W. 279, 280 (1904))).

[71] *Id.* at 81 (Hecht, J., concurring).

[72] 254 S.W. 290 (Tex. 1923).

were "subject to appropriation, without the consent of the owner of the tract, through drainage from wells on adjacent lands."[73] The argument "lack[ed] substantial foundation", we explained, because Mid-Kansas could likewise drain oil and gas from adjacent lands.[74]

> Ultimate injury from the net results of drainage, where proper diligence is used is altogether too conjectural to form the basis for the denial of a right of property in that which is not only plainly as much realty as any other part of the earth's contents, but realty of the highest value to mankind . . . and often worth far more than anything else on or beneath the surface within the proprietor's boundaries.[75]

Ownership of gas in place did not entitle the owner to specific molecules of gas that might move beneath surface tracts but to volumes that, while they could be diminished through drainage, with "proper diligence", could also be replenished through drainage. Recapping our decision years later, we stated that while the rule of capture, "at first blush, would seem to conflict with the view of absolute ownership of the minerals in place, . . . it was otherwise decided in [*Stephens County*]."[76]

> [N]otwithstanding the fact that oil and gas beneath the surface are subject both to capture and administrative regulation, the fundamental rule of absolute ownership of the minerals in place is not affected in our state.[77]

Most recently, in *Coastal Oil & Gas Corp. v. Garza Energy Trust*,[78] we observed that "the rule of capture determines title to [natural] gas that drains from property owned by one person onto

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[73] *Id.* at 292.

[74] *Id.*

[75] *Id.*

[76] *Elliff v. Texon Drilling Co.*, 210 S.W.2d 558, 561 (Tex. 1948).

[77] *Id*.

[78] 268 S.W.3d 1 (Tex. 2008).

property owned by another. It says nothing about the ownership of gas that has remained in place."[79] The same is true of groundwater.

B

We held long ago that oil and gas are owned in place. In *Texas Co. v. Daugherty*,[80] the issue was whether an oil and gas lessee's interest was subject to ad valorem taxation. If the lessee's interest were "a mere franchise or privilege . . . with the usufructuary right . . . to appropriate a portion of such oil and gas as might be discovered," then the interest was part of the value of the land on which the landowner, not the lessee, should be taxed.[81] But we concluded that the lessee's interest was a separate, real interest, "amount[ing] to a defeasible title in fee to the oil and gas in the ground".[82] We recognized that "[b]ecause of the fugitive nature of oil and gas, some courts, emphasizing the doctrine that they are incapable of absolute ownership until captured and reduced to possession and analogizing their ownership to that of things ferae naturae," had held that oil and gas interests, unlike interests in non-fugacious minerals, were not interests in realty.[83] We thought that the rule of capture provided no "substantial ground" for treating the two kinds of interests differently.[84]

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[79] *Id.* at 14.

[80] 176 S.W. 717 (Tex. 1915).

[81] *Id.* at 718.

[82] *Id.* at 719.

[83] *Id.*

[84] *Id.* at 719-720.

> The possibility of the escape of the oil and gas from beneath the land before being finally brought within actual control may be recognized, as may also their incapability of absolute ownership, in the sense of positive possession, until so subjected. But nevertheless, while they are in the ground, they constitute a property interest.[85]

Notwithstanding the rule of capture, we concluded, a landowner's "right to the oil and gas beneath his land is an exclusive and private property right . . . inhering in virtue of his proprietorship of the land, and of which he may not be deprived without a taking of private property."[86] Ownership of oil and gas in place is the prevailing rule among the states.[87]

Groundwater, like oil and gas, often exists in subterranean reservoirs in which it is fugacious. Unless the law treats groundwater differently from oil and gas, *Daugherty* refutes the Authority's argument that the rule of capture precludes ownership in place. The Authority contends that the rule of capture deprives a landowner's interest in groundwater of two attributes essential to the ownership of property: a right of possession (i) from which others are excluded[88] and (ii) which may be enforced. Because a landowner is not entitled to any specific molecules of groundwater or even to any specific amount, the Authority argues that the landowner has no interest that entitles him to

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[85] *Id.* at 720.

[86] *Id.* at 722; *see also Brown v. Humble Oil & Ref. Co.*, 83 S.W.2d 935, 940 (Tex. 1935) ("The rule in Texas recognizes the ownership of oil and gas in place . . . . Owing to the peculiar characteristics of oil and gas, the foregoing rule of ownership of oil and gas in place should be considered in connection with the law of capture. This rule gives the right to produce all of the oil and gas that will flow out of the well on one's land; and this is a property right. And it is limited only by the physical possibility of the adjoining landowner diminishing the oil and gas under one's land by the exercise of the same right of capture. . . . Both rules are subject to regulation under the police power of a state.").

[87] *See* HOWARD R. WILLIAMS ET AL., OIL & GAS LAW § 203.3 (2011).

[88] *See College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 673 (1999) ("The hallmark of a protected property interest is the right to exclude others. That is one of the most essential sticks in the bundle of rights that are commonly characterized as property.") (internal citations and quotation marks omitted).

exclude others from taking water below his property and therefore no ownership in place. The lessee in *Daugherty* made essentially the same argument, and we rejected it. Furthermore, we later held that a landowner is entitled to prohibit a well from being drilled on other property but bottomed in an oil and gas formation under his own — a slant or deviated well.[89] Thus, a landowner has a right to exclude others from groundwater beneath his property, but one that cannot be used to prevent ordinary drainage.

The Authority argues that groundwater must be treated differently because the law recognizes correlative rights in oil and gas but not in groundwater. The Authority points to *East*'s observation that "the law recognizes no correlative rights in respect to underground waters percolating . . . through the earth"[90] but over-reads this statement. As we have explained above, *East* did not rule out an action for "malice or wanton conduct",[91] including waste.[92] Likewise, the rule of capture does not preclude an action for drainage of oil and gas due to waste, as we held in *Elliff v. Texon Drilling Co.*[93] More importantly, however, the Court observed in *Elliff* that "correlative rights between the various landowners over a common reservoir of oil or gas" have been recognized through state regulation of oil and gas production that affords each landowner "the opportunity to

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[89] *Hastings Oil Co. v. Tex. Co.*, 234 S.W.2d 389, 396 (Tex. 1950).

[90] *Hous.& T.C. Ry. v. East*, 81 S.W. 279, 280 (Tex. 1904) (quoting *Frazier v. Brown*, 12 Ohio St. 294, 311 (1861)).

[91] *Id.* at 282.

[92] *Sipriano v. Great Spring Waters of Am., Inc.*, 1 S.W.3d 75, 76 (Tex. 1999) (noting that the rule of capture does not insulate "malice or willful waste" from liability).

[93] 210 S.W.2d 558, 582-583 (Tex. 1949).

produce his fair share of the recoverable oil and gas beneath his land".[94] Similarly, one purpose of the EAAA's regulatory provisions is to afford landowners their fair share of the groundwater beneath their property. In both instances, correlative rights are a creature of regulation rather than the common law. In 1904, when *East* was decided, neither groundwater production nor oil and gas production were regulated, and we indicated that limiting groundwater production might impede public purposes. The State soon decided that regulation of oil and gas production was essential, adopting well-spacing regulations in 1919,[95] and it has since determined that the same is true for groundwater production, as for example, in the EAAA.

The Authority argues that regulation of oil and gas production to determine a landowner's fair share is based on the area of land owned and is fundamentally different from regulation of groundwater production. It is true, of course, that the considerations shaping the regulatory schemes differ markedly. The principal concerns in regulating oil and gas production are to prevent waste and to provide a landowner a fair opportunity to extract and market the oil and gas beneath the surface of the property. Groundwater is different in both its source and uses. Unlike oil and gas, groundwater in an aquifer is often being replenished from the surface, and while it may be sold as a commodity, its uses vary widely, from irrigation, to industry, to drinking, to recreation. Groundwater regulation must take into account not only historical usage but future needs, including the relative importance of various uses, as well as concerns unrelated to use, such as environmental impacts and subsidence. But as the State tells us in its petition: "While there are some differences

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[94] *Id.* at 562.

[95] *Brown v. Humble Oil & Ref. Co.*, 83 S.W.2d 935, 941 (Tex. 1935).

in the rules governing groundwater and hydrocarbons, at heart both are governed by the same fundamental principle: each represents a shared resource that *must* be conserved under the Constitution."[96] In any event, the Authority's argument is that groundwater cannot be treated like oil and gas because landowners have no correlative rights, not because their rights are different. That argument fails.

Finally, the Authority argues that groundwater is so fundamentally different from oil and gas in nature, use, and value that ownership rights in oil and gas should have no bearing in determining those in groundwater. Hydrocarbons are minerals; groundwater, at least in some contexts, is not.[97] Groundwater is often a renewable resource, replenished in aquifers like the Edwards Aquifer; is used not only for drinking but for recreation, agriculture, and the environment; and though life-sustaining, has historically been valued much below oil and gas. Oil and gas are essentially non-renewable, are used as a commodity for energy and in manufacturing, and have historically had a market value higher than groundwater. But not all of these characteristics are fixed. Although today the price of crude oil is hundreds of times more valuable than the price of municipal water, the price of bottled water is roughly equivalent to, or in some cases, greater than the price of oil. To differentiate between groundwater and oil and gas in terms of importance to modern life would be difficult. Drinking water is essential for life, but fuel for heat and power, at least in this society, is also indispensable. Again, the issue is not whether there are important differences between groundwater

[96] State of Texas, Petition for Review at 11.

[97] *See* TEX. NAT. RESOURCES CODE § 53.1631(a) ("Unless otherwise expressly provided by statute, deed, patent, or other grant from the State of Texas, groundwater shall not be considered a mineral in any past or future reservation of title or rights to minerals by the State of Texas.").

and hydrocarbons; there certainly are. But we see no basis in these differences to conclude that the common law allows ownership of oil and gas in place but not groundwater.

In *Elliff*, we restated the law regarding ownership of oil and gas in place:

> In our state the landowner is regarded as having absolute title in severalty to the oil and gas in place beneath his land. The only qualification of that rule of ownership is that it must be considered in connection with the law of capture and is subject to police regulations. The oil and gas beneath the soil are considered a part of the realty. Each owner of land owns separately, distinctly and exclusively all the oil and gas under his land and is accorded the usual remedies against trespassers who appropriate the minerals or destroy their market value.[98]

We now hold that this correctly states the common law regarding the ownership of groundwater in place.

C

The Legislature appears to share this view of the common law. "The ownership and rights of the owner of the land, his lessees and assigns, in underground water" were "recognized" in one provision of the Groundwater Conservation District Act of 1949 (the "GCDA"),[99] which later became section 36.002 of the Water Code.[100] That bare recognition of landowners' rights did not describe them with specificity, but last year, the Legislature amended section 36.002, to set out its fuller understanding of the matter:

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[98] 210 S.W.2d 558, 561 (internal citations omitted).

[99] Act of May 23, 1949, 51st Leg., R.S., ch. 306, § 1, 1949 Tex. Gen. Laws 559, 562 (codified as TEX. REV. CIV. STAT. ANN. art. 7880-3c(D), later codified as TEX. WATER CODE § 52.002).

[100] Act of May 29, 1995, 74th Leg., R.S., ch. 933, § 2, 1995 Tex. Gen. Laws 4673, 4680 (adopting TEX. WATER CODE § 36.002) ("The ownership and rights of the owners of the land and their lessees and assigns in groundwater are hereby recognized, and nothing in this code shall be construed as depriving or divesting the owners or their lessees and assigns of the ownership or rights, subject to rules promulgated by a district.").

> (a) The legislature recognizes that a landowner owns the groundwater below the surface of the landowner's land as real property.
>
> (b) The groundwater ownership and rights described by this section:
>
> (1) entitle the landowner, including a landowner's lessees, heirs, or assigns, to drill for and produce the groundwater below the surface of real property, subject to Subsection (d), without causing waste or malicious drainage of other property or negligently causing subsidence, but does not entitle a landowner, including a landowner's lessees, heirs, or assigns, to the right to capture a specific amount of groundwater below the surface of that landowner's land; and
>
> (2) do not affect the existence of common law defenses or other defenses to liability under the rule of capture.[101]

By ownership of groundwater as real property, the Legislature appears to mean ownership in place.[102]

The State distinguishes its position from the Authority's. The State argues that landowners have ownership rights in groundwater but those rights are "too inchoate" to be protected by the Takings Clause of the Texas Constitution. Groundwater ownership, the State contends, cannot entitle a landowner to any specific amount of water because its availability in a rechargeable aquifer is difficult to determine and constantly changing due to climate conditions. In this same vein, amicus curiae Houston-Galveston Subsidence District argues that while groundwater rights should be severable from the land and freely transferable, the uncertainties involved in determining ownership to any amount of water preclude constitutional compensation for a taking. But the State acknowledges that its argument cannot be pushed to the extreme. Suppose a landowner were

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[101] TEX. WATER CODE § 36.002(a)-(b).

[102] Importantly, the State does not claim to own groundwater.

prohibited from all access to groundwater. In its brief, the State concedes: "Given that there is a property interest in groundwater, some manner and degree of groundwater regulation could, under some facts, effect a compensable taking of property."[103] We agree, but the example demonstrates the validity of Day's claim. Groundwater rights are property rights subject to constitutional protection, whatever difficulties may lie in determining adequate compensation for a taking.

The rest of section 36.002, not quoted here but discussed below, evidences the Legislature's understanding of the interplay between groundwater ownership and groundwater regulation, which forms the backdrop of the issue to which we now turn: whether Day has stated a viable takings claim.

IV

Day alleges that the EAAA's permitting process has deprived him of his groundwater and therefore constitutes a taking for which compensation is due under article I, section 17 of the Texas Constitution. To assess this claim, we begin by surveying the history and current status of groundwater regulation in Texas in order to place the EAAA in context, and then we turn to its application.

A

[103] Brief of Petitioner State of Texas at 26.

In 1917, following a period of severe droughts[104] and floods,[105] the people of Texas adopted article XVI, section 59 of the Texas Constitution, the Conservation Amendment. The Amendment provides in part: "The conservation and development of all of the natural resources of this State . . . are each and all hereby declared to be public rights and duties; and the Legislature shall pass all such laws as may be appropriate thereto." Thus, the "responsibility for the regulation of natural resources, including groundwater, rests in the hands of the Legislature."[106]

The Groundwater Conservation District Act of 1949 was the first significant legislation providing for the conservation and development of groundwater. Efforts to pass a comprehensive, statewide, groundwater management scheme had repeatedly failed.[107] The Act permitted landowners to petition for creation of a groundwater conservation district to regulate production from an underground reservoir. The petition was directed to the county commissioners' court if the district lay entirely within one county, or to the State Board of Water Engineers if it did not. A district was required to be approved by voters and was governed by an elected board of directors. The Act, with

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[104] *In re Adjudication of the Water Rights of Upper Guadalupe Segment of Guadalupe River Basin*, 642 S.W.2d 438, 447 (Tex. 1982) ("The droughts in 1910 and 1917 prompted the citizens of Texas to adopt the 'Conservation Amendment' to the Texas Constitution, mandating the conservation of public waters.").

[105] *See* TEX. CONST. art. XVI, § 59 interp. commentary, at 402 (West 1993) ("Inspired by the terrific floods in Texas during 1913 and 1914, the citizens began to demand a constructive conservation program and agitated for an amendment to the constitution which would recognize the state's duty to prevent floods, or at least to take steps necessary for the conservation of the state's natural resources.").

[106] *Sipriano v. Great Spring Waters of Am., Inc.*, 1 S.W.3d 75, 77 (Tex. 1999).

[107] Edward P. Woodruff, Jr. & James Peter Williams, Jr., Comment, *Texas Groundwater District Act of 1949: Analysis and Criticism*, 30 TEX. L. REV. 862, 865-866 (1952) ("During the past fifteen years, several attempts have been made in the Legislature to provide the state with comprehensive groundwater legislation. Bills which would have accomplished this object were introduced in 1937, 1939, 1941, and in 1947. The rejection of each of these proposed measures made it apparent that if the state were to have any groundwater legislation, some retreat would have to be made from the ideal of a comprehensive code. As a result of compromises between divergent factions of groundwater users, the important and controversial Act of 1949 was passed.").

many changes, is now chapter 36 of the Water Code. There are currently ninety-six groundwater districts covering all or parts of 173 counties.[108] While districts have broad statutory authority,[109] their activities remain under the local electorate's supervision.[110]

Groundwater conservation districts have little supervision beyond the local level. Each district must develop a groundwater management plan every five years, which aims to address pertinent issues such as water supply needs, management goals, and the amount of water estimated to be used and recharged annually within the district.[111] The management plan must be submitted for approval by the Texas Water Development Board and its implementation is subject to review by the State Auditor's Office.[112] Districts are also required to participate in joint planning within designated groundwater management areas ("GMAs").[113] The regional water planning process was

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[108] *See* TEX. WATER DEV. BD., 2012 STATE WATER PLAN 23-24 (available from the Texas Water Development Board's website, at http://www.twdb.state.tx.us/publications/state_water_plan/2012/2012_SWP.pdf).

[109] TEX. WATER CODE § 36.101(a) ("A district may make and enforce rules, including rules limiting groundwater production based on tract size or the spacing of wells, to provide for conserving, preserving, protecting, and recharging of the groundwater or of a groundwater reservoir or its subdivisions in order to control subsidence, prevent degradation of water quality, or prevent waste of groundwater and to carry out the powers and duties provided by this chapter.").

[110] *Id*. §§ 36.011-36.0171. Voter approval is often the most significant hurdle, as unwanted taxes and groundwater regulation lead to opposition to the creation of new districts. *See* TEX. COMM'N ON ENVTL. QUALITY & TEX. WATER DEV. BD., PRIORITY GROUNDWATER MANAGEMENT AREAS AND GROUNDWATER CONSERVATION DISTRICTS, REPORT TO THE 81ST TEXAS LEGISLATURE 37, tbl.6 (2009) (listing the failed GCDs since 1989), *available at* http://www.tceq.state.tx.us/assets /public/comm_exec/pubs/sfr/053_06.pdf.

[111] TEX. WATER CODE §§ 36.1072(e), 36.1071.

[112] *Id*. §§ 36.1072(a), 36.302(c).

[113] *Id*. § 35.002(11).

created in 1997,[114] and since 2001 it has included all of the major and minor aquifers in the State.[115] Now, sixteen regional groundwater management areas cover the State, with their borders mirroring those of the State's major aquifers.[116] About 80% of Texas overlies nine major aquifers and twenty minor aquifers, with the nine major aquifers providing about 97% of the State's groundwater.[117] Since 1995, groundwater conservation districts within a groundwater management area have been required to work together.[118]

Still, as chapter 36 states, "[g]roundwater conservation districts created as provided by this chapter are the state's preferred method of groundwater management through rules developed, adopted, and promulgated by a district in accordance with the provisions of this chapter."[119] Section 36.113 provides that districts must "require a permit for the drilling, equipping, operating, or completing of wells or for substantially altering the size of wells or well pumps."[120] In acting on permit requests, a district must consider, among other things, whether "the proposed use of water

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[114] Act of June 1, 1997, 75th Leg., R.S., ch. 1010, 1997 Tex. Gen. Laws 3610.

[115] Act of May 27, 2001, 77th Leg., R.S., ch. 966, § 2.22, 2001 Tex. Gen. Laws 1991, 2003 (codified at TEX. WATER CODE § 35.004).

[116] *See generally* 31 TEX. ADMIN. CODE § 356(B); TEX. WATER DEV. BD., GROUNDWATER MANAGEMENT AREAS IN TEXAS (providing a map of the sixteen GMAs), *available at* http://www.twdb.state.tx.us/mapping/maps/pdf/GMA%20map%208x11.pdf.

[117] Ronald Kaiser, *Who Owns the Water?: A Primer on Texas Groundwater Law and Spring Flow*, TEX. PARKS & WILDLIFE, July 2005, at 33, *available at* http://www.tamu.edu/faculty/rakwater/research/tpwd_Water_Article.pdf.

[118] Act of May 29, 1995, 79th Leg., R.S., ch. 933, § 5, 1995 Tex. Gen. Laws 4673, 4688 (codified at TEX. WATER CODE § 36.108).

[119] TEX. WATER CODE § 36.0015; *cf. Sipriano v. Great Spring Waters of Am., Inc.*, 1 S.W.3d 75, 81 (Tex. 1999) (Hecht, J., concurring) ("Actually, such districts are not just the preferred method of groundwater management, they are the only method presently available.").

[120] TEX. WATER CODE § 36.113(a).

unreasonably affects existing groundwater and surface water resources or existing permit holders", whether "the proposed use of water is dedicated to any beneficial use", and whether "the proposed use of water is consistent with the district's approved management plan".[121] In issuing permits, a district must also "manage total groundwater production on a long-term basis to achieve an applicable desired future condition", considering estimates of groundwater availability.[122]

Districts' regulatory authority is broad:

> In order to minimize as far as practicable the drawdown of the water table or the reduction of artesian pressure, to control subsidence, to prevent interference between wells, to prevent degradation of water quality, or to prevent waste, a district by rule may regulate:
>
> (1) the spacing of water wells by:
>
> (A) requiring all water wells to be spaced a certain distance from property lines or adjoining wells;
>
> (B) requiring wells with a certain production capacity, pump size, or other characteristic related to the construction or operation of and production from a well to be spaced a certain distance from property lines or adjoining wells; or
>
> (C) imposing spacing requirements adopted by the board; and
>
> (2) the production of groundwater by:
>
> (A) setting production limits on wells;
>
> (B) limiting the amount of water produced based on acreage or tract size;
>
> (C) limiting the amount of water that may be produced from a

[121] *Id.* § 36.113(d)(2)-(4).

[122] *Id.* § 36.1132(b)

defined number of acres assigned to an authorized well site;

(D) limiting the maximum amount of water that may be produced on the basis of acre-feet per acre or gallons per minute per well site per acre;

(E) managed depletion; or

(F) any combination of the methods listed above in Paragraphs (A) through (E).[123]

Section 36.116(b) provides that "[i]n promulgating any rules limiting groundwater production, the district may preserve historic or existing use before the effective date of the rules to the maximum extent practicable consistent with the district's management plan . . . and as provided by Section 36.113."[124] In *Guitar Holding Co. v. Hudspeth County Underground Water Conservation District*,[125] we rejected the argument that a district's discretion in preserving "historic or existing use" was limited to the amount of water permitted. Rather, we said,

> the amount of groundwater withdrawn and its purpose are both relevant when identifying an existing or historic use to be preserved. Indeed, in the context of regulating the production of groundwater while preserving an existing use, it is difficult to reconcile how the two might be separated. . . . [B]oth the amount of water to be used and its purpose are normal terms of a groundwater production permit and are likewise a part of any permit intended to "preserve historic or existing use." A district's discretion to preserve historic or existing use is accordingly tied both to the amount and purpose of the prior use.[126]

Districts may have different rules; indeed, a district may adopt different rules for different

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[123] *Id.* § 36.116(a).

[124] *Id.* § 36.116(b).

[125] 263 S.W.3d 910 (Tex. 2004).

[126] *Id.* at 916.

areas of the district.[127] Special legislation, unique to each district, may also grant powers beyond those provided in chapter 36.[128]

B

Although the Edwards Aquifer Authority is a "conservation and reclamation district"[129] created under the Conservation Amendment,[130] its powers and duties are governed by the EAAA, not by chapter 36 of the Water Code. The EAAA does not refer to chapter 36. The Authority is responsible not only for permitting groundwater use but for "protect[ing] terrestrial and aquatic life",[131] specifically, "species that are designated as threatened or endangered under applicable federal or state law".[132]

As already noted, the EAAA requires the Authority, in issuing permits, to give preference to "existing users", considering only the amounts of groundwater put to beneficial use during the

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[127] TEX. WATER CODE § 36.116(d) ("For better management of the groundwater resources located in a district or if a district determines that conditions in or use of an aquifer differ substantially from one geographic area of the district to another, the district may adopt different rules for: (1) each aquifer, subdivision of an aquifer, or geologic strata located in whole or in part within the boundaries of the district; or (2) each geographic area overlying an aquifer or subdivision of an aquifer located in whole or in part within the boundaries of the district.").

[128] *See, e.g.,* Act of June 18, 2005, 79th Leg., R.S., ch. 1324, § 1, 2005 Tex. Gen. Laws 4138 (creating the Corpus Christi Aquifer Storage and Recovery Conservation District); Act of June 17, 2005, 79th Leg., R.S., ch. 661, § 1, 2005 Tex. Gen. Laws 1644 (creating the Victoria County Groundwater Conservation District).

[129] EAAA § 1.02(a) ("A conservation and reclamation district, to be known as the Edwards Aquifer Authority, is created . . . .").

[130] *Id.* § 1.02(b) ("The authority is created under and is essential to accomplish the purposes of Article XVI, Section 59, of the Texas Constitution.").

[131] *Id.* § 1.01.

[132] *Id.* § 1.14(a)(7). The Legislature passed the EAAA, in part, to end federal litigation that sought judicial regulation of the Edwards Aquifer. *See, e.g., Sierra Club v. City of San Antonio*, 112 F.3d 789 (5th Cir. 1997) (vacating preliminary injunction entered pursuant to the Endangered Species Act for lack of a showing of probable success on the merits following enactment of the EAAA); *Edwards Aquifer Auth. v. Bragg*, 21 S.W.3d 375, 377 (Tex. App.– San Antonio 2000), *aff'd* ,71 S.W.3d 375 (Tex. 2002). Chapter 36 does not mention endangered species.

twenty-year historical period ending May 31, 1993. The Authority received some 1,100 IRP applications by the December 30, 1996 filing deadline, claiming 834,244 acre-feet per year, far more than the 450,000 acre-feet-per-year cap then in place. Approximately 58% of the applications were for irrigation, 20% for industrial use, 15% for municipal use, and 7% for permit-exempt domestic and livestock wells.[133] The Authority recommended denying 22% of the IRP applications and reducing the permitted amounts for 71% of the applications granted.[134] Of the total permitted annual withdrawal of 563,300 acre-feet, approximately 47% was for irrigation, 13% for industrial use, and 40% for municipal use. Some 35% of the applicants requested review.[135] (Day's contest was the first one decided.) Currently, the Authority has issued 1,975 permits to the limit of its statutory cap of 572,000 acre-feet per year.[136]

Numerous facial constitutional challenges to the EAAA were asserted in *Barshop v. Medina County Underground Water Conservation District*,[137] and we rejected them all, concluding that the EAAA "is a valid exercise of the police power necessary to safeguard the public safety and welfare."[138] One claim was that the Act's permitting process, on its face, constituted an uncompensated taking in violation of article I, section 17 of the Texas Constitution. The parties

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[133] *See* Darcy Alan Frownfelter, *Edwards Aquifer Authority*, *in* ESSENTIALS OF TEXAS WATER RESOURCES 364-365 (Mary K. Sahs ed., 2009).

[134] *Id.* at 365-366.

[135] *Id.* at 366.

[136] EAAA § 1.14(c); Edwards Aquifer Authority, *Groundwater Permit List*, http://www.edwardsaquifer.org/pweb/PermitList.aspx (last visited Feb. 23, 2012) (authorizing 571,599.500 acre-feet).

[137] 925 S.W.2d 618 (Tex. 1996).

[138] *Id.* at 635.

differed over whether landowners had a property right in groundwater subject to the constitutional provision. We explained their positions as follows:

> Plaintiffs concede that the State has the right to regulate the use of underground water, but maintain that they own the water beneath their land and that they have a vested property right in this water. The State insists that, until the water is actually reduced to possession, the right is not vested and no taking occurs. Thus, the State argues that no constitutional taking occurs under the statute for landowners who have not previously captured water, while Plaintiffs argue that these landowners have had a constitutional deprivation of property rights. The parties simply fundamentally disagree on the nature of the property rights affected by this Act.[139]

Noting that we had "not previously considered the point at which water regulation unconstitutionally invades the property rights of landowners", we concluded that that "complex and multi-faceted" issue was not properly presented by a facial challenge to the Act.[140]

> Assuming without deciding that Plaintiffs possess a vested property right in the water beneath their land, the State still can take the property for a public use as long as adequate compensation is provided. The Act expressly provides that the Legislature "intends that just compensation be paid if implementation of [the Act] causes a taking of private property or the impairment of a contract in contravention of the Texas or federal constitution." Based on this provision in the Act, we must assume that the Legislature intends to compensate Plaintiffs for any taking that occurs. As long as compensation is provided, the Act does not violate article I, section 17.[141]

Today we have decided that landowners do have a constitutionally compensable interest in groundwater, and we come at last to the issue not presented in *Barshop*: whether the EAAA's regulatory scheme has resulted in a taking of that interest.

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[139] *Id.* at 625 (citation omitted).

[140] *Id.* at 626.

[141] *Id.* at 630-631 (citation omitted) (quoting EAAA § 1.07).

C

As we noted in *Sheffield Development Co. v. City of Glenn Heights*,[142] in construing article I, section 17 of the Texas Constitution, we have generally been guided by the United States Supreme Court's construction and application of the similar guarantee provided by the Fifth Amendment to the United States Constitution and made applicable to the states by the Fourteenth Amendment.[143] We described the foundation principle of federal regulatory takings jurisprudence as follows:

> "Government hardly could go on", wrote Justice Holmes in the first regulatory takings case in the United States Supreme Court, "if to some extent values incident to property could not be diminished [by government regulation] without paying for every such change in the general law." Yet, he continued, "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." "The general rule at least", he concluded, is "that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking", adding, "this is a question of degree — and therefore cannot be disposed of by general propositions." "[T]he question at bottom is upon whom the loss of the changes desired *should* fall."[144]

The Supreme Court has developed three analytical categories, as summarized in *Lingle v. Chevron U.S.A. Inc.*:

> Our precedents stake out two categories of regulatory action that generally will be deemed *per se* takings for Fifth Amendment purposes. First, where government requires an owner to suffer a permanent physical invasion of her

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[142] 140 S.W.3d 660 (Tex. 2004).

[143] *Id.* at 669 ("The two guarantees, though comparable, are worded differently. 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 . . . .' The Takings Clause of the Fifth Amendment states: 'nor shall private property be taken for public use without just compensation.' . . . [I]t could be argued that the differences in the wording of the two provisions are significant, [but absent such an argument] we . . . look to federal jurisprudence for guidance, as we have in the past . . . ." (footnotes omitted)).

[144] *Id*. at 670 (footnotes omitted) (emphasis in original) (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413, 416 (1922)).

> property — however minor — it must provide just compensation. See *Loretto v. Teleprompter Manhattan CATV Corp.*, [458 U.S. 419] (1982) (state law requiring landlords to permit cable companies to install cable facilities in apartment buildings effected a taking). A second categorical rule applies to regulations that completely deprive an owner of "*all* economically beneficial us[e]" of her property. [*Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992) (emphasis in original).] . . .
>
> Outside these two relatively narrow categories (and the special context of land-use exactions . . .), regulatory takings challenges are governed by the standards set forth in *Penn Central Transp. Co. v. New York City*, [438 U.S. 104] (1978). The Court in *Penn Central* acknowledged that it had hitherto been "unable to develop any 'set formula'" for evaluating regulatory takings claims, but identified "several factors that have particular significance." [*Id*., at 124.] Primary among those factors are "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations." *Ibid*. In addition, the "character of the governmental action" — for instance whether it amounts to a physical invasion or instead merely affects property interests through "some public program adjusting the benefits and burdens of economic life to promote the common good" — may be relevant in discerning whether a taking has occurred. *Ibid*. The *Penn Central* factors — though each has given rise to vexing subsidiary questions — have served as the principal guidelines for resolving regulatory takings claims that do not fall within the physical takings or Lucas rules.
>
> Although our regulatory takings jurisprudence cannot be characterized as unified, these three inquiries (reflected in *Loretto*, *Lucas*, and *Penn Central*) share a common touchstone. Each aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain. Accordingly, each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights.[145]

We followed this analytical structure in *Sheffield*, adding that all of the surrounding circumstances must be considered in applying "a fact-sensitive test of reasonableness",[146] but in the end, "whether

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[145] 544 U.S. 528, 538-539 (2005) (citations omitted).

[146] *Sheffield*, 140 S.W.3d at 672 (quoting *City of Coll. Station v. Turtle Rock Corp.*, 680 S.W.2d 802, 804 (Tex.1984) (internal quotation marks omitted).

the facts are sufficient to constitute a taking is a question of law."[147]

The first category — involving a physical invasion of property — does not apply to the present case. It is an interesting question, and one we need not decide here, whether regulations depriving a landowner of all access to groundwater — confiscating it, in effect — would fall into the category. The EAAA does not restrict landowners' access to as much as 25,000 gallons of groundwater a day for domestic and livestock use.[148] Also, we have held that Day is entitled to a permit for fourteen acre-feet of water per year for irrigation.

With respect to the second category — for a deprivation of all economically beneficial use of property — and the first of the three *Penn Central* factors for the third category — the economic impact on the claimant — the summary judgment record before us is inconclusive. Day's permit will not allow him to irrigate as much as his predecessors, who used well water flowing into the lake. By making it much more expensive, if not impossible, to raise crops and graze cattle, the denial of Day's application certainly appears to have had a significant, negative economic impact on him, though it may be doubted whether it has denied him *all* economically beneficial use of his property.

The second *Penn Central* factor — the interference with investment-backed expectations — is somewhat difficult to apply to groundwater regulation under the EAAA. Presumably, Day knew before he bought the property that the Act had passed the year before and could have determined from the same investigation he made later that he could not prove much historical use of

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[147] *Id.* at 673 (quoting *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 933 (Tex.1998)).

[148] EAAA §§ 1.15(b), 1.16(c), 1.33.

groundwater to obtain a permit. Had all this information demonstrated that his investment in the property was not justified, one could argue that he had no reasonable expectation with which the EAAA could interfere. But the government cannot immunize itself from its constitutional duty to provide adequate compensation for property taken through a regulatory scheme merely by discouraging investment. While Day should certainly have understood that the Edwards Aquifer could not supply landowners' unlimited demands for water, we cannot say that he should necessarily have expected that his access to groundwater would be severely restricted. We underscore "necessarily" because there is little in the record to illuminate what his expectations were or reasonably should have been. In any event, no single *Penn Central* factor is determinative; all three must be evaluated together, as well as any other relevant considerations.

The third *Penn Central* factor focuses on the nature of the regulation and is not as factually dependent as the other two. Unquestionably, the State is empowered to regulate groundwater production. In *East*, we concluded that there were no correlative rights in groundwater "[i]n the absence of . . . legislation",[149] suggesting that legislation would be permitted. A few years later, the Conservation Amendment made groundwater regulation "the responsibility . . . of the Legislature."[150] Groundwater provides 60% of the 16.1 million acre-feet of water used in Texas each year.[151] In many areas of the state, and certainly in the Edwards Aquifer, demand exceeds supply. Regulation is essential to its conservation and use.

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[149] *Hous.& T.C. Ry. v. East*, 81 S.W. 279, 280 (Tex. 1904).

[150] *Sipriano v. Great Spring Waters of Am., Inc.*, 1 S.W.3d 75, 77 (Tex. 1999).

[151] *See* TEX. WATER DEV. BD., 2012 STATE WATER PLAN 163.

As with oil and gas, one purpose of groundwater regulation is to afford each owner of water in a common, subsurface reservoir a fair share.[152] Because a reservoir's supply of oil or gas cannot generally be replenished, and because oil and gas production is most commonly used solely as a commodity for sale, land surface area is an important metric in determining an owner's fair share. Reasonable regulation aims at allowing an owner to withdraw the volume beneath his property and sell it. Groundwater is different. Aquifers are often recharged by rainfall, drainage, or other surface water. The amount of groundwater beneath the surface may increase as well as decrease; any volume associated with the surface is constantly changing. Groundwater's many beneficial uses — for drinking, agriculture, industry, and recreation — often do not involve a sale of water. It value is realized not only in personal consumption but through crops, products, and diversion. Groundwater may be used entirely on the land from which it is pumped, or it may be transported for use or sale elsewhere. Consequently, regulation that affords an owner a fair share of subsurface water must take into account factors other than surface area.

As explained above, chapter 36 gives groundwater conservation districts the discretion in regulating production to "preserve historic or existing use".[153] In *Guitar Holding*, district rules required that a groundwater permit amount be based on the applicant's use of water for irrigation during a specified historical period. Guitar Holding, one of the largest landowners in the county,

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[152] *See Elliff v. Texon Drilling Co.* 210 S.W.2d 558, 562 (Tex. 1948) ("[O]ur courts, in decisions involving well-spacing regulations of our Railroad Commission, have frequently announced the sound view that each landowner should be afforded the opportunity to produce his fair share of the recoverable oil and gas beneath his land . . . .").

[153] TEXAS WATER CODE § 36.116(b).

had irrigated only a small part of its land during the period.[154] When the district's rules took effect, the permits Guitar Holding received were limited in amount. Others who had irrigated more obtained permits for greater amounts. Meanwhile, a market for transporting water for consumption outside the district had developed, and landowners were turning from irrigation to selling water in the new market. Guitar Holding complained that the rules preserved only historic *amounts*, not historic *use*, and gave those who had used water for irrigation a perpetual franchise to transport it for sale. We agreed that "use" under the statute included purpose as well as amount.[155]

As we have seen, chapter 36 requires groundwater districts to consider several factors in permitting groundwater production, among them the proposed use of water, the effect on the supply and other permittees, a district's approved management plan.[156] By contrast, the EAAA requires that permit amounts be determined based solely on the amount of beneficial use during the historical period and the available water supply. Under the EAAA, a landowner may be deprived of all use of groundwater other than a small amount for domestic or livestock use,[157] merely because he did not use water during the historical period. The Authority argues that basing permits on historical use is sound policy because it recognizes the investment landowners have made in developing groundwater resources. But had the permit limitation been anticipated before the EAAA was passed, landowners would have been perversely incentivized to pump as much water as possible,

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[154] *Guitar Holding Co. v. Hudspeth Cnty. Underground Water Conservation Dist.*, 263 S.W.3d 910, 914-915 (Tex. 2008).

[155] *Id.* at 916.

[156] TEX. WATER CODE § 36.113(d)(2)-(4).

[157] EAAA §§ 1.15(b), 1.16(c), and 1.33.

even if not put to best use, to preserve the right to do so going forward. Preserving groundwater for future use has been an important strategy for groundwater rights owners. For example, amicus curiae Canadian River Municipal Water Authority argues that it has acquired groundwater rights to protect supplies for municipal use but has not produced them, waiting instead until they become necessary. The Authority's policy argument is flawed.

The Authority argues that this use-it-or-lose-it limitation is legally justified by *In re Adjudication of the Water Rights of the Upper Guadalupe Segment of the Guadalupe River Basin*.[158] There we held that landowners who had not used water from the Upper Guadalupe River during a five-year historical period could be denied a permit for such water. We had previously upheld the cancellation of permits for use of river water after ten years' non-use.[159] But riparian rights are usufructuary, giving an owner only a right of use,[160] not complete ownership. Furthermore, non-use of groundwater conserves the resource, "whereas[] the non-use of appropriated waters is equivalent to waste."[161] To forfeit a landowner's right to groundwater for non-use would encourage waste.

As already discussed, the Legislature last year amended section 36.002 of the Water Code to "recognize[] that a landowner owns the groundwater below the surface of the landowner's land as real property." Regarding groundwater regulation, section 36.002 continues:

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[158] 642 S.W.2d 438 (Tex. 1982).

[159] *Tex. Water Rights Comm'n v. Wright*, 464 S.W.2d 642 (Tex. 1971).

[160] *Guadalupe*, 642 S.W.2d at 444 ("It is true that riparians, whose land grants were acquired before July 1, 1895, have a vested right in the use of the non-flood waters, but that vested right is to a usufructory use of what the state owns. A usufruct has been defined as the right to use, enjoy and receive the profits of property that belongs to another.").

[161] *Id.* at 445 (quoting *Wright*, 464 S.W.2d at 647).

> (c) Nothing in this code shall be construed as granting the authority to deprive or divest a landowner, including a landowner's lessees, heirs, or assigns, of the groundwater ownership and rights described by this section.
>
> (d) This section does not:
>
> (1) prohibit a district from limiting or prohibiting the drilling of a well by a landowner for failure or inability to comply with minimum well spacing or tract size requirements adopted by the district;
>
> (2) affect the ability of a district to regulate groundwater production as authorized under Section 36.113, 36.116, or 36.122 or otherwise under this chapter or a special law governing a district; or
>
> (3) require that a rule adopted by a district allocate to each landowner a proportionate share of available groundwater for production from the aquifer based on the number of acres owned by the landowner.
>
> (e) This section does not affect the ability to regulate groundwater in any manner authorized [for the Edwards Aquifer Authority, the Harris-Galveston Subsidence District, and the Fort Bend Subsidence District].

Subsections (c) and (e) appear to be in some tension. Under the EAAA, a landowner can be prohibited from producing groundwater except for domestic and livestock use. This regulation, according to subsection (e), is unaffected by the Legislature's recognition of groundwater ownership in subsection (a). But subsection (c) abjures all "authority to deprive or divest a landowner . . . of . . . groundwater ownership and rights". If prohibiting all groundwater use except for domestic and livestock purposes does not divest a landowner of groundwater ownership, then either the groundwater rights recognized by section 36.002 are extremely limited, or else by "deprive" and "divest" subsection (c) does not include a taking of property rights for which adequate compensation is constitutionally guaranteed. We think the latter is true. The EAAA itself states: "The legislature intends that just compensation be paid if implementation of this article causes a taking of private

property or the impairment of a contract in contravention of the Texas or federal constitution."[162] The requirement of compensation may make the regulatory scheme more expensive, but it does not affect the regulations themselves or their goals for groundwater production.

The Legislature has declared that "rules developed, adopted, and promulgated by a district in accordance with the provisions of [chapter 36]" comprise "the state's preferred method of groundwater management".[163] Chapter 36 allows districts to consider historical use in permitting groundwater production, but it does not limit consideration to such use.[164] Neither the Authority nor the State has suggested a reason why the EAAA must be more restrictive in permitting groundwater use than chapter 36, nor does the Act suggest any justification. But even if there were one, a landowner cannot be deprived of all beneficial use of the groundwater below his property merely because he did not use it during an historical period and supply is limited.

In sum, the three *Penn Central* factors do not support summary judgment for the Authority and the State. A full development of the record may demonstrate that EAAA regulation is too restrictive of Day's groundwater rights and without justification in the overall regulatory scheme. We therefore agree with the court of appeals that summary judgment against Day's takings claim must be reversed.

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[162] EAAA § 1.07.

[163] TEX. WATER CODE § 36.0015.

[164] *See generally id.* § 36.116.

D

The Authority warns that if its groundwater regulation can result in a compensable taking, the consequences will be nothing short of disastrous. A great majority of landowners in its area, it contends, cannot show the historical use necessary for a permit, and therefore the potential number of takings claims is enormous. The Authority worries that the financial burden of such claims could make regulation impossible, or at least call into question the validity of existing permits. Regulatory takings litigation is especially burdensome, the Authority notes, because of the uncertainties in applying the law that increase the expense and risk of liability. And the uncertainties are worse with groundwater regulation, the Authority contends, because there is no sure basis for determining permit amounts other than historical use. Moreover, the Authority is concerned that takings litigation will disrupt the robust market that has developed in its permits and that buyers will be wary of paying for permits that may later be reduced.

It must be pointed out that the Authority has identified only three takings claims that have been filed in the more than fifteen years that it has been in operation. While the expense of such litigation cannot be denied, groundwater regulation need not result in takings liability. The Legislature's general approach to such regulation has been to require that all relevant factors be taken into account. The Legislature can discharge its responsibility under the Conservation Amendment without triggering the Takings Clause. But the Takings Clause ensures that the problems of a limited public resource — the water supply — are shared by the public, not foisted onto a few. We cannot know, of course, the extent to which the Authority's fears will yet materialize, but the burden of the Takings Clause on government is no reason to excuse its

applicability.

V

We turn briefly to Day's other constitutional claims.

Day contends that he was denied procedural due process in the administrative proceedings before the State Office of Administrative Hearings ("SOAH"). First, he complains that he was not allowed to challenge the constitutionality of the EAAA. But as a rule, an agency lacks authority to decide such an issue,[165] and Day points to no exception for this case. Second, Day complains that his case should have been heard by the Authority's full board of directors rather than an administrative law judge. But the Legislature created SOAH "to serve as an independent forum for the conduct of adjudicative hearings" and "to separate the adjudicative function from the investigative, prosecutorial, and policymaking functions in the executive branch".[166] SOAH was authorized to hear Day's case,[167] and Day does not explain how a hearing in an independent forum violated his constitutional rights. Third, Day complains that an administrative law judge's statutory authority to "communicate ex parte with an agency employee who has not participated in a hearing in the case for the purpose of using the special skills or knowledge of the agency and its staff in evaluating the evidence"[168] violates constitutional guarantees of due process and open courts. The

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[165] *Cent. Power & Light Co. v. Sharp*, 960 S.W.2d 617, 618 (Tex. 1997) (per curiam) ("Where, as here, the final agency order is challenged in the trial court on the ground that the underlying statute is unconstitutional, the agency lacks the authority to decide that issue.").

[166] TEX. GOV'T CODE § 2003.021(a).

[167] *Id.* § 2003.021(b)(4) ("[SOAH] may conduct . . . administrative hearings . . . in matters voluntarily referred to the office by a governmental entity.").

[168] *Id.* § 2001.061(c).

authority quoted is an exception to the general statutory rule prohibiting ex parte contacts.[169] We need not address Day's argument because he points to no ex parte contacts in this case.

Day argues that the substantial evidence rule deprives him of due process by restricting the evidence he can present on judicial review of the administrative decision. Day does not identify evidence he was prevented from presenting in the administrative proceeding that would have affected the Authority's decision. The substantial evidence rule does not operate to restrict Day's evidence on his takings claim.[170]

Day complains that the Authority acted arbitrarily by indicating its preliminary approval of a 600 acre-feet permit, granting his application for a replacement well, which he drilled at a cost of $95,000, then limiting his permit to 14 acre feet. But the Authority clearly communicated to Day that neither decision suggested what its final decision would be.

Finally, Day complains that section 36.066(g) of the Water Code,[171] which authorizes an award of attorney fees and expenses to a groundwater conservation district that prevails in a suit like this but not to an opposing party, violates equal protection. Day does not argue that the statute "'jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect

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[169] *Id.* § 2001.061(a) ("Unless required for the disposition of an ex parte matter authorized by law, a member or employee of a state agency assigned to render a decision or to make findings of fact and conclusions of law in a contested case may not directly or indirectly communicate in connection with an issue of fact or law with a state agency, person, party, or a representative of those entities, except on notice and opportunity for each party to participate.").

[170] *See City of Dall. v. Stewart*, ___ S.W.3d ___, ___ (Tex. 2012).

[171] TEX. WATER CODE § 36.066(g) ("If the district prevails in any suit other than a suit in which it voluntarily intervenes, the district may seek and the court shall grant, in the same action, recovery for attorney's fees, costs for expert witnesses, and other costs incurred by the district before the court. The amount of the attorney's fees shall be fixed by the court.").

characteristic,'"[172] and thus "the law will be upheld as long as it is rationally related to a legitimate state interest."[173] We agree with the court of appeals that the State has a legitimate interest in "discourag[ing] suits against groundwater districts to protect them from costs and burdens associated with such suits", and a cost-shifting statute is rationally related to advancing that interest.[174]

Accordingly, we conclude that Day's various constitutional claims, other than his takings claim, are without merit.

* * *

For these reasons, the judgment of the court of appeals is

Affirmed.

Nathan L. Hecht
Justice

Opinion delivered: February 24, 2012

[172] *First Am. Title Ins. Co. v. Combs*, 258 S.W.3d 627, 639 (Tex. 2008) (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992)).

[173] *Id.* at 639.

[174] *Edwards Aquifer Auth. v. Day*, 274 S.W.3d 755 (Tex. App.–San Antonio 2008).

IN THE SUPREME COURT OF TEXAS

NO. 09-0079

VENKATESWARLU THOTA, M.D. AND NORTH TEXAS CARDIOLOGY CENTER, PETITIONERS,

v.

MARGARET YOUNG, INDIVIDUALLY, AND AS REPRESENTATIVE OF THE ESTATE OF WILLIAM R. YOUNG, RESPONDENT

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

Argued November 10, 2011

JUSTICE GREEN delivered the opinion of the Court.

We have held that reversible error is presumed when a broad-form question submitted to the jury incorporates multiple theories of liability and one or more of those theories is invalid, *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 388 (Tex. 2000), or when the broad-form question commingles damage elements that are unsupported by legally sufficient evidence, *Harris Cnty. v. Smith*, 96 S.W.3d 230, 233–34 (Tex. 2002). We have not, however, addressed whether that presumed harm analysis applies to a broad-form submission in a single-theory-of-liability case when the negligence charge includes both an improper defensive theory of contributory negligence and an improper inferential rebuttal instruction. For the reasons explained below, we hold that it does not,

and that meaningful appellate review is provided through a traditional harm analysis. Inasmuch as the court of appeals ruled otherwise, we reverse its judgment and remand the case to that court for further consideration consistent with this opinion.

I. Background

William R. Young (Ronnie) died of leukemia on March 10, 2005, at the age of fifty-seven. Prior to his death, Ronnie suffered from several physical ailments, including a rare blood disorder called polycythemia vera, coronary artery disease, hypertension, and angina. In late 2001, Ronnie visited Venkateswarlu Thota, M.D., a cardiologist at the North Texas Cardiology Center (NTCC), complaining of chest pains. After medications failed, Dr. Thota recommended that Ronnie undergo a coronary angiography—a test using dye and x-rays to observe how blood flows through the heart—to evaluate Ronnie's heart condition. Dr. Thota performed the cardiac catheterization procedure—insertion and threading of a thin tube into the coronary arteries, through which dye is released into the bloodstream—on the morning of March 4, 2002, at the United Regional Health Care System in Wichita Falls, Texas. Ronnie was released from the hospital at approximately 2:30 p.m. that afternoon and given routine instructions to call if he experienced any problems. Ronnie's wife, Margaret, drove him home after the catheterization procedure.

Later that evening, Ronnie experienced abdominal pain. Ultimately, Ronnie's condition worsened, and he fell from his reclining chair around 11:30 p.m. Margaret called 911, and Ronnie returned by ambulance to the hospital's emergency room at approximately 1:15 a.m. Dr. Thota's partner, Siriam Sudarshan, M.D., saw Ronnie in the emergency room. An abdominal CT scan showed bleeding from the puncture site—where the needle and catheter were inserted during the

catheterization procedure—at Ronnie's right external iliac artery, as well as a large hematoma. Because of those results, Dr. Sudarshan consulted Olyn Walker, M.D., a vascular surgeon in Wichita Falls, concerning Ronnie's condition. Soon thereafter, Dr. Walker performed an emergency surgery to repair a tear in Ronnie's right external iliac artery, allegedly caused by the catheterization procedure. During the emergency surgery, Dr. Walker discovered a large hematoma from severe bleeding in Ronnie's peritoneal cavity. After repairing the tear in the iliac artery and draining the retroperitoneal hematoma, the emergency care providers placed Ronnie on a ventilator.

Ronnie remained on the ventilator for several months and required additional procedures to treat injuries resulting from the severe bleed. Ronnie suffered acute renal failure that required dialysis, had multiple blood transfusions, underwent a splenectomy, and had his gallbladder removed because it had turned gangrenous as a result of ischemia—the lack of blood supply—caused from the bleed. Ronnie ultimately lost his vision in one eye and suffered numerous strokes and blood clots, all allegedly as a result of the catheterization. Later, Ronnie was transferred from the Wichita Falls hospital to Baylor University Medical Center in Dallas to receive treatment for various other ailments. After several months of additional treatment, Ronnie was released from the hospital in August 2002. Nearly three years after the catheterization procedure, Ronnie died of leukemia, which had developed as a complication of his prolonged struggle with polycythemia vera.

A. The Medical-Malpractice Lawsuit

Following Ronnie's death, Margaret brought this suit both individually and on behalf of Ronnie's estate (collectively, Young) against Dr. Thota and NTCC (collectively, Dr. Thota).[1] Young alleged that Dr. Thota was negligent by: (1) failing to obtain Ronnie's complete medical history; (2) failing to heed Ronnie's underlying medical conditions, which may have exacerbated his risk of potential complications; (3) failing to properly locate Ronnie's femoral artery during the catheterization procedure and lacerating his right iliac artery instead; (4) failing to discover the iliac artery tear before discharging Ronnie from the hospital; and (5) failing to diagnose and treat the artery tear. Young sought damages for Ronnie's pain and suffering and mental anguish, medical expenses, physical disfigurement, and lost earnings. Additionally, Young sought damages for Margaret's loss of consortium and loss of household services.

In his answer, Dr. Thota generally denied all of Young's claims and, alternatively, claimed that Ronnie's injuries were the result of an unavoidable accident, a new and independent cause, or pre-existing or subsequent medical conditions. Dr. Thota's answer also contended that Ronnie's injuries were partially the result of Ronnie's own negligence and included a counterclaim against Young for contribution due to Young's alleged failure to mitigate his damages.

The case proceeded to a week-long jury trial. At the charge conference, both parties raised several objections and argued over the proper questions and instructions that the trial court should submit to the jury. Young's theory of liability rested on the claim that Dr. Thota breached the

[1] Young alleged that NTCC was liable for Ronnie's injuries on the basis of respondeat superior.

standard of care by puncturing Ronnie's iliac artery instead of the femoral artery, resulting in the extensive bleeding and concomitant injuries that Ronnie suffered. In contrast, Dr. Thota's theory of the case considered Ronnie's injury to be the extensive bleed. Accordingly, Dr. Thota alleged that Ronnie was negligent in failing to return to the hospital at the first sign of pain, which would have substantially alleviated Ronnie's resulting health problems. Dr. Thota averred that the negligence, if any, resulted from the concurrent actions of both parties, which made this a contributory negligence issue rather than a mitigation-of-damages issue.

At the charge conference, Young objected to the inclusion of the definitions of negligence, ordinary care, and proximate cause in reference to Ronnie, arguing that contributory negligence was not supported by the evidence and that any delay on Ronnie's part in seeking medical treatment was a mitigation-of-damages issue. The trial court overruled Young's objection and included a question on Ronnie's contributory negligence in the charge. Additionally, the trial court overruled Young's objections to the inclusion of instructions on new and independent cause and unavoidable accident. Neither party advised the trial court that the charge might contain a *Casteel* problem, which arises when a broad-form charge mixes valid and invalid theories of liability, making it impossible for the appellate courts to determine if the jury answered the liability question based on an invalid theory, nor did either party request separate submissions for the negligence of Dr. Thota and Young. *See Casteel*, 22 S.W.3d at 388–89. Instead, Young's objections rested on the argument that there was no evidence to support the inclusion of the disputed jury charge items in the broad-form question.

The charge included one broad-form submission as to the single theory of liability—negligence—and additional questions regarding apportionment and calculation of damages. Question 1 addressed both parties' liability and stated:

> Did the negligence, if any, of those named below, proximately cause the injury in question, if any?
>
> "Negligence," when used with respect to the conduct of Venkat Thota, M.D., means failure to use ordinary care, that is, failing to do that which a cardiologist of ordinary prudence would have done under the same or similar circumstances or doing that which a cardiologist of ordinary prudence would not have done under the same or similar circumstances.
>
> "Ordinary care," when used with respect to the conduct of Venkat Thota, M.D., means that degree of care that a cardiologist of ordinary prudence would use under the same or similar circumstances.
>
> "Proximate Cause," when used with respect to the conduct of Venkat Thota, M.D., means that cause which, in a natural and continuous sequence unbroken by any new and independent cause, produces an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a cardiologist using ordinary care would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event.
>
> "New and independent cause," when used with respect to the conduct of Venkat Thota, M.D., means the act or omission of a separate and independent agency, not reasonably foreseeable by a cardiologist exercising ordinary care, that destroys the causal connection, if any, between the act or omission inquired about and the injury in question and thereby becomes the immediate cause of such injury.
>
> "Negligence," when used with respect to the conduct of [Ronnie] Young means failure to use ordinary care, that is, failing to do that which a person of ordinary prudence would have done under the same or similar circumstances or doing that which a person of ordinary prudence would not have done under the same or similar circumstances.

> "Ordinary care," when used with respect to the conduct of [Ronnie] Young means that degree of care that a person of ordinary prudence would use under the same or similar circumstances.
>
> "Proximate cause," when used with respect to the conduct of [Ronnie] Young means that cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a person using ordinary care would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event.
>
> An injury may be an "unavoidable accident," that is, an event not proximately caused by the negligence of any party to it.
>
> Answer "Yes" or "No".
>
> Venkat Thota, M.D.: _____
>
> [Ronnie] Young: _____
>
> If you have answered "Yes" to Question 1 for both of those named in Question 1, then answer Question 2. Otherwise do not answer Question 2.
>
> If you have answered "Yes" to Question 1 only as to Mr. Young, then do not answer Questions 2, 3, or 4.
>
> If you have answered "Yes" to Question 1 only as to Dr. Thota, then answer Questions 3 and 4.

Question 2 conditionally asked about Dr. Thota's and Ronnie's comparative negligence, and Questions 3 and 4 concerned the amount of damages owed for Ronnie's and Margaret's injuries.

The jury answered Question 1 with a "No" as to Dr. Thota's negligence and a "Yes" as to Ronnie's negligence. On July 18, 2005, the trial court entered final judgment that Young take nothing. Young filed a motion for new trial, arguing that the trial court had erred in overruling Young's objections to the jury charge and that the jury's findings were against the great weight and

preponderance of the evidence or based on insufficient evidence. The trial court denied Young's motion for new trial, and Young timely appealed.

B. Appellate Court Proceedings

On appeal, Young raised the same issues presented in the motion for new trial. Specifically, Young challenged the trial court's judgment for the following reasons: (1) the jury's finding of no negligence as to Dr. Thota was against the great weight and preponderance of the evidence and was manifestly unjust and/or the opposite answer was conclusively proven as a matter of law; (2) the evidence was insufficient to support the jury's findings as to Ronnie's contributory negligence, and the trial court erred by overruling Young's objection to the inclusion of contributory negligence in the jury charge; and (3) the trial court erred in overruling Young's objections and submitting jury instructions on unavoidable accident and new and independent cause.

The court of appeals held that the trial court's inclusion of the question on Ronnie's contributory negligence and the new and independent cause instruction in the jury charge was an abuse of discretion and constituted harmful error; accordingly, it reversed the trial court's judgment and remanded the case for a new trial. 271 S.W.3d 822, 841 (Tex. App.—Fort Worth 2008, pet. granted). The appellate court found that the "injury in question" was the tear in Ronnie's iliac artery and, contrary to Dr. Thota's arguments, not the extensive bleed. *Id.* at 834–35. The court of appeals compared the parties' theories of liability and concluded that Dr. Thota's premise for Ronnie's contributory negligence was "based upon Ronnie's alleged negligence occurring *after* the tear, not Ronnie's negligence in *causing* the tear." *Id.* at 833. The court recognized that contributory negligence must have a causal connection with the original accident, while a failure to mitigate

damages "arises from an injured party's duty to act reasonably in reducing his damages." *Id.* (citing *Hygeia Dairy Co. v. Gonzalez*, 994 S.W.2d 220, 226 (Tex. App.—San Antonio 1999, no pet.)). Because it found that Dr. Thota's theory pointed only to Young's "*subsequent* negligence that might have increased his damages as opposed to Dr. Thota's original negligence," the court concluded "that Ronnie's negligence, if any, only increased the damages he suffered after the catheterization or tear, as opposed to causing the 'injury,' 'accident,' or 'occurrence' itself." *Id.*

The appellate court then considered whether the disputed inferential rebuttal instructions on new and independent cause and unavoidable accident were proper. *Id.* at 836–39. Finding that Dr. Thota presented some evidence that the tear in Ronnie's artery could have been a natural result of Ronnie's then-existing illnesses or an unexpected catastrophe, the court of appeals held that the trial court did not abuse its discretion in submitting the unavoidable accident instruction.[2] *Id.* at 837. The court concluded that Ronnie's massive bleed and resulting injuries were foreseeable risks in the catheterization procedure and held that the trial court abused its discretion by submitting the new and independent cause instruction in connection with Dr. Thota's negligence. *Id.* at 838.

After holding that the trial court erred in submitting the question of Ronnie's contributory negligence and the new and independent cause instruction as to Dr. Thota, the court of appeals considered which level of harm analysis applied. *Id.* at 839. The court, sua sponte, held that Young's objections to these specific aspects of the charge invoked *Casteel*'s presumed harm analysis because the improperly submitted broad-form question commingled valid and invalid theories of

[2] In this Court, the parties do not contest the court of appeals' holding as to the unavoidable accident instruction. Therefore, our opinion focuses solely on the disputed charge issues concerning the inclusion of Ronnie's contributory negligence and the instruction on new and independent cause.

liability. *Id.* at 836 (citing *Casteel*, 22 S.W.3d at 388–89).[3] The court acknowledged our opinion in *Bed, Bath & Beyond, Inc. v. Urista*, 211 S.W.3d 753 (2006), which held that *Casteel*'s presumed harm analysis does not apply to broad-form questions based on a single theory of liability that are submitted with improper inferential rebuttal instructions, *id.* at 757, but distinguished Young's situation because "the jury was not only given an erroneous defensive instruction on new and independent cause that benefitted only Dr. Thota but also an erroneous jury question on liability—Ronnie's contributory negligence—a theory not supported by the evidence." 271 S.W.3d at 839. Concluding that *Casteel*'s presumed harm analysis applied, the court of appeals reasoned:

> We simply cannot determine, on this evidence, whether the jury properly found Dr. Thota not negligent, properly found that his negligence was excused based upon the unavoidable accident instruction, or improperly found that his negligence was excused based upon the new and independent cause instruction alone or combined with its improper finding of Ronnie's negligence.

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[3] As mentioned by Young's counsel at oral argument, at least one other appellate court has followed this approach and held that a broad-form charge that includes separate blanks for multiple parties' fault, under a single theory of liability, presents a *Casteel* issue. *See Block v. Mora*, 314 S.W.3d 440, 450 (Tex. App.—Amarillo 2009, pet. dism'd by agr.). In *Block*, Question 1 of the jury charge asked: "Did the negligence, if any, of those named below proximately cause the injuries, if any, to [the plaintiff]?" *Id.* at 444. Question 1 included two separate answer blanks next to the names of the plaintiff and the defendant. *Id.* The jury answered "Yes" to the plaintiff's negligence and "No" to the defendant's negligence. *Id.* On appeal, the plaintiff complained that the evidence supported judgment in his favor because the defendant's negligence was established as a matter of law. *Id.* The plaintiff also alleged that there was no evidence of his contributory negligence nor any evidence that he had proximately caused the accident or his injuries, and he claimed that the trial court erred in submitting his negligence to the jury. *Id.* On appeal, the court of appeals held that it was error to submit the invalid theory of the plaintiff's contributory negligence to the jury. *Id.* at 450. Like the court of appeals in *Thota*, the *Block* court held that because "the trial court submitted two competing theories of liability within one broad-form liability question that asked whether the negligence of the two parties involved in the accident caused the plaintiff's injuries," it could not "determine whether the jury truly found that [the defendant] was not negligent in causing the accident or [that the plaintiff] was solely negligent in causing his injuries (both of which findings would be against the great weight and preponderance of the evidence)." *Id.* The court cited to *Casteel*'s presumed harm analysis, but held, under the traditional harmless error analysis that the charge error "likely caused the rendition of an improper judgment." *Id.*; *see* TEX. R. APP. P. 44.1.

Id. Specifically, the court held that the charge commingled Dr. Thota's improper theory of liability (the extensive bleeding) with Young's proper theory of liability (the torn artery) and, consequently, prevented the appellate court "from being able to determine whether the jury's finding of no liability as to Dr. Thota was a finding of no negligence on his part, an erroneous finding of contributory negligence on Ronnie's part, or an erroneous finding of new and independent cause." *Id.* at 841. The court concluded: "Because these instructions likely caused rendition of an improper judgment or, at least, prevented [Young] from properly presenting her case on appeal, we conclude that such error was harmful." *Id.*

C. Dr. Thota's Petition for Review

Dr. Thota petitioned our Court for review, and we granted his petition on rehearing. 54 Tex. Sup. Ct. J. 682 (Mar. 18, 2011). Dr. Thota argues that the court of appeals erred in holding that the trial court's inclusion of Ronnie's contributory negligence and the inferential rebuttal instruction constituted an abuse of discretion. Dr. Thota claims that even if there were error in the jury charge, it was harmless, and *Casteel*'s presumed harm analysis does not apply. Furthermore, Dr. Thota claims that the court of appeals improperly reversed the trial court's judgment based on unassigned error because Young neither raised a *Casteel* issue before the court of appeals nor made a timely or specific objection before the trial court to assert that the submission of Young's contributory negligence or the inferential rebuttal instruction would improperly commingle valid and invalid theories of liability and, therefore, prevent the appellate court from conducting a meaningful appellate review. Finally, Dr. Thota claims that the appellate court misapplied our holding in *Elbaor v. Smith*, 845 S.W.2d 240 (Tex. 1992), by holding that the trial court abused its discretion by

submitting a question on Ronnie's contributory negligence instead of an instruction on Ronnie's duty to mitigate his damages.

Young counters that the trial court's submission of Ronnie's contributory negligence and the inferential rebuttal instruction on new and independent cause was an abuse of discretion. According to Young, the court of appeals correctly interpreted *Elbaor* because Ronnie could not have been negligent in causing the tear to his iliac artery and any fault on Ronnie's part should have been submitted only through an instruction on Ronnie's failure to mitigate his damages. *See Elbaor*, 845 S.W.2d at 244–45. Young asserts that *Casteel*'s presumed harm analysis applies because the submitted jury charge was based on one valid and one invalid theory of liability, which obviously confused the jury to such a degree that an appellate court cannot determine whether the jury based its decision on the valid or invalid theory. Young claims that direct mention of *Casteel* to the trial court was not required to preserve the *Casteel* error, and Young's timely and specific no-evidence objections to the charge errors were sufficient to inform the trial court of the *Casteel* problem. Alternatively, Young claims that the trial court's judgment must be reversed even under the traditional harmless error analysis.

II. Harm Analysis

Assuming, but not deciding, that it was error for the trial court to submit the question on Ronnie's contributory negligence and the instruction on new and independent cause, we consider whether these charge issues constituted harmful error. *See, e.g.*, TEX. R. APP. P. 61.1; *Urista*, 211 S.W.3d at 756. We first address whether the court of appeals correctly applied *Casteel*'s presumed harm analysis to the contested jury charge. We hold that it did not. For reasons stated below, we

further hold that even if the submission of the contested charge issues were an abuse of discretion, a review of the entire record provides no clear indication that the contested charge issues probably caused the rendition of an improper judgment and, therefore, we must conclude that the trial court's submission was harmless. *See* TEX. R. APP. P. 44.1(a), 61.1(a).

A. General Law

"We review a trial court's decision to submit or refuse a particular instruction under an abuse of discretion standard of review." *In re V.L.K.*, 24 S.W.3d 338, 341 (Tex. 2000). The trial court has considerable discretion to determine proper jury instructions, and "[i]f an instruction might aid the jury in answering the issues presented to them, or if there is any support in the evidence for an instruction, the instruction is proper." *La.-Pac. Corp. v. Knighten*, 976 S.W.2d 674, 676 (Tex. 1998). "An instruction is proper if it (1) assists the jury, (2) accurately states the law, and (3) finds support in the pleadings and evidence." *Columbia Rio Grande Healthcare, L.P. v. Hawley*, 284 S.W.3d 851, 855–56 (Tex. 2009). An appellate court will not reverse a judgment for a charge error unless that error was harmful because it "probably caused the rendition of an improper judgment" or "probably prevented the petitioner from properly presenting the case to the appellate courts." TEX. R. APP. P. 61.1; *see* TEX. R. APP. P. 44.1(a).[4] "Charge error is generally considered harmful if it relates to a contested, critical issue." *Hawley*, 284 S.W.3d at 856; *see also Quantum*

[4] Rule 61.1 is the Supreme Court version of the harmful error rule. *See* TEX. R. APP. P. 61.1. Similarly, the appellate court provision, Rule 44.1(a), states:

> No judgment may be reversed on appeal on the ground that the trial court made an error of law unless the court of appeals concludes that the error complained of: (1) probably caused the rendition of an improper judgment; or (2) probably prevented the appellant from properly presenting the case to the court of appeals.

TEX. R. APP. P. 44.1(a).

Chem. Corp. v. Toennies, 47 S.W.3d 473, 480 (Tex. 2001) ("An improper instruction is especially likely to cause an unfair trial when the trial is contested and the evidence sharply conflicting . . . .")

B. *Casteel* and Its Progeny

Casteel involved a dispute between an insurance agent and the insurer. 22 S.W.3d at 381. In *Casteel*, the trial court submitted a single broad-form question on the issue of the insurer's liability to the agent, which included thirteen independent grounds for liability. *Id.* at 387. We determined that five of the thirteen independent grounds for liability did not apply and held that the trial court erred by submitting the invalid grounds for liability in the charge. *Id.* We then considered whether the charge error was harmful. *Id.* Because the single broad-form charge mixed valid and invalid theories of liability, we held that the charge error constituted harmful error, explaining:

> It is fundamental to our system of justice that parties have the right to be judged by a jury properly instructed in the law. Yet, when a jury bases a finding of liability on a single broad-form question that commingles invalid theories of liability with valid theories, the appellate court is often unable to determine the effect of this error. The best the court can do is determine that some evidence *could* have supported the jury's conclusion on a legally valid theory. To hold this error harmless would allow a defendant to be held liable without a judicial determination that a factfinder actually found that the defendant *should* be held liable on proper, legal grounds.

Id. at 388. Therefore, we held: "When a single broad-form liability question erroneously commingles valid and invalid liability theories and the appellant's objection is timely and specific, the error is harmful when it cannot be determined whether the improperly submitted theories formed the sole basis for the jury's finding." *Id.* at 389.

Following *Casteel*, we have clarified the extent of its presumed harm analysis on several occasions. *See Urista*, 211 S.W.3d 753; *Romero v. KPH Consolidated, Inc.*, 166 S.W.3d 212 (Tex.

2006); *Harris Cnty.*, 96 S.W.3d 230. In *Harris County*, we extended *Casteel*'s presumed harm analysis to a broad-form question that commingled valid and invalid elements of damages for which there was no evidence. 96 S.W.3d at 233–34. In *Romero*, we applied *Casteel*'s presumed harm analysis to a single broad-form proportionate responsibility question that included a factually-unsupported malicious credentialing claim. 166 S.W.3d at 227–28 (noting that "unless the appellate court is 'reasonably certain that the jury was not significantly influenced by issues erroneously submitted to it,' the error is reversible" (citations omitted)). Later, in *Urista*, we declined to extend *Casteel*'s presumed harm analysis to the trial court's submission of an erroneous inferential rebuttal instruction. 211 S.W.3d at 756–57. In *Urista*, we explained:

> We specifically limited our holdings in *Casteel* and *Harris County* to submission of a broad-form question incorporating multiple theories of liability or multiple damage elements. We have never extended a presumed harm rule to instructions on defensive theories such as unavoidable accident, and we decline to do so now. . . . When, as here, the broad-form questions submitted a single liability theory (negligence) to the jury, *Casteel*'s multiple-liability-theory analysis does not apply. Moreover, when a defensive theory is submitted through an inferential rebuttal instruction, *Casteel*'s solution of departing from broad-form submission and instead employing granulated submission cannot apply. Unlike alternate theories of liability and damage elements, inferential rebuttal issues cannot be submitted in the jury charge as separate questions and instead must be presented through jury instructions. Therefore, although harm can be presumed when meaningful appellate review is precluded because valid and invalid liability theories or damage elements are commingled, we are not persuaded that harm must likewise be presumed when proper jury questions are submitted along with improper inferential rebuttal instructions.

Id. (citations omitted). *Cf. Hawley*, 284 S.W.3d at 865 (applying Rule 61.1(b) in a non-*Casteel* context where the trial court omitted the defendant's proposed instruction in a single-theory-of-liability case, thereby allowing the jury to potentially find the defendant liable on an invalid basis).

Because we held that *Casteel*'s presumed harm analysis did not apply to the inferential rebuttal question in *Urista*, we applied the traditional harmless error analysis, which considers whether the instruction "probably caused the rendition of an improper judgment." 211 S.W.3d at 757; *see* TEX. R. APP. P. 61.1(a); *see also Reinhart v. Young*, 906 S.W.2d 471, 473 (Tex. 1995) ("Error in the jury charge is reversible only if, in the light of the entire record, it was reasonably calculated to and probably did cause the rendition of an improper judgment."). After reviewing the entire record, we concluded in *Urista* that there was some evidence the plaintiff failed to meet his burden of proof and therefore held that the unavoidable accident instruction did not probably cause the jury to render an improper verdict. 211 S.W.3d at 758–59.

Notwithstanding *Casteel*'s presumed harm analysis in situations that erroneously commingle valid and invalid theories of liability, we have repeatedly reaffirmed our longstanding, fundamental commitment to broad-form submission. *See, e.g.*, *Harris Cnty.*, 96 S.W.3d at 235–36. We first expressed our preference for broad-form practice in 1973 and, after issuing multiple opinions in which we supported broad-form submission, we modified Rule 277 of the Texas Rules of Civil Procedure in 1988 to more expressly mandate the use of broad-form submission. *See id.*; *see also Lemoz v. Montez*, 680 S.W.2d 798, 801 (Tex. 1984) (explaining our progression from separate, granulated charge issues to the broad-form charge). *See generally* William G. "Bud" Arnot, III & David Fowler Johnson, *Current Trends in Texas Charge Practice: Preservation of Error and Broad-Form Use*, 38 ST. MARY'S L.J. 371, 416–40 (2007) (providing a more detailed history of Texas jury charge practice); William L. Davis, *Tools of Submission: The Weakening Broad-Form "Mandate" in Texas and the Roles of Jury and Judge*, 24 REV. LITIG. 57 (2005) (same). Since 1988,

Rule 277 has stated, in pertinent part: "In all jury cases the court shall, whenever feasible, submit the cause upon broad-form questions." TEX. R. CIV. P. 277. *Casteel* and its progeny denote situations where broad-form submission may be unfeasible. *See, e.g.*, *Casteel*, 22 S.W.3d at 389. But "whenever feasible," broad-form submission should be the norm. *See* TEX. R. CIV. P. 277; *Harris Cnty.*, 96 S.W.3d at 235–36; *see also Tex. Dep't of Human Servs. v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) (interpreting "whenever feasible" to mandate broad-form submission "in any or every instance in which it is capable of being accomplished").

C. Preservation of Error

We first address Dr. Thota's argument that the court of appeals improperly reversed the judgment of the trial court based on unassigned and unpreserved error. Our procedural rules govern the preservation requirements for raising a jury charge complaint on appeal and require the complaining party to make an objection before the trial court. TEX. R. CIV. P. 274; TEX. R. APP. P. 33.1. Rule 274 requires that an objecting party "must point out distinctly the objectionable matter and the grounds of the objection," and states that "[a]ny complaint as to a question, definition, or instruction, on account of any defect, omission, or fault in pleading, is waived unless specifically included in the objections." TEX. R. CIV. P. 274. Additionally, to preserve error for appellate review, the rules generally require the complaining party to (1) make a timely objection to the trial court that "state[s] the grounds for the ruling that the complaining party [seeks] from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context," and (2) obtain a ruling. TEX. R. APP. P. 33.1. As we stated twenty years ago, the procedural requirements for determining whether a party has preserved error in the

jury charge are explained by one basic test: "whether the party made the trial court aware of the complaint, timely and plainly, and obtained a ruling." *State Dep't of Highways v. Payne*, 838 S.W.2d 235, 241 (Tex. 1992).

Although Young made a timely and specific objection at the charge conference to the inclusion of the question on Ronnie's contributory negligence and the instruction on new and independent cause, Dr. Thota argues that because Young failed to specifically state that these charge issues raised a *Casteel* problem or notify either the trial or appellate court that the charge would prevent Young from obtaining meaningful appellate review, Young waived the right to invoke *Casteel* and the court of appeals improperly reversed the trial court on unassigned error. In essence, Dr. Thota argues that because Young did not cite *Casteel* or specifically object to the form of the charge question, Young waived any benefit of the presumed harm analysis.

Contrary to Dr. Thota's narrow and technical interpretation of our preservation of error requirements, we have never held that a no-evidence objection in this context is insufficient to preserve a broad-form complaint on appeal. *See, e.g.*, *Romero*, 166 S.W.3d at 229; *Harris Cnty.*, 96 S.W.3d at 236; *Casteel*, 22 S.W.3d at 387, 389. Moreover, we have long favored a common sense application of our procedural rules that serves the purpose of the rules, rather than a technical application that rigidly promotes form over substance. *See Alaniz v. Jones & Neuse, Inc.*, 907 S.W.2d 450, 451–52 (Tex. 1995) (per curiam) (citing *Payne*, 838 S.W.2d at 241) ("While *Payne* does not revise the requirements of the rules of procedure regarding the jury charge, it does mandate that those requirements be applied in a common sense manner to serve the purposes of the rules, rather than in a technical manner which defeats them.").

In addition, Dr. Thota's reliance on our opinions in *In re A.V.*, 113 S.W.3d 355, 362 (Tex. 2003), and *In re B.L.D.*, 113 S.W.3d 340, 349–50 (Tex. 2003), to support his contention that Young failed to preserve any complaint regarding the charge's broad-form submission is misplaced. Although in those cases we did hold that complaints of harmful charge error were not preserved, those cases are distinguishable from this case because in both *A.V.* and *B.L.D.*, the complaining party raised no objections to items included in the broad-form charge. *See A.V.*, 113 S.W.3d at 357; *B.L.D.*, 113 S.W.3d at 349. Moreover, the charge complaint at issue in those parental-rights-termination cases was that separate statutory grounds for terminating the parents' parental rights should not have been submitted within a single broad-form question. *See A.V.*, 113 S.W.3d at 357; *B.L.D.*, 113 S.W.3d at 349. The basis for the parents' complaints was not that the charge should not include the termination grounds at all, but that it was error for the trial court to submit them in a broad-form question. *See A.V.*, 113 S.W.3d at 357; *B.L.D.*, 113 S.W.3d at 349. In those circumstances, it was necessary for the complaining party to make a specific objection to the form of the charge to put the trial court on notice of the alleged error and afford the court an opportunity to correct the error. *See A.V.*, 113 S.W.3d at 363 (holding that the parent failed to preserve the issue for appellate review because he did not make "a specific objection to the charge to put [the] trial court on notice to submit a granulated question to the jury"); *B.L.D.*, 113 S.W.3d at 349; TEX. R. APP. P. 33.1. *Cf. Keetch v. Kroger Co.*, 845 S.W.2d 262, 267 (Tex. 1992) (stating that "[e]rror in the charge must be preserved by distinctly designating the error and the grounds for the objection" and holding that error was not preserved when the complaint of the trial court's failure to submit in broad form was first raised in this Court). In this case, a separate objection to the form of the charge

question was not necessary to inform the trial court of Young's complaint—that the inclusion of Ronnie's contributory negligence and the instruction on new and independent cause should not be submitted to the jury. A granulated submission would have cured the alleged charge defect in *A.V.* and *B.L.D.*, but here, even if the trial court submitted the issue of Ronnie's contributory negligence in a separate question, this would not have cured Young's no-evidence objection.

In every case in which we have considered *Casteel*'s presumed harm analysis, including *Casteel* itself, we have emphasized the need for the complaining party to make a timely and specific objection to preserve complaints of error in broad-form submission. *See, e.g.*, *Casteel*, 22 S.W.3d at 387–89; *Romero*, 166 S.W.3d at 229. As we stated in *Harris County*, under our preservation rules: "A timely objection, plainly informing the court that a specific element . . . should not be included in a broad-form question because there is *no evidence to support its submission*, therefore preserves the error for appellate review." 96 S.W.3d at 236 (emphasis added). Again in *A.V.* and *B.L.D.*, we quoted that statement from *Harris County* and held that without some objection to the charge, claiming the submitted theory had no evidentiary support, or an objection to the form of the charge, any complaint of charge error was not preserved for review by the court of appeals. *See A.V.*, 113 S.W.3d at 362–63; *B.L.D.*, 113 S.W.3d at 349–50. In contrast to *A.V.* and *B.L.D.*, Young made a specific and timely no-evidence objection to the charge question on Ronnie's contributory negligence and also specifically objected to the disputed instruction on new and independent cause. In addition to Young's timely and specific objections at the charge conference, Young submitted a proposed charge to the trial court, which omitted any inclusion of Ronnie's contributory negligence and the new and independent cause instruction and presented the charge according to Young's theory

of the case. This was sufficient to place the trial court on notice that Young believed the evidence did not support an inclusion of Ronnie's contributory negligence or instruction on new and independent cause, and our procedural rules require nothing more.

By making timely and specific objections that there was no evidence to support the disputed items submitted in the broad-form charge and raising these issues for the court of appeals to consider, Young properly preserved these issues for appellate review; Young did not have to cite or reference *Casteel* specifically to preserve the right for the appellate court to apply the presumed harm analysis, if applicable, to the disputed charge issues. *See, e.g.*, *Harris Cnty.*, 96 S.W.3d at 236; *Casteel*, 22 S.W.3d at 387–88, 390. *Cf. Pat Baker Co., Inc. v. Wilson*, 971 S.W.2d 447, 450 (Tex. 1998) (per curiam) ("It is axiomatic that an appellate court cannot reverse a trial court's judgment absent properly assigned error."). With the charge issues properly preserved and contested on appeal, an appellate court reviews the basis of the complaints and reverses only if the alleged charge errors were harmful. TEX. R. APP. P. 44.1(a), 61.1. Because Young properly preserved error as to the disputed charge issues, we must consider whether the appellate court properly applied the correct harm analysis. *See Urista*, 211 S.W.3d at 757.

D. Application of Harm Analysis Law

Young alleges, and the court of appeals agreed, that the trial court erred by submitting a jury question on Dr. Thota's theory of the case—Ronnie's contributory negligence. Even if Young is correct, *Casteel*'s presumed harm analysis does not apply because the separate answer blanks allow us to determine whether the jury found Dr. Thota negligent. Unlike *Casteel*, which involved thirteen independent grounds for liability with one answer blank for the defendant's liability, here, the charge

provided two separate blanks for the jury to answer the single-theory-of-liability question. *See Casteel*, 22 S.W.3d at 387. The charge mirrors the *Texas Pattern Jury Charges*'s longstanding use of separate blanks when multiple parties' negligence are in issue. *See* Comm. On Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges: General Negligence & Intentional Personal Torts* PJC 4.1 (2010). The only theory of liability asserted against Dr. Thota was negligence, and the jury's findings on that theory are clear: Dr. Thota was not negligent. We hold that this charge question simply does not raise a *Casteel* issue, and the court of appeals erred in applying *Casteel*'s presumed harm analysis.

Additionally, we hold that the new and independent cause instruction fails to present a *Casteel* situation. *See Urista*, 211 S.W.3d at 756–57. In concluding that the new and independent cause instruction constituted harmful error, the appellate court reasoned:

> Here, however, the jury was not only given an erroneous defensive instruction on new and independent cause that benefitted only Dr. Thota but also an erroneous jury question on liability—Ronnie's contributory negligence—a theory not supported by the evidence. So, we should not be limited to *Urista*'s traditional harm analysis when trying to determine the impact of the improperly submitted instruction on new and independent cause when combined with the improperly submitted question of Ronnie's contributory negligence. We simply cannot determine, on this evidence, whether the jury properly found Dr. Thota not negligent, properly found that his negligence was excused based upon the unavoidable accident instruction, or improperly found that his negligence was excused based upon the new and independent cause instruction alone or combined with its improper finding of Ronnie's negligence.

271 S.W.3d at 839. And in response to the dissent, the majority added:

> It is the combination of these two incorrect theories that prevents us from being able to determine whether the jury's finding of no liability as to Dr. Thota was a finding of no negligence on his part, an erroneous finding of contributory negligence on Ronnie's part, or an erroneous finding of new and independent cause.

> Importantly, we are not trying to extend *Casteel*'s presumed harm analysis to defensive theories; we are applying it to a single broad-form question that erroneously includes two different theories of liability. This error is only exacerbated by the erroneous defensive instruction of new and independent cause.

Id. at 841.

We disagree with the court of appeals' interpretation of our holding in *Urista* and hold that, even assuming the new and independent cause instruction in this charge constituted error, it does not raise a *Casteel* issue. Like *Urista*, this case involves a single liability theory—negligence—so *Casteel*'s multiple-liability-theory analysis does not apply. *See* 211 S.W.3d at 756–57. Moreover, as we noted in *Urista*, "when a defensive theory is submitted through an inferential rebuttal instruction, *Casteel*'s solution of departing from broad-form submission and instead employing granulated submission cannot apply." *Id.* at 757. Inferential rebuttal issues are distinct from theories of liability and damage elements because they "cannot be submitted in the jury charge as separate questions and instead must be presented through jury instructions." *Id.* Like the inferential rebuttal instruction on unavoidable accident in *Urista*, the new and independent cause instruction "was given in reference to the causation element of the plaintiff's negligence claim." *Id.* at 756–57. While appellate courts may presume harm when meaningful appellate review is precluded because the submitted charge mixes valid and invalid theories of liability or commingles improper damage elements, the courts do not presume harm because of improper inferential rebuttal instructions on defensive theories. *See id.* at 757. Therefore, assuming without deciding that the submission of the new and independent cause instruction was an abuse of discretion, we hold that this charge error does not present a *Casteel* problem.

Even if the inclusion of a jury question regarding a party's contributory negligence and an inferential rebuttal instruction were erroneous in a single-theory-of-liability case, the combination of these errors would not automatically trigger a situation where the appellate court must presume the error was harmful. If presumed harm analysis were required, then our fundamental commitment to submitting broad-form questions, whenever feasible, would routinely be discarded for separate, granulated submissions to the jury. *See* TEX. R. CIV. P. 277; *Harris Cnty.*, 96 S.W.3d at 235–36. Moreover, even in multiple-theory-of-liability cases like *Casteel*, the presumed harm analysis is not automatic. *See Casteel*, 22 S.W.3d at 389–90; *Romero*, 166 S.W.3d at 227–28. As we stated in *Casteel*, "when questions are submitted in a manner that allows the appellate court to determine that the jury's verdict was actually based on a valid liability theory, the error may be harmless." 22 S.W.3d at 389 (citing *City of Brownsville v. Alvarado*, 897 S.W.2d 750, 752 (Tex. 1995)). And regardless of whether "a granulated or broad-form charge is submitted, the trial court's duty is to submit only those questions, instructions, and definitions raised by the pleadings and the evidence." *Harris Cnty.*, 96 S.W.3d at 236; *see* TEX. R. CIV. P. 278; *Elbaor*, 845 S.W.2d at 243.

While *Casteel*'s presumed harm analysis is necessary in instances where the appellate court cannot determine "whether the improperly submitted theories formed the sole basis for the jury's finding" because the broad-form question mixed valid and invalid theories of liability, *Casteel*, 22 S.W.3d at 389, or when the broad-form question commingled damage elements that are unsupported by legally sufficient evidence, *Harris Cnty.*, 96 S.W.3d at 235, an improper inferential rebuttal instruction and improper defensive theory of contributory negligence presented in a broad-form question with separate answer blanks in a single-theory-of-liability case does not prevent the harmed

party from obtaining meaningful appellate review. When a trial court abuses its discretion by including erroneous charge questions or instructions in a single-theory-of-liability case, our traditional harmless error analysis applies and the appellate courts should review the entire record to determine whether the charge errors probably caused the rendition of an improper judgment. *See* TEX. R. APP. P. 44.1, 61.1; *Urista*, 211 S.W.3d at 757.

Because we hold that *Casteel*'s presumed harm analysis does not apply, we next consider whether, applying traditional harmless error analysis, the alleged charge errors constitute reversible error. *See* TEX. R. APP. P. 61.1(a); *Urista*, 211 S.W.3d at 757. We address Young's objections to the inclusion of Ronnie's contributory negligence and the instruction of new and independent cause in turn.

1. Contributory Negligence

When charge questions are submitted in a manner that allows the appellate court to determine whether the verdict was actually based on a valid theory of liability, the error may be harmless. *Casteel*, 22 S.W.3d at 389; *see also Alvarado*, 897 S.W.2d at 752 ("Submission of an improper jury question can be harmless error if the jury's answers to other questions render the improper question immaterial."); *Boatland of Hous., Inc. v. Bailey*, 609 S.W.2d 743, 750 (Tex. 1980) (holding that the potentially erroneous submission of defensive theories was harmless error because the jury found for the defendant on independent grounds and the complaining party failed to show how it probably resulted in an improper verdict). Young's argument that the inclusion of Ronnie's contributory negligence was harmful error fails for several reasons. First, Dr. Thota could only have been negligent in causing the tear in Ronnie's artery, and the jury failed to find that he was. The jury's

finding as to Dr. Thota's non-negligence is entirely separate from its finding as to Ronnie's negligence. Perhaps the jury was confused about whether to find Ronnie negligent and, despite the unavoidable accident instruction, believed that they had to find someone negligent. Either way, any error associated with the inclusion of a jury question regarding Ronnie's negligence was harmless.

Moreover, when determining whether harm occurred, we consider the entire charge. *See, e.g.*, *Tex. Emp'rs Ins. Assoc. v. McKay*, 210 S.W.2d 147, 149 (Tex. 1948). Here, the clarifying instructions at the end of Question 1 made it clear that the jury could answer in any of the following combinations: (1) "Yes" to both Dr. Thota and Ronnie; (2) "No" to both; or (3) "Yes" to one and "No" to the other—the choice the jury ultimately made. The charge's definition of proximate cause also clearly informed the jury that "[t]here may be more than one proximate cause of an event." In light of the entire charge and the separate answer blanks for Dr. Thota and Ronnie, it is evident that the jury was well aware that its findings as to Dr. Thota's and Ronnie's negligence were separate and that there could be more than one proximate cause of an event.

When the answer to a jury question cannot alter the effect of the verdict, the reviewing court considers that question immaterial. *See Alvarado*, 897 S.W.2d at 752. In *Alvarado*, we held that even if it were error for the trial court to submit a question as to the deceased plaintiff's negligence, that question was immaterial because of the jury's finding of "No" as to the defendant's liability for negligence. *Id.* Like *Alvarado*, any error in submitting the question of Ronnie's contributory negligence to the jury was harmless and rendered immaterial in light of the jury's finding of no negligence as to Dr. Thota. Once the jury answered "No" to whether any negligence of Dr. Thota

proximately caused Ronnie's injury, Dr. Thota was exonerated, and neither a "Yes" nor a "No" answer as to Ronnie's contributory negligence could alter the verdict. *See id.*

2. New and Independent Cause

Assuming without deciding that the new and independent cause instruction was improper, a review of the record does not indicate that it probably caused the rendition of an improper judgment. *See* TEX. R. APP. P. 61.1(a); *Urista*, 211 S.W.3d at 757; *Reinhart*, 906 S.W.2d at 473. At trial, Dr. Thota testified on his own behalf, and Neill Doherty III, M.D. testified as Young's expert witness. The evidence from the medical records and Dr. Thota's testimony indicated that good hemostasis was most likely obtained, which would mean that Ronnie was in a stable condition by the time he was released from the hospital. Even Young's own medical expert, Dr. Doherty, admitted on cross-examination that there was a 99% chance that Ronnie was not bleeding when he was released after the catheterization procedure and that, based on the totality of the medical records, there was no objective evidence that Ronnie was bleeding or experiencing any complications at the time he was discharged from the hospital. Both Dr. Thota and Dr. Doherty testified that if there had been an improper puncture in the iliac artery preventing hemostasis, Ronnie would likely have developed signs of bleeding before his discharge. Dr. Doherty also testified that the cardiac catheterization was a reasonable procedure, given Ronnie's condition, and that the medical records did not indicate Dr. Thota had incorrectly performed the procedure.

Both parties' experts based their opinions, in part, on their interpretations of the doctors' reports from the emergency surgery the night of Ronnie's catheterization procedure. The report by Dr. Thota's partner, Dr. Sudharshan, noted that Ronnie had a "puncture site just about the inguinal

ligament" and that a CT scan "apparently revealed bleeding from [the] external iliac artery puncture site." Based on Dr. Sudharshan's assessment, Dr. Walker performed the emergency surgery, and Dr. Walker's report noted that he repaired a "high tear" in Ronnie's right external iliac artery. Neither Dr. Sudharshan nor Dr. Walker testified at trial.

At trial, Dr. Thota's and Dr. Doherty's testimony about Ronnie's medical reports conflicted. Dr. Doherty testified that the standard of care for cardiac catheterization was to insert a needle and catheter into the right femoral artery below the inguinal ligament. In Dr. Doherty's opinion, Dr. Thota punctured Ronnie's artery at the wrong location, above the inguinal ligament and into the right external iliac artery. Dr. Doherty's opinion was based on Dr. Walker's report, the CT scan mentioned on Dr. Sudharshan's report, and the bleed in Ronnie's retroperitoneal cavity, which could occur when the puncture is too high, rather than the more visible femoral bleed that would occur if the puncture is in the femoral artery. In contrast, Dr. Thota claimed at trial that he did not breach the standard of care during Ronnie's catheterization procedure. He testified that he had no problems inserting the catheter and that he believed he entered the artery at the appropriate location. Dr. Thota stated that Dr. Sudharshan's finding that the puncture site was at "about the inguinal ligament," would indicate that the puncture site was correct. He further testified that Dr. Walker's report was ambiguous as to what he repaired and how far above or below the inguinal ligament the bleed originated. Also, Dr. Thota testified that a retroperitoneal bleed can occur with a femoral artery stick as well as an iliac artery stick and that, based on his review of the medical records and his own knowledge of the procedure, he met the standard of care.

Like many medical malpractice cases, this record contains conflicting expert opinions. The fact that Dr. Thota testified on his own behalf does not negate the weight that the jury could give to his testimony. *See City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005) (holding that the proper test for legal-sufficiency review must "credit favorable evidence if reasonable jurors could, and disregard contrary evidence unless reasonable jurors could not"); *see also Wilson v. Scott*, 412 S.W.2d 299, 303 (Tex. 1967) (noting that the defendant physician's own testimony can establish the standard of care). "Jurors are the sole judges of the credibility of the witnesses and the weight to give their testimony." *City of Keller*, 168 S.W.3d at 819. Because of the conflicting testimony of Dr. Doherty and Dr. Thota, and because both testifying experts agreed that Ronnie was likely not bleeding upon his discharge from the hospital, the jury could have reasonably believed Dr. Thota's opinions and discounted Dr. Doherty's opinions. In circumstances where a reasonable jury could resolve conflicting evidence either way, we presume the jury did so in favor of the prevailing party. *See id.* at 821.

Based on the conflicting evidence, the jury could have reasonably concluded that Dr. Thota did not breach the standard of care without reaching the issue of proximate cause. In that case, the jury would not have relied on the new and independent cause instruction because it pertains only to the proximate cause element. *See Hawley*, 284 S.W.3d at 856 ("New and independent cause is a component of the proximate cause issue."). Thus, the record supports the jury's finding of no negligence as to Dr. Thota. Accordingly, our review of the entire record provides no clear indication that the new and independent cause instruction, if erroneous, probably caused the rendition of an

improper verdict. We therefore conclude that any error in the trial court's submission of the new and independent cause instruction was harmless. *See Urista*, 211 S.W.3d at 759.

III. Conclusion

In sum, we hold that Young's timely and specific no-evidence objections were sufficient to preserve the disputed charge issues for appellate review. Because the trial court submitted a broad-form question on a single theory of liability that included separate answer blanks for Dr. Thota's and Ronnie's negligence, we hold that the court of appeals misapplied *Casteel* and its presumed harm analysis.[5] Even assuming the trial court abused its discretion by including a question as to Ronnie's contributory negligence and an instruction on new and independent cause, for the reasons explained above, we hold that these alleged charge errors were harmless and did not probably cause the rendition of an improper judgment. Because *Casteel*'s presumed harm analysis does not apply and any error in the disputed charge issues was harmless, we need not address Dr. Thota's remaining issues. Accordingly, we reverse the court of appeals' judgment and, without addressing whether the trial court erred by submitting the question as to Ronnie's contributory negligence or the instruction on new and independent cause, we remand the case to the court of appeals to consider Young's remaining issues.

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Paul W. Green
Justice

OPINION DELIVERED: May 11, 2012

[5] To the extent that it conflicts with this opinion, we expressly disapprove the appellate court's opinion in *Block v. Mora*, 314 S.W.3d 440 (Tex. App.—Amarillo 2009, pet. dism'd by agr.).

IN THE SUPREME COURT OF TEXAS

NO. 09-0223

SHARYLAND WATER SUPPLY CORPORATION, PETITIONER,

v.

CITY OF ALTON, CARTER & BURGESS, INC., CRIS EQUIPMENT COMPANY, AND TURNER, COLLIE & BRADEN, INC., RESPONDENTS

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

Argued March 24, 2010

CHIEF JUSTICE JEFFERSON delivered the opinion of the Court.

A water supply corporation sued a city and the city's contractors after the contractors installed sewer lines above portions of the corporation's water system. A jury found that the city breached its contract with the water supply corporation and that the contractors were negligent. The court of appeals disagreed, rendering a take-nothing judgment against the water supply corporation, except as to its claim against the city for attorney's fees related to its declaratory judgment action. We agree that the water supply corporation cannot recover against the city, but we disagree that attorney's fees may be awarded. Thus, we affirm in part and reverse in part the judgment as to the city. Because we conclude that the economic loss rule does not preclude a negligence claim against the contractors, however, we affirm in part and reverse in part the court of appeals' judgment with

respect to the contractors. We remand this case to the court of appeals to consider issues it did not reach.

I. Factual and Procedural Background

Alton is a municipality located in Hidalgo County. Sharyland Water Supply Corporation is a non-profit rural water supply corporation with offices in Mission, which is also in Hidalgo County. In the early 1980s, Alton constructed a potable water distribution system for its residents.[1] Alton and Sharyland entered into a Water Supply Agreement under which Alton conveyed its water system to Sharyland. In exchange, Sharyland provided potable water to Alton residents and maintained the system. The Water Supply Agreement gave Sharyland a ten-foot easement and required Sharyland to set rates and regulate the water distribution system's operation. After an initial one-year period, Sharyland was responsible for repairing the system and maintaining the lines in conformity with current or future state agency[2] rules and regulations.

In 1994, Alton received federal and local grants to install a sanitary sewer system,[3] consisting of main sewer lines, residential service connections, and yard lines. 277 S.W.3d at 139-40. A portion of the sewer system was built in the public right-of-way, while another portion connected the sewer system from the public right-of-way to residences. Alton contracted with Carter &

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[1] Before installation of the water system, the vast majority of Alton residents were without running water.

[2] At the time the parties entered into the agreement, the governing agency was the Texas State Department of Health. The pertinent portion of that agency then became the Texas Natural Resources Conservation Commission, which is now the Texas Commission on Environmental Quality. *See* TCEQ HISTORY, http://www.tceq.texas.gov/about/tceqhistory.html (all Internet materials as visited October 19, 2011 and copy in Clerk of Court's file).

[3] *See* U.S. DEP'T OF HOUS. & URBAN DEV., HIDALGO COUNTY, TX CONSOLIDATED PLAN FOR 1995 EXECUTIVE SUMMARY, http://archives.hud.gov/reports/plan/tx/hidaltx.html.

Burgess, Inc.; Turner, Collie & Braden, Inc.; and Cris Equipment Company, Inc. (collectively, the contractors) to build the sanitary sewer system. In some locations, Alton's sewer main was installed parallel to Sharyland's water main, so that connecting the sewer main to the residential service line (or "stub-out") required that the sewer line cross the water main. Construction was completed in 1999.

A year later, Sharyland sued Alton for breaching the Water Supply Agreement, alleging that Sharyland suffered significant injury because Alton's sanitary sewer residential service connections were negligently installed in violation of state regulations and industry standards. *Id*. at 140. In particular, Sharyland claimed that the location and proximity of the sewer lines to the water system threatened to contaminate Sharyland's potable water supply. *Id*. Alton counterclaimed, seeking a declaration that the Water Supply Agreement was void. Sharyland also sued the contractors for negligence and breach of contract, contending it was a third party beneficiary of the contractors' agreement with Alton.

Alton filed a jurisdictional plea asserting immunity from suit. The trial court denied the plea, and the court of appeals affirmed in a pre-*Tooke* decision holding that Local Government Code section 51.013's "sue and be sued" language waived immunity. *City of Alton v. Sharyland Water Supply Corp.*, 145 S.W.3d 673, 681 (Tex. App.—Corpus Christi 2004, no pet.); *see also* TEX. LOC. GOV'T CODE § 51.013; *Tooke v. City of Mexia*, 197 S.W.3d 325, 328-29 (Tex. 2006) (holding that "sue and be sued" and "plead and be impleaded" did not clearly and unambiguously waive immunity). Alton did not petition this Court for review of that decision.

Back in the trial court, Sharyland successfully moved for summary judgment on Alton's counterclaim. The trial court also granted Sharyland's motion seeking a judgment declaring that Chapter 30, section 317.13 of the Texas Administrative Code (requiring, among other things, certain minimum distances between potable water and sanitary sewer lines) governed the sewer lines at issue in this case. 277 S.W.3d at 141.

The remaining claims were tried to a jury, which found that Alton breached the Water Supply Agreement, that each of the three contractors breached their contracts with Alton, and that Sharyland was a third party beneficiary of those contracts. The jury also found that the contractors' negligence injured Sharyland. The jury awarded identical damages for each of the three claims: $14,000 in past damages and $1,125,000 in future damages. The jury also found that Sharyland had incurred reasonable attorney's fees for trial and appeal. The trial court rendered judgment for Sharyland against Alton and the contractors, jointly and severally, and denied Sharyland's request for injunctive relief to compel Alton to bring the sewer system into compliance with Administrative Code section 317.13.

As to Alton, the court of appeals held that Chapter 271 of the Local Government Code waived immunity on Sharyland's contract claim. 277 S.W.3d at 144; *see also* TEX. LOC. GOV'T CODE § 271.152 (waiving immunity for certain contract claims against local government entities). Nonetheless, the court held that the damages awarded were not for a "balance due and owed" nor for "change orders or additional work," and thus were not within the scope of damages allowed by statute. 277 S.W.3d at 146 (citing TEX. LOC. GOV'T CODE § 271.153). The appellate court rejected Sharyland's arguments that an equitable waiver-by-conduct exception to immunity applied or that

Alton's counterclaim negated immunity. *Id*. at 143. Although the court of appeals concluded that Sharyland could not recover attorney's fees on its contract claim against Alton, the court held that Sharyland could, on remand, segregate and attempt to recover fees attributable to its declaratory judgment on the applicability of Administrative Code section 317.13. *Id*. at 147-48.

As to the contractors, the court of appeals held that the economic loss rule barred Sharyland's negligence claim. *Id*. at 155. The court concluded that Sharyland was not a third party beneficiary of Alton's agreement with the contractors, and therefore could not recover either damages or attorney's fees for the contractor's breach. *Id.* The court affirmed the trial court's denial of Sharyland's request for equitable relief but reversed the remainder of the judgment, rendering judgment that Sharyland take nothing as to everything but its attorney's fees claim for the declaratory judgment. *Id.* at 158. We granted Sharyland's petition for review.[4] 53 Tex. Sup. Ct. J. 285 (Feb. 12, 2010).

II. Sharyland's claims against Alton

Alton asserts that it is immune from Sharyland's claims. For several reasons, Sharyland disagrees. First, Sharyland argues, Local Government Code chapter 271 waives Alton's immunity from suit. Second, even if chapter 271 is inapplicable, Alton is not entitled to immunity on claims that are germane to, connected with, and properly defensive to its counterclaim. *See Reata Constr. Corp. v. City of Dall.*, 197 S.W.3d 371 (Tex. 2006). Finally, Sharyland asks us to recognize an

[4] Attorney R. Carson Fisk, the Texas Society of Architects, and the Texas Council of Engineering Companies submitted amicus curiae briefs.

equitable waiver of immunity, given the extent of Alton's purported misconduct and the threat to public health.

A. Waiver of immunity under Local Government Code section 271.152

Local Government Code section 271.152 provides a limited waiver of immunity for local governmental entities that enter into certain contracts. TEX. LOC. GOV'T CODE § 271.152. To come within the waiver, the contract must be in writing, properly executed, and must state "the essential terms of the agreement for providing goods or services to the local governmental entity." *Id.* § 271.151. As the court of appeals noted, no one disputes that the agreements in this case involve services. 277 S.W.3d at 144. Nor does Alton dispute that section 271.152 applies to its contract with Sharyland. Therefore, the court of appeals correctly concluded that section 271.152 waived Alton's immunity. *Id.*

B. Damages under Local Government Code section 271.153

We next determine whether Sharyland may recover under Local Government Code section 271.153, which limits damage awards against local governmental entities. *See* TEX. LOC. GOV'T CODE § 271.153(a). Sharyland sought to recover the costs to repair its system, and the court of appeals held that section 271.153(a) prohibits the recovery of money damages for these alleged injuries. 277 S.W.3d at 146. *Id.* We agree.

Section 271.153 limits "[t]he total amount of money awarded in an adjudication brought against a local governmental entity for breach of a contract subject to [subchapter I of chapter 271]." TEX. LOC. GOV'T CODE § 271.153(a). The provision specifies that recovery is limited to:

(1) the balance due and owed by the local governmental entity under the contract as it may have been amended, including any amount owed as compensation for the increased cost to perform the work as a direct result of owner-caused delays or acceleration;

(2) the amount owed for change orders or additional work the contractor is directed to perform by a local governmental entity in connection with the contract; and

(3) interest as allowed by law.

Id.[5] Section 271.153(b) further limits damages by excluding the following forms of recovery under subchapter I:

(1) consequential damages, except as expressly allowed under Subsection (a)(1);

(2) exemplary damages; or

(3) damages for unabsorbed home office overhead.

Id. § 271.153(b). The court of appeals concluded that section 271.153(a) "does not provide Sharyland an avenue for recovery." 277 S.W.3d at 146. The kind of damages sought by Sharyland were not those provided for or contemplated in the Water Supply Agreement and are not a "balance due and owed" under that contract. Nor are these costs the "direct result of owner-caused delays or acceleration," or the "amount owed for change orders or additional work the contractor [was] directed to perform by [the] local governmental entity in connection with the contract." TEX. LOC.

[5] Section 271.153 limited recovery to these three categories at the time this suit was initiated. The statute was amended in 2009 to additionally allow for "reasonable and necessary attorney's fees that are equitable and just." *See* Act of May 31, 2009, 81st Leg., R.S., ch. 1266, § 8, 2009 Tex. Gen. Laws 4006, 4007 (codified at TEX. LOC. GOV'T CODE § 271.153(a)(3)). Those amendments are inapplicable here. *See* Act of June 17, 2005, 79th Leg., R.S., ch. 604, § 2, 2005 Tex. Gen. Laws 1548, 1549; *see also Harris Cnty. Flood Control Dist. v. Great Am. Ins. Co.*, 309 S.W.3d 614, 618 (Tex. App.–Houston [14th Dist.] 2010, no pet.) ("During the 2009 legislative session, section 271.153(a) was amended to add that a plaintiff could recover reasonable and necessary attorney's fees that are equitable and just. . . . However, the amendment to section 271.153(a) took effect on June 19, 2009 and only applies to contracts executed after that date."). References herein to section 271.153 are to the version in effect at the time suit was filed.

GOV'T CODE § 271.153(a). A plain reading of the statute negates recovery under this chapter. *See, e.g., Hernandez v. Ebrom*, 289 S.W.3d 316, 318 (Tex. 2009); *Morrison v. Chan*, 699 S.W.2d 205, 208 (Tex. 1985).

C. Waiver of immunity by counterclaim

Sharyland also argues that Alton is not entitled to immunity because it filed a counterclaim seeking affirmative relief. The court of appeals held that because Alton's counterclaim merely asked for a declaration that the Water Supply Agreement was void, without an accompanying claim for monetary damages, Alton did not waive its immunity. 277 S.W.3d at 143.

Sharyland contends that the court of appeals erred in holding that only counterclaims for monetary damages deprive Alton of immunity. Sharyland asserts that a rescission counterclaim that would transfer a valuable asset should fall within *Reata*'s offset holding as well. Sharyland argues that Alton's counterclaim sought affirmative relief because it demanded that Sharyland be divested of valuable property by requesting that the trial court rescind Sharyland's easements and award a portion of the Sharyland Water supply system to Alton.

We need not decide whether Sharyland's argument is viable, however. Even assuming that it is, under our recent precedent, Sharyland could not recover against Alton once its sole counterclaim was defeated on summary judgment. In *Reata Construction Corp. v. City of Dallas,* we held that "when an affirmative claim for relief is filed by a governmental entity, . . . immunity from suit no longer completely exists for the governmental entity." *Reata*, 197 S.W.3d 371, 376 (Tex. 2006). We reasoned that

> 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.

Id. at 376-77. Shortly after *Reata*, we held that a city "does not have immunity from suit for claims germane to, connected with, and properly defensive to its counterclaim to the extent [the opposing party's] claims act as an offset against the City's recovery." *City of Irving v. Inform Constr., Inc.*, 201 S.W.3d 693, 694 (Tex. 2006) (per curiam). We explained that, even though the City's counterclaim was compulsory, "[w]e see no difference between a compulsory counterclaim and a counterclaim which is not compulsory insofar as whether the City has immunity from suit." *Id*.

Alton's counterclaim was short-lived; the trial court held that it was barred by section 1926(b) of title 7 of the United States Code. 277 S.W.3d at 141; *see also* 7 U.S.C. § 1926(b).[6] From that point forward, Alton had no pending claim for Sharyland to offset. We recently held that a governmental entity that nonsuits its counterclaim is not entitled to immunity, but the plaintiff nonetheless cannot recover because the government is no longer "pursuing a claim for damages to which an offset would apply." *City of Dall. v. Albert*, ___ S.W.3d ___, ___ (Tex. 2011). Even if

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[6] That statute applies to federal water and waste facility loans and grants and provides:

> Curtailment or limitation of service prohibited. The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event.

7 U.S.C. § 1926(b).

Alton's rescission counterclaim meant that it was not entitled to immunity from suit at least up to the amount of an offset, the offset disappeared when Alton's counterclaim was defeated on summary judgment. With its counterclaim gone, there were no longer any claims to offset, and Sharyland could not recover a judgment for damages against Alton.

D. Equitable waiver

Finally, Sharyland asserts that a party can waive immunity by conduct. It points to a footnote in *Federal Sign v. Texas Southern University*, 951 S.W.2d 401, 408 n.1 (Tex. 1997), in which we observed that there may be circumstances "where the State may waive its immunity by conduct other than simply executing a contract." Five years after *Federal Sign*, however, we rejected the invitation to recognize such a waiver, holding that it was generally the Legislature's province to waive immunity. *Tex. Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 857 (Tex. 2002). We noted that "[c]reating a waiver-by-conduct exception would force the State to expend its resources to litigate the waiver-by-conduct issue before enjoying sovereign immunity's protections—and this would defeat many of the doctrine's underlying policies." *Id*. We also emphasized that the Legislature had enacted comprehensive schemes that allow contracting parties to resolve breach-of-contract claims against the government. *Id*. By providing these avenues for redress, the Legislature has balanced competing private and public interests—a balance that would be thwarted if we allowed waiver-by-conduct exceptions in breach-of-contract actions against the government.

IT-Davy is dispositive here. As in that case, we reject the invitation to recognize a waiver-by-conduct exception in a breach-of-contract suit against a governmental entity. The court of appeals correctly held that such an exception did not apply. 277 S.W.3d at 143.

III. Sharyland's claims against the contractors

A. The economic loss rule

The court of appeals held that Sharyland suffered only economic losses, which it could not recover in its negligence action against the contractors. *Id*. at 154-55. It is true that parties may be barred from recovering in negligence or strict liability for purely economic losses. This is often referred to as "the economic loss rule." *See Equistar Chems., L.P. v. Dresser-Rand Co.*, 240 S.W.3d 864, 867 (Tex. 2007); *Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617, 618 (Tex. 1986). The term is something of a misnomer, however, as

> there is not one economic loss rule broadly applicable throughout the field of torts, but rather several more limited rules that govern recovery of economic losses in selected areas of the law. For example, the rules that limit the liability of accountants to third parties for harm caused by negligence or that save careless drivers from liability to the employer of a person injured in an auto accident may be fundamentally distinct from the ones that bar compensation in tort for purely economic losses resulting from defective products or misperformance of obligations arising only under contract.

Vincent R. Johnson, *The Boundary-Line Function of the Economic Loss Rule*, 66 WASH. & LEE L. REV. 523, 534-35 (2009); *see also* Jay M. Feinman, *The Economic Loss Rule and Private Ordering*, 48 ARIZ. L. REV. 813, 813 (2006) ("The most general statement of the economic loss rule is that a person who suffers only pecuniary loss through the failure of another person to exercise reasonable

care has no tort cause of action against that person. Because the rule applies to a diverse range of situations, there is not one economic loss rule, but several.").

1. Application of the rule in Texas

The economic loss rule was initially formulated to set perimeters in product liability cases. *See* Eddward P. Ballinger, Jr. & Samuel A. Thumma, *The History, Evolution and Implications of Arizona's Economic Loss Rule*, 34 ARIZ. ST. L.J. 491, 492 (2002). As we recently described it, "[t]he economic loss rule applies when losses from an occurrence arise from failure of a product and the damage or loss is limited to the product itself." *Equistar*, 240 S.W.3d at 867; *see also Seely v. White Motor Co.*, 403 P.2d 145, 151 (Cal. 1965).[7] In such cases, recovery is generally limited to remedies grounded in contract (or contract-based statutory remedies), rather than tort. *See, e.g.*, *Signal Oil & Gas Co. v. Universal Oil Prods.*, 572 S.W.2d 320, 325 (Tex. 1978) ("[W]here only the product itself is damaged, such damage constitutes economic loss recoverable only as damages for breach of an implied warranty under the [Business and Commerce Code]")[8]; *Mid Continent Aircraft Corp v. Curry Cnty. Spraying Serv. Inc.*, 572 S.W.2d 308, 313 (Tex. 1978)("[I]njury to the defective product itself is an economic loss governed by the Uniform Commercial Code.").

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[7] *Seely* is considered a seminal case on the economic loss rule. The *Seely* court explained that:

> A consumer should not be charged at the will of the manufacturer with bearing the risk of physical injury when he buys a product on the market. He can, however, be fairly charged with the risk that the product will not match his economic expectations unless the manufacturer agrees that it will. Even in actions for negligence, a manufacturer's liability is limited to damages for physical injuries and there is no recovery for economic loss alone.

Seely v. White Motor Co., 403 P.2d 145, 151 (Cal. 1965).

[8] *See also JCW Elecs., Inc. v. Garza*, 257 S.W.3d 701, 704 (Tex. 2008) (noting that implied warranty claim could sound in either contract or tort depending on the damages alleged).

Our earliest articulation of the economic loss rule came in a product liability case. *See Nobility Homes of Tex., Inc. v. Shivers*, 557 S.W.2d 77 (Tex. 1977). In *Nobility Homes*, a mobile-home purchaser sued the manufacturer for defective workmanship and materials. *Id*. at 77-78. We held that the plaintiff could "not recover his economic loss under section 402A of the Restatement (Second) of Torts,"[9] establishing strict liability for defective products, but that he could "recover such loss under the implied warranties of the Uniform Commercial Code."[10] *Id*. at 78. Importantly, we did not hold that economic damages were unavailable, but rather that they were more appropriately recovered through the UCC's thorough commercial-warranty framework. *Id*. at 81 (noting that "[t]he fact that a product injures a consumer economically and not physically should not bar the consumer's recovery").[11] We noted that the UCC protected manufacturers from "unlimited

[9] Section 402A(1) of the Second Restatement provides that the seller of a product may be liable to the purchaser for a "defective condition unreasonably dangerous to the user or consumer or to his property." RESTATEMENT (SECOND) OF TORTS § 402A(1). In *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787, 788-89 (Tex. 1967), we held that section 402A's standard governed personal-injury product liability claims in Texas. Sections 1 and 2 of the Third Restatement, adopted in 1998, address liability for sellers or distributors of defective products that harm people or property. RESTATEMENT (THIRD) OF TORTS §§ 1, 2. We have cited but not adopted those standards. *See, e.g., New Tex. Auto Auction Servs., L.P. v. De Hernandez*, 249 S.W.3d 400, 404-06 (Tex. 2008) (noting that the Third Restatement did not apply to auctioneers); *Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 42 (Tex. 2007) (observing that deviation from manufacturer's design is incorporated into the Third Restatement's manufacturing-defect definition).

[10] We also stated that the purchaser could recover his loss under "the theory of common law negligence." *Nobility Homes*, 557 S.W.2d at 78. That conclusion, however, was based on the manufacturer's failure to challenge on appeal the jury's negligence findings. *Id*. at 83. To the extent this statement may be read to have foreclosed application of the economic loss rule, we note that it was supplanted by *Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617, 618 (Tex. 1986), in which we held that even a gross negligence finding would not support the recovery of purely economic losses in a case that could "only be characterized as a breach of contract." *See, e.g., Coastal Conduit & Ditching, Inc. v. Noram Energy Corp.*, 29 S.W.3d 282, 286 (Tex. App.–Houston [14th Dist.] 2000, no pet.); *see also* William Powers, Jr. & Margaret Niver, *Negligence, Breach of Contract, and the "Economic Loss" Rule*, 23 TEX. TECH L. REV. 477, 487 (1992) ("Any confusion about the meaning of *Nobility Homes* has been laid to rest by *Jim Walter Homes*.").

[11] *See also* Powers & Niver, 23 TEX. TECH L. REV. at 482 ("It would be problematic to have a tort theory similar to warranty that is not bound by the other requirements of the [UCC], such as privity, notice, disclaimers, and remedy limitations.") (footnotes omitted).

and unforeseeable liability" for economic losses and that its implied warranties were the means by which a consumer should seek redress for economic losses caused by a product defect. *Id*. at 82.

We reprised this theme six years later in *Mid Continent Aircraft Corp. v. Curry County Spraying Service, Inc.*, 572 S.W.2d 308, 312-13 (Tex. 1978). Curry bought an overhauled aircraft from Mid Continent and sued after the plane crashed. *Id*. at 309-10. We rejected a strict product liability theory in favor of an implied warranty action under the UCC, because Curry's economic loss (damage to the plane itself) was "merely loss of value resulting from a failure of the product to perform according to the contractual bargain and therefore is governed by the Uniform Commercial Code." *Id.* at 311. We distinguished cases involving personal injury or damage to property other than the product itself, noting that those damages could be recovered under strict liability theories. *Id*. at 311-13. We held that "[i]n transactions between a commercial seller and commercial buyer, when no physical injury has occurred to persons or other property, injury to the defective product itself is an economic loss governed by the [breach of warranty provisions of the] Uniform Commercial Code." *Id*. at 313. In another case decided the same day, we permitted a purchaser who had suffered collateral property damage in addition to damage to the product itself to recover under either a strict liability theory or a UCC implied warranty theory. *See Signal Oil & Gas Co. v. Universal Oil Prods.*, 572 S.W.2d 320, 325-26 (Tex. 1978).

Subsequently, in *Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617, 618 (Tex. 1986), we examined the difference between contract duties and tort duties arising under contractual relationships. That case involved a claim by homeowners against their builder, and we had to decide whether an independent tort supported an award of exemplary damages against the builder. *Jim*

Walter Homes, 711 S.W.2d at 617. Because the injury resulted from negligent construction, we held that such disappointed expectations could "only be characterized as a breach of contract, and breach of contract cannot support recovery of exemplary damages." *Id*. at 618.

Relying on the tort and contract distinctions articulated in *Jim Walter Homes*, we again applied the economic loss rule in *Southwestern Bell Telephone Co. v. Delanney*, 809 S.W.2d 493 (Tex. 1991). In that case, we considered "whether a cause of action for negligence is stated by an allegation that a telephone company negligently failed to perform its contract to publish a Yellow Pages advertisement." *Delanney*, 809 S.W.2d at 493. We held that, because the plaintiff sought damages for breach of a duty created under contract, as opposed to a duty imposed by law, tort damages were unavailable. *Id*. at 494. Quoting *Jim Walter Homes*, we explained that

> [t]he acts of a party may breach duties in tort or contract alone or simultaneously in both. The nature of the injury most often determines which duty or duties are breached. When the injury is only the economic loss to the subject of a contract itself the action sounds in contract alone.

Id. at 495 (quoting *Jim Walter Homes*, 711 S.W.2d at 618).

We later declined to extend *DeLanney* to a fraudulent inducement claim, even when the claimant suffered only economic losses to the subject of a contract. *See Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 46 (Tex. 1998). We reasoned that Texas law has long imposed a duty to refrain from fraudulently inducing a party to enter into a contract, and our prior decisions made it clear that tort damages were not precluded simply because

a fraudulent representation caused only an economic loss. *Id*. at 46-47.[12] Finally and most recently, we discussed the economic loss rule in *Equistar Chemicals, L.P. v. Dresser-Rand Co.*, 240 S.W.3d 864 (Tex. 2007). We noted that the rule "applies when losses from an occurrence arise from failure of a product and the damage or loss is limited to the product itself." *Equistar*, 240 S.W.3d at 867.

Thus, we have applied the economic loss rule only in cases involving defective products or failure to perform a contract. In both of those situations, we held that the parties' economic losses were more appropriately addressed through statutory warranty actions or common law breach of contract suits than tort claims. Although we applied this rule even to parties not in privity (*e.g.* a remote manufacturer and a consumer),[13] we have never held that it precludes recovery completely between contractual strangers in a case not involving a defective product—as the court of appeals did here.

The court of appeals relied on a different sort of economic loss rule—one that says that you can never recover economic damages for a tort claim—to reject Sharyland's negligence claim against the contractors. That court analyzed whether Sharyland's claim was one for property damage or for purely economic loss and concluded it was the latter. 277 S.W.3d at 154-55 (noting that "some physical destruction of tangible property must occur" for there to be property damage). Because there was no evidence that the sewer lines had contaminated the water supply, the court of

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[12] *But see D.S.A., Inc. v. Hillsboro Indep. Sch. Dist.*, 973 S.W.2d 662, 663 (Tex. 1998) (per curiam)(explaining that *Formosa* did not extend to negligent misrepresentation claims, which are viable only if a party sustains an injury independent from those stemming from a contractual breach).

[13] *See Nobility Homes*, 557 S.W.2d at 77.

appeals reasoned, Sharyland had not suffered property damage, and the economic loss rule precluded a damage award. *Id*.

There are at least two problems with this analysis. First, it both overstates and oversimplifies the economic loss rule. *See, e.g.*, *Giles v. GMAC*, 494 F.3d 865, 874 (9th Cir. 2007) (noting that "many courts have stated in overly broad terms that purely economic losses cannot be recovered in tort" but "[s]uch broad statements are not accurate"). To say that the economic loss rule "preclude[s] tort claims between parties who are not in contractual privity" and that damages are recoverable only if they are accompanied by "actual physical injury or property damage," 277 S.W.3d at 152-53, overlooks all of the tort claims for which courts have allowed recovery of economic damages even absent physical injury or property damage. *See, e.g.*, *Formosa*, 960 S.W.2d at 47; *see also* Powers & Niver, 23 TEX. TECH L. REV. at 492 (noting that "the 'economic loss' rule has never been a general rule of *tort* law; it is a rule in *negligence* and *strict product liability*" and observing that "[p]ure economic loss is commonly recoverable in certain torts"). Among these are

negligent misrepresentation,[14] legal[15] or accounting[16] malpractice, breach of fiduciary duty,[17] fraud,[18] fraudulent inducement,[19] tortious interference with contract,[20] nuisance,[21] wrongful death claims

[14] *See, e.g.*, *Grant Thornton L.L.P. v. Prospect High Income Fund*, 314 S.W.3d 913, 920 (Tex. 2010) (confirming that, under Texas law and the Restatement (Second) of Torts section 552, auditors could be liable to third parties for negligent misrepresentation); *Fed. Land Bank Ass'n of Tyler v. Sloane*, 825 S.W.2d 439, 442 (Tex. 1991) (citing RESTATEMENT (SECOND) OF TORTS § 552B)(adopting Restatement measure of damages for negligent misrepresentation claims, which includes the difference in value and other consequential damages that can properly be classified as pecuniary losses).

[15] *See, e.g.*, *Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Research Corp.*, 299 S.W.3d 106, 122 (Tex. 2009) (holding that "a malpractice plaintiff may recover damages for attorney's fees paid in the underlying case to the extent the fees were proximately caused by the defendant attorney's negligence").

[16] *See, e.g.*, *Atkins v. Crosland*, 417 S.W.2d 150, 152-53 (Tex. 1967) (holding that tax losses were recoverable in accounting malpractice case).

[17] *See, e.g.*, *ERI Consulting Eng'rs, Inc. v. Swinnea*, 318 S.W.3d 867, 873-74 (Tex. 2010) (noting that fee forfeiture, as well as actual damages, are recoverable for breach of fiduciary duty).

[18] *See, e.g.*, *Trenholm v. Ratcliff*, 646 S.W.2d 927, 933 (Tex. 1983) (upholding a jury's award of lost profits for fraud claim); *see also* TEX. BUS. & COM. CODE § 27.01 (authorizing actual damages for fraud in certain real estate or stock transactions).

[19] *See, e.g.*, *Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 47 (Tex. 1998) (holding that "tort damages are recoverable for a fraudulent inducement claim irrespective of . . . whether the plaintiff only suffers an economic loss related to the subject matter of the contract").

[20] *See, e.g.*, *Am. Nat'l Petroleum Co. v. Transcon. Gas Pipe Line Corp.*, 798 S.W.2d 274, 278 (Tex. 1990) ("In a commercial relations tort, the fact that the damages are 'economic' does not mean that they may not be damages for the tort. The basic measure of actual damages for tortious interference with contract is the same as the measure of damages for breach of the contract interfered with, to put the plaintiff in the same economic position he would have been in had the contract interfered with been actually performed.").

[21] *See, e.g.*, *Comminge v. Stevenson*, 13 S.W. 556, 558 (Tex. 1890) (holding that depreciation in property value is recoverable in nuisance claim).

related to loss of support from the decedent,[22] business disparagement,[23] and some statutory causes of action.[24]

Moreover, the question is not whether the economic loss rule should apply where there is no privity of contract (we have already held that it can), but whether it should apply at all in a situation like this. Merely because the sewer was the subject of *a* contract does not mean that a contractual stranger is necessarily barred from suing a contracting party for breach of an independent duty. If that were the case, a party could avoid tort liability to the world simply by entering into a contract with one party. The economic loss rule does not swallow all claims between contractual and commercial strangers.

The court of appeals' blanket statement also expands the rule, deciding a question we have not—whether purely economic losses may ever be recovered in negligence or strict liability cases. This involves a third formulation of the economic loss rule, one that does not lend itself to easy answers or broad pronouncements. *See, e.g.*, Johnson, 66 WASH. & LEE L. REV. at 527 (noting that

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[22] *See, e.g., Francis v. Atchison, Topeka & Santa Fe Ry. Co.*, 253 S.W. 819 (Tex. 1923).

[23] *See, e.g., Hurlbut v. Gulf Atl. Life Ins. Co.*, 749 S.W.2d 762, 767 (Tex. 1987) (noting that proof of special damages was required in business disparagement case and that plaintiff must "establish pecuniary loss that has been realized or liquidated as in the case of specific lost sales").

[24] *See, e.g.*, TEX. BUS. & COM. CODE § 17.45 (defining "[e]conomic damages" as "compensatory damages for pecuniary loss, including costs of repair and replacement"); *id.* § 17.50 (authorizing recovery of economic damages for certain deceptive trade practices); *see also, e.g.*, Johnson, 66 WASH. & LEE L. REV. at 529-32 (noting exceptions to economic loss rule including negligent misrepresentation, defamation, professional malpractice, breach of fiduciary duty, nuisance, loss of consortium, wrongful death, spoliation of evidence, unreasonable failure to settle a claim within insurance policy limits, and certain statutory causes of action); Powers & Niver, 23 TEX. TECH L. REV. at 492, 496 (noting that purely economic losses may be recovered in cases involving fraud, negligent misrepresentation, or intentional interference with contract).

outside the realm of product- or contract-related claims, "the operation of the economic loss rule is not well mapped, and whether there is a 'rule' at all is a subject of contention").[25]

This is an area we need not explore today, however, because the court of appeals erred in concluding that Sharyland's water system had not been damaged. *See* 277 S.W.3d at 154 (noting that the sewer lines had not corroded the waterlines). Sharyland's system once complied with the law, and now it does not. Sharyland is contractually obligated to maintain the system in accordance with state law and must either relocate or encase its water lines. These expenses, imposed on Sharyland by the contractors' conduct, were the damages the jury awarded.[26] Costs of repair necessarily imply that the system was damaged, and that was the case here. Sharyland presented evidence that it experiences between 100 and 150 water system leaks each year. A break in the water line threatens contamination. There was evidence that when Sharyland excavated a representative sample of sixty-six sewer crossings, sixty of them had been illegally installed, and there was at least one leaking sewer pipe located six inches above a water pipe. There was also evidence that approximately 340 locations would require remediation. We disagree that the economic loss rule bars Sharyland's recovery in this case.

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[25] This is a complex area of the law that evades precise categorization. *See, e.g.*, Johnson, 66 WASH. & LEE L. REV. at 536 (observing that "[t]he confusing mass of precedent relating to tort liability for economic loss has yet to be disentangled and expressed with the clarity commonly found with respect to other tort law topics"). The American Law Institute is at work on a section of the Third Restatement that will focus on torts that involve economic loss, or pecuniary harm not resulting from physical harm or physical contact to a person or property. Although the ALI's Council approved the start of the project in 2004, thus far no part of the work has been approved by the Council or by the membership. *See* AM. LAW INST., CURRENT PROJECTS: RESTATEMENT THIRD, TORTS: LIABILITY FOR ECONOMIC HARM, http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=15; *see also* Johnson, 66 WASH. & LEE L. REV. at 535-36 (noting that none of the project's initial drafts were approved by the American Law Institute).

[26] The jury awarded Sharyland "[t]he reasonable cost of the repairs necessary to restore the property to its condition immediately before the injury."

The contractors argue that permitting recovery in this case will upend the industry because construction contracts are negotiated based on anticipated risks and liabilities, and allowing parties like Sharyland to recover in tort would skew that analysis. Construction defect cases, however, usually involve parties in a contractual chain who have had the opportunity to allocate risk, unlike the situation faced by Sharyland. While it is impossible to analyze all the situations in which an economic loss rule may apply, it does not govern here. The rule cannot apply to parties without even remote contractual privity, merely because one of those parties had a construction contract with a third party, and when the contracting party causes a loss unrelated to its contract.

B. Third party beneficiary status

Sharyland argues that there was evidence to support the jury finding that Sharyland was a third party beneficiary of the agreements between Alton and the contractors. The court of appeals disagreed, holding that Sharyland was "no more than an incidental beneficiary" to the contract. 277 S.W.3d at 152. Because the contracts entered into between Alton and the contractors make no reference to Sharyland and indicate no intention to confer a benefit on it, we agree with the court of appeals that Sharyland was not a third party beneficiary of those contracts.

As noted by the court of appeals, "[t]here is a presumption against conferring third-party beneficiary status on noncontracting parties." *Id.* at 149; *see also S. Tex. Water Auth. v. Lomas*, 223 S.W.3d 304, 306 (Tex. 2007) (per curiam). We stated as much in another case involving a water supply agreement between a local water authority and a city, under which a citizen organization claimed to be a third party beneficiary of the agreement. *Lomas*, 223 S.W.3d at 306. We noted that

> [i]n deciding whether a third party may enforce or challenge a contract between others, it is the contracting parties' intent that controls. . . . The intent to confer a direct benefit upon a third party "must be clearly and fully spelled out or enforcement by the third party must be denied." . . . Incidental benefits that may flow from a contract to a third party do not confer the right to enforce the contract. . . . A third party may only enforce a contract when the contracting parties themselves intend to secure some benefit for the third party and entered into the contract directly for the third party's benefit.

Id. (citations omitted). Importantly, "'the fact that a person is directly affected by the parties' conduct, or that he 'may have a substantial interest in a contract's enforcement, does not make him a third-party beneficiary.'" *Fleetwood Enters. Inc. v. Gaskamp*, 280 F.3d 1069, 1075 (5th Cir. 2002) (applying Texas law and quoting *Loyd v. Eco Res., Inc.*, 956 S.W.2d 110, 134 (Tex. App.–Houston [14th Dist.] 1997, no pet.)).

Sharyland does not meet the criteria necessary to confer third party beneficiary status. Sharyland is neither mentioned in the contracts themselves, nor is there evidence that Alton and the contractors intended to confer a direct benefit on Sharyland. Alton contracted with Carter & Burgess to manage construction of the sewer system; with Turner, Collie & Braden to engineer and inspect the system; and with Cris Equipment Company to build the system. While Sharyland may incidentally benefit from the contractors' promises to place the sewer lines in accordance with the plans and specifications, the contract falls far short of "clearly and fully spell[ing] out" such an intent. *Lomas,* 223 S.W.3d at 306. The primary purpose of these agreements was to provide for the construction of a sewer system in Alton, not to benefit Sharyland. *Cf. Basic Capital Mgmt., Inc. v. Dynex Commercial, Inc.*, ___ S.W.3d ___, ___ (Tex. 2011) (noting that contract had "no purpose whatever" other than to benefit third party). We agree with the court of appeals that Sharyland was

not a third party beneficiary of the agreement between Alton and the contractors. 277 S.W.3d at 152.

IV. Administrative Code Chapter 30, section 317.13

As an alternate basis for affirming the court of appeals' judgment, the contractors urge that the trial court incorrectly held that section 317.13 of the Texas Administrative Code, which was in effect at the time the dispute arose, applied to the sewer lines in this case.[27] The contractors argue that Sharyland's entire case hinged on the 317.13 violation, and without it, there is no basis for finding that the contractors were negligent.

Section 317.13 provides, in pertinent part:

> The following rules apply to separation distances between potable water and wastewater plants, and waterlines and sanitary sewers.
>
> (1) Waterline/new sewer line separation. When new sanitary sewers are installed, they shall be installed no closer to waterlines than nine feet in all directions. Sewers that parallel waterlines must be installed in separate trenches. Where the nine-foot separation distance cannot be achieved, the following guidelines will apply.
>
> (A) Where a sanitary sewer parallels a waterline, the sewer shall be constructed of cast iron, ductile iron, or PVC meeting ASTM specifications with a pressure rating for both the pipe and joints of 150 psi. The vertical separation shall be a minimum of four feet between outside diameters. The sewer shall be located below the waterline.
>
> (B) Where a sanitary sewer crosses a waterline and the sewer is constructed of cast iron, ductile iron, or PVC with a minimum pressure rating of 150 psi, an absolute minimum distance of six inches between outside diameters shall be maintained. In

[27] Section 317.13 was repealed and has since been substantially incorporated into section 217.53 of the Administrative Code. *See* 30 TEX. ADMIN. CODE § 217.53; 30 TEX. ADMIN. CODE § 317.13(1)(B), *repealed* 33 TEX. REG. 6928 (2008).

> addition, the sewer shall be located below the waterline where possible and one length of the sewer pipe must be centered on the waterline.

30 TEX. ADMIN. CODE § 317.13(1)(A)-(B).

Sharyland asserts that the contractors failed to maintain the required minimum distance between water lines and sewer lines, failed to center the sewer pipes, and negligently installed those pipes above the water lines in violation of section 317.13. The contractors contend that section 317.13 applied purely to sewer mains, and not the residential sewer lines at issue here.[28] On Sharyland's request for declaratory relief, the trial court found that section 317.13 "applied to the situation presented in this case" and that "[t]he term 'sewer in the context of . . . [c]hapter 317 refers to a 'conduit which carries off water or waste matter' and includes sanitary sewer residential service connections." The court of appeals did not reach this issue, as it reversed and rendered judgment that Sharyland take nothing.

Section 317.13, which had the force and effect of a statute and must be construed accordingly,[29] is unambiguous. Accordingly, we construe it as a matter of law. The terms "sewer" and "sanitary sewer" were not defined in section 317.13 or anywhere in Chapter 30 of the Administrative Code, so we give them their ordinary meaning. *See, e.g., Guitar Holding Co., L.P. v. Hudspeth Cnty. Underground Water Conservation Dist. No. 1*, 263 S.W.3d 910, 915 (Tex. 2008). Generally, "sewers" or "sanitary sewers" include residential service lines, not just sewer mains. In fact, many definitions explicitly use these terms to mean domestic or residential sewer lines. *See,*

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[28] Residential service connections are the only portions of Alton's sewer system at issue in this case. 277 S.W.3d at 140.

[29] *State Office of Risk Mgmt. v. Lawton*, 295 S.W.3d 646, 648 (Tex. 2009).

e.g., FRANCOIS G. BRIERE, DRINKING-WATER DISTRIBUTION, SEWAGE, AND RAINFALL COLLECTION 144 (2d ed. 2007) ("[A] sanitary sewer system transports domestic wastewater, which includes water used for domestic consumption, water from commercial districts and industrial establishments, . . . and water considered as parasitic . . . ."); THOMAS J. DAY, SEWER MANAGEMENT SYSTEMS 97 (2000) ("The most commonly recognized sewer type is the sanitary sewer, which is designed to carry domestic sewage and processed industrial wastes to a treatment facility. Domestic sewage is that wastewater generated by residential households."); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2012 (2002) (defining "sanitary sewer" as "a sewer to dispose of sewage but not water from ground, surface, or storm"); MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1036 (10th ed. 1993) (defining "sanitary sewage" as "of, relating to, or used in the disposal esp. of domestic waterborne waste"); *see also* THE EDWARDS AQUIFER WEBSITE, GLOSSARY OF WATER RESOURCE TERMS, http://www.edwardsaquifer.net/glossary.html#S (defining "sanitary sewers" as "underground pipes that carry off only domestic or industrial waste, not storm water").

The contractors complain that the trial court improperly excluded testimony from two TNRCC engineers who asserted that they believed section 317.13 applied only to "sewer mains" (and not "service connections" like those at issue here) and that Alton's sewer system did not violate section 317.13. Sharyland responded that the TNRCC employees' testimony was not formal policy, and was inconsistent with a rational reading of the law. The trial court, after determining that section 317.13 applied, excluded the testimony. The contractors urge that this was reversible error. Again, we disagree.

Even assuming that the interpretation of individual officials could be persuasive when determining the meaning of an ambiguous statute or rule, we find no reason to go beyond the text here. Nowhere in chapter 317 were residential service connections excluded from the general meaning of "sewers" or "sanitary sewers." To the contrary, the breadth of the terms implies the definition that dictionaries give it: that is, underground pipes carrying domestic or industrial waste. We agree with the trial court that section 317.13 applied to the sewer lines in this case, and the trial court did not err in excluding the engineers' testimony.

V. Calculating damages

A. Equitable relief

The trial court held, and the court of appeals agreed, that the existence of a remedy at law for Sharyland foreclosed the availability of equitable relief in the form of an injunction or specific performance. We agree. Sharyland contends that an award of money damages "is not as complete, practical, prompt, and efficient as the requested equitable remedies." We have stated that "'[t]he general rule at equity is that before injunctive relief can be obtained, it must appear that there does not exist an adequate remedy at law.'" *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 210 (Tex. 2002) (quoting *Republic Ins. Co. v. O'Donnell Motor Co.*, 289 S.W. 1064, 1066 (Tex. Civ. App.–Dallas 1926, no writ)). We need not decide whether an order mandating that Alton repair its lines is the more efficient means to remedy the mislaid sewer pipes, because the damages awarded will compensate Sharyland for its repair costs. *See Repka v. Am. Nat'l Ins. Co.*, 186 S.W.2d 977, 980 (Tex. 1945) ("[S]ince the legal remedy of the plaintiff is complete, certain, and adequate, there is no necessity for his invoking the aid of the equitable jurisdiction." (quoting 1 POMEROY'S EQUITY

JURISPRUDENCE, § 254, at 429 (4th ed.))). Because an adequate remedy at law exists, we agree with the court of appeals that the availability of a legal remedy foreclosed Sharyland's suit for an injunction or specific performance. 277 S.W.3d at 157.

B. Joint and several liability and attorney's fees against the contractors

The court of appeals held that the trial court erred in imposing joint and several liability on the contractors[30] and awarding attorney's fees against them. 277 S.W.3d at 155. We agree.

Texas law permits joint and several liability for most actions based in tort, as long as "the percentage of responsibility attributed to the defendant with respect to a cause of action is greater than 50 percent." *See* TEX. CIV. PRAC. & REM. CODE § 33.013(b)(1); *JCW Elecs., Inc. v. Garza*, 257 S.W.3d 701, 705 (Tex. 2008) ("[S]ection 33.003 reveals that a 'cause of action based on tort' includes negligence, products liability, and any other conduct that violates an applicable legal standard . . . .") (quoting TEX. CIV. PRAC. & REM. CODE § 33.002(a))). In this case, the jury found that, between the contractors, C&B was 20% negligent, Cris was 40% negligent, and TCB was 40% negligent. Because none of the contractors was attributed a percentage of responsibility greater than 50%, the proportionate responsibility statute does not permit joint and several liability on this basis. *See* TEX. CIV. PRAC. & REM. CODE § 33.013(b)(1).

As to Sharyland's attorney's fee claim against the contractors, we note that it is based on its third party beneficiary theory, which we have rejected. *See* TEX. CIV. PRAC. & REM. CODE § 38.001; *Great Am. Ins. Co. v. N. Austin Mun. Util. Dist. No. 1*, 908 S.W.2d 415, 427-28 (Tex. 1995);

[30] The trial court also made Alton jointly and severally liable for the damages, but because we have held that Sharyland cannot recover against Alton, we do not address this issue.

Dairyland Cnty. Mut. Ins. Co. of Tex. v. Childress, 650 S.W.2d 770, 775-76 (Tex. 1983). Sharyland may not, therefore, recover its attorney's fees against the contractors.

C. Attorney's fees against Alton

The court of appeals held, and we agree, that Sharyland could not recover attorney's fees for Alton's breach of contract, because damages were not recoverable under Local Government Code section 271.153. 277 S.W.3d at 147. The court of appeals also held, however, that Sharyland could recover attorney's fees against Alton on the declaratory judgment claim, and it remanded to give Sharyland an opportunity to segregate those fees. *Id*. at 147-48. But Sharyland's request for a declaration that section 317.13 applied to this case was merely a subset of its larger claim that Alton breached the Water Supply Agreement. We have held that "private parties cannot circumvent [a governmental entity's] immunity from suit by characterizing a suit for money damages, such as a contract dispute, as a declaratory-judgment claim." *Tex. Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 856 (Tex. 2002). Because the declaration was part of Sharyland's breach-of-contract claim, a claim on which Sharyland cannot recover, it was error to remand for an award of attorney's fees on that basis. Accordingly, we reverse that portion of the court of appeals' judgment.

VI. Conclusion

We reverse the court of appeals' judgment with respect to the contractors, because the economic loss rule does not preclude Sharyland's negligence claim against them. We also reverse and render that part of the court of appeals' judgment regarding Sharyland's attorney's fees against Alton for the declaratory judgment claim. We affirm the remainder of the court of appeals' judgment with regard to Sharyland's breach of contract claim against Alton; Sharyland's third party

beneficiary claim against the contractors; Sharyland's claim for attorney's fees against the contractors and Alton; joint and several liability against the contractors; and Sharyland's claim for equitable relief. *Id*. at 157. We remand to that court to address the issues it did not reach. We thus affirm in part, reverse and render in part, and reverse and remand in part the court of appeals' judgment. TEX. R. APP. P. 60.2(a),(c), (d).

_____

Wallace B. Jefferson
Chief Justice

OPINION DELIVERED: October 21, 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.

We deny the motion for rehearing. We withdraw our opinion of July 1, 2011 and substitute the following in its place.

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 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. In the context of a property owner's appeal of an administrative nuisance determination, 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 vandalism 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

[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).

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.

[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.

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 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

[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.

[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.

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* 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 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,

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[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 . . . .").

[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).

> 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) (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.

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[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).

1584, 1585 n.3 (1966) (While the parties are reversed, "[t]he rules of evidence and measure of damages . . . are much the same.").

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 ultimate 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 this 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, when the property owner contests the administrative finding. *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

[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).

(Tex. 1920).[12] In *Stockwell*, a statute empowered the 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*

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[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.

[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

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 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. at 813 (emphasis added). To read this as negating a property owner's right to 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:

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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.

> [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*, an aggrieved property owner is entitled to judicial review.

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

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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.

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]

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*,

[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 evidence review. To the contrary, the opinion's other language—its language of principle—suggests the opposite result.

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 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 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

[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

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) (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*

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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.").

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 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

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[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 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).

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 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 (observing that "'[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 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

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[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 implicated the Takings Clause. *Id.* at 290-91. *Ben Avon* itself supports 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").

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. 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.*

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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").

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 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.*,

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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).

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. 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. Response to Motion for Rehearing

The City and a number of amici[26] urge us to grant rehearing. They argue that failing to accord administrative nuisance determinations preclusive effect will open the floodgates for takings claims. Because takings claims have a ten-year statute of limitations, they contend, parties will now

[26] The International Municipal Lawyers Association, the Texas City Attorneys Association, the Texas Municipal League, and the Cities of Abilene, Aledo, Cleburne, Euless, Fort Worth, Garland, Granbury, Haltom City, Houston, Irving, Kennedale, Lake Worth, McAllen, Mesquite, North Richland Hills, River Oaks, Saginaw, San Antonio, Southlake, and Sulphur Springs have submitted amicus curiae briefs in support of the City's motion for rehearing.

sue to challenge demolitions that occurred any time in the past ten years. Finally, the amici assert that our decision effectively eliminates administrative nuisance abatement because cities lack the resources to file suit to abate every nuisance.

These arguments overlook three key facts. First, takings claims must be asserted on appeal from the administrative nuisance determination. Although agencies have no power to preempt a court's constitutional construction,[27] a party asserting a taking must first exhaust its administrative remedies and comply with jurisdictional prerequisites for suit. We recently explained that a litigant must avail itself of statutory remedies that may moot its takings claim, rather than directly institute a separate proceeding asserting such a claim. *See City of Dall. v. VSC*, 347 S.W.3d 231, 234-37 (Tex. 2011). We held that "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*." *Id*. at 237. We apply the same rationale here. Had Stewart convinced the URSB that her property was not a nuisance, the City would not have obtained a demolition order, and Stewart's takings claim would fail. Because she was unsuccessful before the Board, she properly asserted her takings claim on appeal to district court.

Thus, as one commentator has noted, "even though [a constitutional] claim may be asserted for the first time in the district court upon appeal of the agency order, a failure to comply with the appeal deadlines and/or the failure to so assert the constitutional claim at that time, precludes a party from raising the issue in a separate proceeding." 1 BEAL, TEXAS ADMINISTRATIVE PRACTICE AND PROCEDURE § 9.3.1[c]; *see also Tex. Comm'n on Envtl. Quality v. Kelsoe*, 286 S.W.3d 91, 97 (Tex.

[27] *Cent. Power & Light Co. v. Sharp*, 960 S.W.2d 617, 618 (Tex. 1997).

App.—Austin 2009, pet. denied) (holding that a party making a constitutional claim must nonetheless comply with statutory prerequisites for judicial review). A party cannot attack collaterally what she chooses not to challenge directly. Cities are not, therefore, subject to new takings suits for long-concluded nuisance abatements.

Second, property owners rarely invoke the right to appeal.[28] This may be due to the correctness of the nuisance finding, to the time and expense involved,[29] or to the Local Government Code's narrow thirty day window for seeking review. *See* TEX. LOC. GOV'T CODE § 214.0012(a) (requiring appeals to be filed within thirty days of order). Or it may be because an unsuccessful appellant must pay the municipality's attorney's fees and costs. *Id*. § 214.0012 (h) (requiring appellant to pay municipality's attorney's fees, costs, and expenses, if municipality's decision is affirmed or "not substantially reversed").

Third, and perhaps most importantly, de novo review is required only when a nuisance determination is appealed. Thus, the City need not institute court proceedings to abate every nuisance. Rather, the City must defend appeals of nuisance determinations and takings claims asserted in court by property owners who lost before the agency. Given these considerations, we disagree with the City's and the amici's characterization of the effects of our holding.

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[28] The amici have provided some anecdotal evidence on this point. The City of Fort Worth states that over the past ten years it has brought 1,250 cases to its Building Standards Commission, and fewer than ten of those were appealed to district court. The City of Sulphur Springs has abated 86 structures by demolition over the past five years; in 68 of those abatements, the property owner acquiesced in the demolition order. The City of Mesquite has taken 18 cases to its Building Standards Board since 2009. Of those 18, 15 were ordered demolished, and 14 have been demolished. The one remaining property is apparently the only one in which the owner appealed the case to district court, and that appeal has been dismissed for want of prosecution.

[29] This includes not just litigation costs, but also the civil penalties municipalities can assess against property owners who fail to comply with repair or demolition orders. *See, e.g., Freeman*, 242 F.3d at 645 (noting that the URSB could impose penalties of up to $2000 per day) (citing DALLAS, TEX., CODE ch. 27, art. II, § 27-8).

IV. 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,[30] 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 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).

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Wallace B. Jefferson
Chief Justice

OPINION DELIVERED: January 27, 2012

[30] *See, e.g.*, JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 133 (2004) ("The reason why men enter into society is the preservation of their property . . . .").

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

ON MOTION FOR REHEARING

JUSTICE GUZMAN, dissenting from the denial of rehearing.

Abandoned buildings, dilapidated homes and hazardous properties have in many instances become a haven for vagrants, criminal activity and potential hazards to surrounding neighborhood properties. The Court's holding and today's denial of the Motion for Rehearing in effect have essentially decimated summary nuisance abatement—a city's crucial, front-line tool to combat the detrimental effects of nuisance on the health, safety, and welfare of its citizens.[1] The Court's holding leaves municipalities with equally incongruous options after a determination of public

[1] *City of Dallas v. Stewart*, ___ S.W.3d ___, ___ (Guzman, J., dissenting); *see* 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, 99–100 (2009).

nuisance is made by a municipal board: (1) subject the municipality's tax-payers to the otherwise unnecessary and costly litigation of a de novo trial to determine whether the property is a public nuisance; or (2) accept the board's determination, abate, and subject the municipality to a potentially costly takings claim.

Underscoring the risk to the safety and vitality of entire communities, the City of Dallas urges this Court to vacate its holding. Twelve separate amicus briefs have been submitted in support of the Motion for Rehearing.[2] Amici assert that the Court's decision restricts the ability of municipalities to control and regulate nuisances through their police power and in turn restricts municipalities from protecting their communities' health and safety.[3] Evidencing the debilitating effects the Court's holding has had in the mere six months since it was handed down, many cities

[2] The Texas Municipal League (TML), Texas City Attorneys Association (TCAA), and the International Municipal Lawyers Association (IMLA), as well as the cities of Abilene, Aledo, Cleburne, Euless, Fort Worth, Garland, Granbury, Grapevine, Haltom City, Houston, Hurst, Iving, Kennedale, Lake Worth, McAllen, Mesquite, North Richland Hills, River Oaks, Saginaw, San Antonio, Southlake, and Sulphur Springs submitted a total of twelve amicus curiae briefs in support of the City of Dallas's Motion for Rehearing.

[3] Brief in Support of Petitioner's Motion for Rehearing for Amicus Curiae, City of Abilene at 8–9, *Stewart*, No. 09-0257 (Tex. Aug. 31, 2011); Brief of Amicus Curiae, the City of Garland, in Support of the City of Dallas's Motion for Rehearing at 1, *Stewart*, No. 09-0257 (Tex. Oct. 13, 2011); Brief of Amicus Curiae, IMLA, in Support of Petitioner's Motion for Rehearing at 13, *Stewart*, No. 09-0257 (Tex. Aug. 23, 2011); Amicus Curiae Brief of the City of Irving in Support of Motion for Rehearing at 10–11, *Stewart*, No. 09-0257 (Tex. Aug. 19, 2011); Brief of Amicus Curiae the City of Sulphur Springs, Texas in Support of Petitioner City of Dallas's Motion for Rehearing at 5, *Stewart*, No. 09-0257 (Tex. Sept. 1, 2011); Brief of Amicus Curiae TML & TCAA in Support of Petitioner City of Dallas's Motion for Rehearing at 2–3, *Stewart*, No. 09-0257 (Tex. Aug. 23, 2011).

have brought their substandard structure and nuisance enforcement procedures to a stand-still.[4] And many are concerned that this new requirement will delay an already agonizingly slow process.[5]

I believe the cities' concerns warrant closer examination. But, despite the rapid manifestation of the broad-sweeping effects I cautioned about in my dissent, this Court adheres to its untenable holding—despite long-standing precedent dictating otherwise[6]—that a party whose real property has been determined a nuisance is entitled to an absolute right to de novo judicial review

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[4] *See, e.g.*, Laura Mueller, City of Dallas v. Stewart*: Divided Supreme Court of Texas Holds That Nuisance Decisions Should Be Made by Courts Rather Than City Boards*, TEX. CITY ATTORNEYS ASS'N NEWS, June/July 2011, at 3, *available at* http://www.tml.org/legal_ tcaanews/ News-June-July2011.pdf (stating many cities have halted their nuisance ordinance enforcement until this rehearing is decided) (all Internet materials as visited January 25, 2012 and copy in Clerk of Court's file); Rudolph Bush, *Texas Supreme Court Wants To Hear More About Dallas's Demolition of 'Nuisance' Property*, DALLAS MORNING NEWS, Oct. 20, 2011, *available at* http://cityhallblog.dallasnews .com/ archives/2011/10/texas-supreme-court-wants-to-h.html (noting that "[m]any, if not all, of those cities have since stopped destroying nuisance properties absent a court order"); Brief of Amicus Curiae the City of Sulphur Springs, Texas in Support of Petitioner City of Dallas's Motion for Rehearing at 10, *Stewart*, No. 09-0257 (Tex. Sept. 1, 2011) (stating that the city's program to eliminate dangerous and unhealthy structures has ceased as a direct consequence of this Court's holding).

[5] *See, e.g.*, Ken Fountain, *The Hazard Next Door: Texas Ruling Restricts Cities from Eliminating Blighted Structures*, BELLAIRE EXAMINER, Aug. 11, 2011, *available at* http://www.yourhoustonnews.com/bellaire/news/article_ea69abc2-115b-5edf-9972-7d4ffc16706e.html (indicating that proceeding with demolition after a board's determination opens the municipality to potential costly litigation); Patricia Kilday Hart, *Hart: Whose Property Rights Are Being Protected?*, THE HOUSTON CHRONICLE, Jan. 7, 2012, *available at* http://www.chron.com/news/kilday-hart/article/Hart-Whose-property-rights-are-being-protected-2448385.php (suggesting the Court's opinion "has made it more difficult for municipalities to order demolitions of abandoned nuisances," noting that demolition orders—following a nuisance finding by the municipal board—are now likely to only be acted upon when public health and safety risks outweigh the exposure of a takings claim).

[6] *See Stewart*, ___ S.W.3d at ___ (Guzman, J., dissenting) (explaining that the Court has always recognized the Legislature's capacity to define and abate nuisances and provide for a different standard of review of such abatement).

of the underlying nuisance determination made by an administrative board when the person alleges a taking.

Because the Court's decision essentially strips municipalities of their legislatively provided tool to combat public nuisance, I would grant the motion for rehearing. Because the Court declines to do so, I respectfully dissent.[7]

Eva M. Guzman
Justice

OPINION DELIVERED: January 27, 2011

[7] *See Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 24–29 (Tex. 2007) (Brister, J., dissenting to the denial of rehearing).

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

ON CERTIFIED QUESTIONS FROM THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Argued November 19, 2009
Reargued April 19, 2011

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

JUSTICE WILLETT delivered a concurring opinion.

JUSTICE MEDINA delivered a dissenting opinion, in which JUSTICE LEHRMANN joined and JUSTICE GUZMAN joined in part.

JUSTICE GUZMAN delivered a dissenting opinion.

JUSTICE LEHRMANN delivered a dissenting opinion, in which JUSTICE MEDINA joined.

CHIEF JUSTICE JEFFERSON did not participate in the decision.

After issuing an opinion in this certified question proceeding, we granted respondents' motion for rehearing and heard reargument of the case. Petitioner sold the real property at issue and we abated our proceeding to allow the certifying court, the United States Court of Appeals for the

Fifth Circuit, to consider respondents' motion to dismiss the case as moot. *Severance v. Patterson*, 345 S.W.3d 49 (Tex. 2011). The Fifth Circuit denied the motion by order dated September 28, 2011, and we reinstated our rehearing of the certified questions. We withdraw our opinion of November 5, 2010, and substitute the following in its place.[1]

Pursuant to article V, section 3-c of the Texas Constitution and Texas Rule of Appellate Procedure 58.1, we accepted the petition from the United States Court of Appeals for the Fifth Circuit to answer the following certified 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?
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> 2. If Texas recognizes such an easement, is it derived from common law doctrines or from a construction of the [Open Beaches Act]?
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> 3. To what extent, if any, would a landowner be entitled to receive compensation (other than the amount already offered for removal of the

[1] Prior to issuance of our original opinion, we received amicus briefs from Professor Matthew Festa of the South Texas College of Law; the Galveston Chamber of Commerce; the Surfrider Foundation; Surfside Property Owners; the Texas Chapter of American Shore and Beach Preservation Association; the Texas Conference of Urban Counties; the Texas Landowners Counsel; and the Texas Wildlife Association. On rehearing, we received amicus briefs from Blackburn & Carter, P.C.; Joyce Bowman; Brazoria County; Barbara Clark; Evelyn Clark; Luis Decker; Dewey A. Doga; the Economic Development Alliance for Brazoria County; the City of Galveston; Galveston Chamber of Commerce; the Park Board of Trustees of the City of Galveston; J. D. Gregory; Harris County; Harris County Attorney's Office, Harris County Commissioners Court, and the Texas Conference of Urban Counties (collectively); the City of Houston; the Houston Air Alliance; the Port of Houston Authority; Patricia Janki, M.D.; Steve and Carol Jones; Kendall County and County Attorney Donald W. Allee; Marie B. McDonald; Richard McLaughlin, Endowed Chair for Marine Policy and Law at the Harte Research Institute for Gulf of Mexico Studies at Texas A&M University–Corpus Christi, and Frederick J. McCutchon, Wood Boykin & Wolter PC; Jerry Patterson, Commissioner of the Texas General Land Office (individually); Sonya Porretto; Brooks Porter; State Representative Richard Peña Raymond; Michael R. Riley; D. Ruth Rumsey; Travis W. Rutledge et al.; Save our Beach Association and Friends of Surfside; A.R. "Babe" Schwartz; Charlotte Stirling; the Surfrider Foundation; the Village of Surfside Beach; the Texas Chapter of the American Shore and Beach Preservation Association; the Texas Public Policy Foundation; David Todd; Travis County; and We Texans and Texas United for Reform and Freedom (jointly).

> 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). The central issue in this case is one of first impression for this Court: 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 may also shift. Beachfront property lines retract or extend as previously dry lands become submerged or submerged lands become dry. 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 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 parcels or onto new portions of previously encumbered private beachfront parcels when avulsive events cause dramatic changes in the coastline.[2]

We have carefully considered the state officials' arguments on rehearing. The State argues that the answer to the first question is "yes." In other words, the State claims that it is entitled to an easement on privately owned beachfront property without meeting the law's requirements for establishing an easement—a dedication, prescription, or custom. Under the common law, the State's right to submerged land, including the wet beach, is firmly established, regardless of the water's incursion onto previously dry land. In contrast, the State has provided no indication that the common law has given the State an easement that rolls or springs onto property never previously encumbered. There are policies that favor and disfavor the right the State claims, but the right cannot be found in the law. The law allows the State to prove an easement as would anyone else.

I. Introduction

As we acknowledge continuous and natural physical changes in the West Galveston shoreline, we must also recognize ages-old private property rights that are protected by law. Private property ownership pre-existed the Republic of Texas and the constitutions of both the United States and Texas.[3] *See Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 140 (Tex. 1977) (citing *Pa. Coal Co.*

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[2] Distinctions in legal consequences between gradual erosive versus dramatic avulsive changes in waterfront property have been recognized in Texas common law for over a century and by the English common law for at least two and a half centuries. *See* Part III.A., ___ S.W.3d at ___, *infra*.

[3] The Bill of Rights, including the Fifth Amendment protection of property rights, was not part of the original Constitution ratified in 1788. After an outcry that the Constitution did not protect the rights of individuals vis-a-vis the government, twelve amendments to the Constitution were proposed to the people for ratification, and ten were ratified. *Bute v. Illinois*, 333 U.S. 640, 651 (1948); ROBERT J. ALLISON, AMERICAN ERAS: DEVELOPMENT OF A NATION (1783–1815) 208 (1997). They became know as the Bill of Rights.

v. Mahon, 260 U.S. 393 (1922)); *In re Knott*, 118 S.W.3d 899, 902 (Tex.App.—Texarkana 2003, no pet.). Both constitutions protect these rights in private property as essential and fundamental rights of the individual in a free society.

Private property rights have been described "as fundamental, natural, inherent, inalienable, not derived from the legislature and as pre-existing even constitutions." *Eggemeyer*, 554 S.W.2d at 140.[4] These constitutional protections underlie our analysis in this proceeding. The question to the Court is to define the scope of the property rights at issue.

Generally, an owner of realty has the right to exclude all others from use of the property, one of the "most essential sticks in the bundle of rights that are commonly characterized as property." *Dolan v. City of Tigard*, 512 U.S. 374, 384, 393 (1994); *Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419, 435–36 (1982) (characterizing the right to exclude as "one of the most treasured strands in an owner's bundle of property rights" and observing that "an owner suffers a special kind of injury when a *stranger* directly invades and occupies the owner's property"); *U.S. v. General Motors Corp.*, 323 U.S. 373, 378 (1945) ("property" denotes the group of rights "to possess, use and dispose of it"); *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 634 (Tex. 2004); *Marcus Cable Assoc., L.P. v. Krohn*, 90 S.W.3d 697, 700 (Tex. 2002).

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[4] Private property rights are considered fundamental rights under the Constitution. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) (describing "one's right to life, liberty, and property" as "fundamental rights"); *In re Kemmler*, 136 U.S. 436, 448 (1890) ("Protection to life, liberty, and property rests primarily, with the states, and the [14th] amendment furnishes an additional guaranty against any encroachment by the states upon those fundamental rights which belong to citizenship . . . ."); *Kelo v. City of New London*, 545 U.S. 469, 510–11 (2005) (Thomas, J., dissenting) ("The Public Use Clause, in short, embodied the Framer's understanding that property is a natural, fundamental right . . . ."); *see* James Madison, *Property*, 27 Mar. 1792, *reprinted in* 14 THE PAPERS OF JAMES MADISON 266 (Robert A. Rutland et al., eds., 1983) ("Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*.").

Limitations on property rights may be by consent of the owner, state condemnation with payment of just compensation, appropriate government action under its police power (such as addressing nuisances), sufficient proof of use by persons other than the owner that creates an estoppel-based right to continuing use (easements) or pre-existing limitations in the rights of real property owners that have existed "since time immemorial," in the words of the Texas Open Beaches Act (OBA).[5] TEX. NAT. RES. CODE §§ 61.001(8). The State of Texas takes the position that owners of private property adjacent to the beach in West Galveston Island have never had the right to exclude the public from their property in the dry beach. Because there is no such limitation established in the property owner's deed to the property at issue, or agreed to by the owner, and the State has not attempted to prove an easement on the property, this legal position raises the question of whether limitations on real property rights on the western portion of Galveston Island existed since time immemorial, as required by the OBA.

Legal encumbrances or reservations on private property rights on the West Beach of 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 recognizing public easements on privately owned portions of these beaches or rolling public easements. Prior to 1836, Mexican law precluded colonization of Galveston's beachfront lands for national defense and commercial purposes without

[5] In *Lucas v. South Carolina Coastal Council*, the Supreme Court noted that pre-existing restrictions in the "background principles of the [s]tate's law" of property could limit the rights of property owners. 505 U.S. 1003, 1029 (1992). However, merely pronouncing such a limitation on property rights, whether by judicial decree or executive fiat, would raise serious, constitutional concerns. *See Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, ___ U.S. ___, 130 S. Ct. 2592 (June 17, 2010); *Lucas*, 505 U.S. at 1029. The OBA's reference to "time immemorial" and the Supreme Court's reference to "background principles of [a] [s]tate's law" seem to connote a similar concept. In Texas, non-consensual limitations on property rights not adjudicated and accompanied by due process must have existed since time immemorial to constitute legitimate limitations on the inherent rights of private beachfront property owners.

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 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 principles are not extant in the origins of Texas. Indeed, the original, unrestricted transfer by the Republic to private parties leaves little occasion for the argument that background principles in Texas common law at the inception of this jurisdiction provide a basis for impressing the West Beach area with a public easement, absent appropriate proof.

The 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 since time immemorial . . . ." TEX. NAT. RES. CODE §§ 61.011(a), .013(a). Promulgated in 1959, the OBA did not purport to create public easements along Texas's ocean beaches, but 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 or inherent limitations on their property rights, the State must establish under principles of property law encumbrances on privately owned realty along the West Beach of Galveston Island. For an easement to roll, there must first be an easement.

II. 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 or Kennedy Beach property, is at issue in this case.[6] 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 seaward of Severance's Kennedy Drive property pre-existed her purchase. That easement was established in a default judgment, dated August 1, 1975,[7] 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

[6] 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 to the Fifth Circuit the district 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 remained subject to this litigation at the time we issued the original opinion.

[7] Attached to the amicus curiae brief submitted by Kendall County is a partial copy of an agreed judgment signed by the same trial court in the same case a month later, on September 8, 1975. Kendall County argues that the judgment established an easement on Severance's Kennedy Drive property. This argument and the judgment suffer from several deficiencies: 1) The issue was not raised by any party in this litigation in federal or state court. 2) The judgment was agreed to by two defendants and covers nine properties on Galveston's West Beach. It purports, however, to establish an easement along the entire West Beach and bind many landowners who were not parties to the lawsuit. 3) The September 1975 judgment was neither tried to a jury nor a judge but was agreed, as the parties had a right to do. However, a number of concerns would arise if a couple of property owners were sought out to agree to such an easement on their properties and then attempt to bind the many other property owners along the West Beach. 4) The easement the agreed judgment purports to establish runs from mean low tide to the vegetation line. Physically, such an easement could only encumber those private properties on the front row adjacent to the beach in September 1975. There is no evidence that the property Severance owned on Kennedy Drive was on the front row of West Beach in September 1975. Logic suggests that with a number of hurricanes re-contouring Galveston's beaches since 1975, including Hurricane Rita in 2005, the Kennedy Drive property was not on the front row in 1975. In fact, the court in *Matcha v. Mattox* cites evidence that the Galveston Beach vegetation line was moved landward from 125 to 150 feet by Hurricane Alicia in 1983. 711 S.W.2d 95, 97 (Tex.App.—Austin 1986, writ ref'd n.r.e.). 5) The September 1975 judgment states that Exhibits "B" and "C" attached thereto define the vegetation line along the beach at that time. Neither exhibit was included with the judgment attached to the amicus brief.

Rita devastated the adjacent property burdened by an easement and moved the line of vegetation landward. The entirety of the house on Severance's Kennedy Drive 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 upon 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 the case on the merits and for lack of jurisdiction. The federal district court dismissed Severance's case after determining her arguments regarding the constitutionality of a rolling easement while "arguably ripe" were deficient on the merits. *Severance v. Patterson*, 485 F. Supp. 2d 793, 800, 805 (S.D. Tex. 2007). Not presented with the information concerning the Republic's land grant, the court held that an easement on a parcel seaward 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. *Id.* at 802–04. Severance only appealed her Fourth and Fifth Amendment challenges to the rolling easement theory. On appeal, 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, 503–04.

We issued an opinion addressing the certified questions on November 5, 2010. *Severance v. Patterson*, 345 S.W.3d 18 (Tex. 2010, reh'g granted). On the State's motion, we granted the request for rehearing on March 11, 2011. While rehearing was pending in this Court, Severance sold the remaining property at issue in her suit to the City of Galveston in June 2011 as part of a disaster-assistance program funded by the Federal Emergency Management Agency. *See* 42 U.S.C. § 5170c. The State then requested that we vacate our November 5, 2010 opinion and return the matter to the Fifth Circuit to dismiss as moot. The State also filed a similar motion before that Court. We abated our rehearing on July 29, 2011 to allow the Fifth Circuit to resolve the mootness issue raised by the State. Following briefing by the parties, the Fifth Circuit issued an order dated September 28, 2011 denying the State's request, concluding that the statutory threat of civil penalties imparted continued vitality to Severance's action. After the Fifth Circuit determined that the dispute between the parties continues to present a live controversy, we reinstated, on October 7, 2011, our consideration of the matter on rehearing.

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 rolling 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)).

Certainly, there is a history in Texas of public use of public Gulf-front beaches, including on Galveston Island's West Beach. On one hand, the public has an important interest in the enjoyment of the 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. The boundary distinguishing private property rights is set forth in the definition of public beaches, prudently set forth in the OBA.

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 "[p]ublic beach[es]" 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).[8] 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 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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[8] In 2009, Texas voters approved an amendment to the Constitution to protect the public's right to use "public beach[es]" of the Gulf of Mexico. TEX. CONST. art. I, § 33. Public beaches are defined, similar to the OBA, as state-owned beaches and "any larger area" in the wet or dry beach "to which the public has acquired a right of use or easement . . . or retained a right by virtue of continuous right." 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 OBA does not create easements for public use along Texas Gulf-front beaches. *Id*. at § 61.011(a); *Seaway Co. v. Att'y Gen.*, 375 S.W.2d 923, 929–30 (Tex. Civ. App.—Houston 1964, writ ref'd n.r.e.).

The wet beaches are all owned by the State of Texas, 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); Richard J. Elliott, *The Texas Open Beaches Act: Public Rights to Beach Access*, 28 BAYLOR L. REV. 383, 384 (1976) (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."). However, the dry beach often is privately owned and the right to use it is not presumed under the OBA.[9] The Legislature recognized that the existence of a public right to an easement in the privately owned dry beach area of West Beach is dependent on the government's

[9] 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.); Shannon H. Ratliff, *Shoreline Boundaries, Part I: Legal Principles*, Texas Coastal Law Conference, May 19-20, 2005 20 n.42 *reprinted in* Plaintiff's Appendix of Record Excerpts and Cited Materials at tab 6, *Severance v. Patterson* (No. 09-0387), ___ S.W.3d ___ (also noting the same constitutional concern).

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 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 house on the Kennedy Drive property was landward of the vegetation line. After Hurricane Rita, because the storm moved the vegetation and high tide lines landward, the property between Severance's land and the sea, on which a public easement had been established, 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 on 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, because Severance's house is now located in the dry beach, is it thereby subject to an enforcement action to remove it under the OBA? The Fifth Circuit's first question, its threshold inquiry, encompasses both whether an easement can "roll" from a parcel previously encumbered by an easement established by prescription, dedication, or custom to a distinct parcel not so encumbered as well as whether a previously established easement can roll from one portion of a parcel to another part of the same parcel. From the Fifth Circuit's opinion, we understand that no easement has been

proven to exist on Severance's property under the OBA or the common law. *See Severance*, 566 F.3d at 494 (noting that no easement had been established on Severance's property by prescription, implied dedication, or continuous right). Severance contends, and it is not disputed, 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, or whether principles of Texas property law provide for a rolling easement on the beaches along the Gulf Coast.

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."[10]); *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

[10] "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*, 143 S.W.2d 1028, 1033 (1940); *Crary v. Port Arthur Channel & Dock Co.*, 92 Tex. 275, 47 S.W. 967, 970 (1898)).

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).

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.[11] 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"] 97 (Austin, Gammel Book Co. 1898).[12] At the time that Texas became a republic, privately owned West Galveston lands were subject to significant governmental restrictions.

However, in November 1840, the Republic of Texas granted private title to West Beach property to Levi Jones and Edward Hall in a single patent (the "Jones and Hall Grant"). Jones and Hall Grant Papers, *available at* http://www.glo.texas.gov/cf/land-grant-search/index.cfm (search

[11] The briefs and the record do not address the effect of the early land grant of Galveston's West Beach.

[12] 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).

abstract number 121, Galveston County);[13] *see Seaway*, 375 S.W.2d at 928. 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, *reprinted in* 3 GAMMEL, THE LAWS OF TEXAS, at 1020; Act of Feb. 8, 1854, 5th Leg., R.S., ch. 73, § 1, 1854 Tex. Special Laws 125–26, *reprinted in* 4 GAMMEL, THE LAWS OF TEXAS, at 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").[14] In the 1854 Act, 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.[15] The

[13] All Internet materials as visited March 14, 2012 and available in clerk of Court's file.

[14] 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 125–26, *reprinted in* 4 GAMMEL, THE LAWS OF TEXAS, at 125–26.

[15] 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 (1838), *reprinted in* 1GAMMEL, THE LAWS OF TEXAS, at 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

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.

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.[16] 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

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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. *City of Galveston v. Menard*, 23 Tex. 349, 391 (1859).

[16] 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 3–4, *reprinted in* 2 GAMMEL, THE LAWS OF TEXAS, at 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).

the public trust extended to the vegetation line and included the dry beach. The State argued that it did. *Luttes* rejected that proposition and established the landward boundary of the public trust at the mean high tide line. *Luttes*, 324 S.W.2d at 187.

These boundary demarcations, linked to vegetation, high tide, and low tide lines 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 also constantly affected by the tide, wind, and other forces of nature.

A person purchasing beachfront property along the Texas coast does so with the risk that her 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 naturally and 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.* at 100–01. 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. Because the State could no longer lay claim to the dry beach as part of the public trust, some feared that this holding might "'give encouragement to some overanxious developers to fence the seashore'" in the dry beach 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 (quoting Richard M. Morehead, *Texas Coast Gets Wave of Attention at Session*, DALLAS MORNING NEWS, May 30, 1959, at 10 (quoting Rep. Bob Eckhardt (Hou.))). 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 if the public had 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 use State-owned beaches. Therefore, the OBA, by its terms, does not create or diminish substantive property rights. The statute cannot truly be said to create any new rights. *See* BEACH STUDY COMM., FOOTPRINTS 17 (noting that the OBA "does not and can not, declare that the public has an easement to the beach, a right of access over private property to and from the State-owned beaches bordering on the Gulf of Mexico"); Elliott, 28 BAYLOR L. REV. at 392 ("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 of Gulf-shore beach property. *Id.* § 61.023 (noting that "[t]he provisions of this subchapter shall not be construed as affecting in any way the title of the owners of land adjacent to any state-owned beach bordering on the seaward shore of the Gulf of Mexico . . . ."); *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.[17]

In 1969, the Legislature's Interim Beach Study Committee, chaired by Senator A.R. "Babe" Schwartz of Galveston County, confirmed 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*.

BEACH STUDY COMM., FOOTPRINTS 17 (emphasis added). The Legislature created the Interim Beach Study Committee, 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.

[17] 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, negotiations to obtain them would not be necessary.

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.[18] The State obtained the *Hill* judgment in August 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 is subject to a rolling 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 dry beach.

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[18] The district court opinion mentions in a parenthetical phrase that Severance admitted that an easement existed on her properties when she purchased them. On rehearing at the district court, Severance objected to the statement. The Fifth Circuit, as quoted, appears to disagree with it. The State has not asserted either that an easement existed on Severance's Kennedy Drive property when she purchased it or that she admitted to its existence, but the State does contend that, essentially, a virtual easement always exists on private property in the dry beach by virtue of the "rolling easement" theory. *See* JUSTICE MEDINA's dissent, ___ S.W.3d at ___; JUSTICE LEHRMANN's dissent, ___ S.W.3d at ___.

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.

III. 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* Part II.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.").[19] 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.

A. Dynamic Nature of Beachfront Easements

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

[19] The State argues that four courts of appeals opinions establish legal limitations dating back to "time immemorial" on private title to West Galveston property. *See* TEX NAT. RES. CODE § 61.001(8). These opinions are discussed further at Part III.C, *infra*.

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.*

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.

Courts generally adhere to the principle "that a riparian or littoral owner acquires or loses title to the land 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. "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 . . . ." *Id.* at 952. "Accretion" is the process of "gradual enlargement" of riparian or littoral land. *York*, 532 S.W.2d at 952. Closely related, "erosion" is "the gradual wearing away of the land." *Brainard v. State*, 12 S.W.3d 6, 10 n.1 (Tex. 1999). *See also* BLACK'S LAW DICTIONARY at 582 (8th ed. 2004) (defining "erosion" in relevant part as "the gradual eating away of soil by the operation of currents or tides"). Avulsion, by contrast, as derived from English common law, is the sudden and perceptible change in land and is said not to divest an owner of title. *York*, 532 S.W.2d at 952. We have never applied the avulsion doctrine to upset the mean high tide line boundary as established by *Luttes*.[20] 324 S.W.2d at 191. We have previously recognized the import of gradual additions to oceanfront land holding that additions to the property above the high tide line caused by accretion belong to the upland owner. *State v. Balli*, 190 S.W.2d 71, 100 (Tex. 1944); *see also Lakefront Trust, Inc. v. City of Port Arthur*, 505 S.W.2d 606, 608 (Tex. Civ. App.—Beaumont 1974, writ ref'd n.r.e.) (citing the general rule).

On rehearing, respondents and the dissents of JUSTICE MEDINA AND JUSTICE LEHRMANN, along with several amici, contend that the legal distinction between avulsion and erosion is immaterial. On the contrary, the distinct legal consequences arising from the difference between avulsive and gradual changes in land due to natural causes have been recognized in Texas law for

[20] 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, Inc.*, 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.

over a century. *See Denny v. Cotton*, 22 S.W. 122, 125 (Tex. Civ. App. 1893, writ ref'd) (stating the distinction in relation to riparian ownership). Avulsion is a rapid and perceptible change; accretion and erosion are gradual and imperceptible changes. *York*, 532 S.W.2d at 952 (concerning waters of the Houston Ship Channel) (citing *Denny*, 22 S.W. at 125); *Manry v. Robison*, 56 S.W.2d 438, 443–44 (Tex. 1932) (discussing the effect of erosion as dispossessing riparian landowners of their title). "The rule is long established that a change is 'gradual and imperceptible' if 'though the witnesses may see, from time to time, that progress has been made, they could not perceive it while the progress was going on.'" *Brainard*, 12 S.W.3d 6, 18 (Tex. 1999) (quoting *Denny*, 22 S.W. at 124); *see Nebraska v. Iowa*, 143 U.S. 359, 368 (1892). The venerable authority Sir William Blackstone explained in 1766, also in the context of property ownership, that different legal consequences are occasioned by gradual changes versus sudden changes: ". . . the law is held to be, that if th[e] gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining" but if the change be "sudden and considerable, in this case it belongs to the king." 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND [hereinafter BLACKSTONE, COMMENTARIES] *262 (1766); *see Cnty. of St. Clair v. Lovingston*, 90 U.S. 46, 67 (1874) (quoting Blackstone). "So that the quantity of the ground gained, and the time during which it is gaining, are what make it either the king's, or the subject's property." BLACKSTONE, COMMENTARIES *262; *see also York*, 532 S.W.2d at 952. Analogously, the legal implications of erosion differ from those of avulsion in the context of easements. The holding in this case arises in part from the distinction between avulsive and gradual changes along the beach, but we do not

decide whether this distinction in physical changes on the beaches necessarily has the same legal effects on riparian landowners.

Property along the Gulf of Mexico is subjected to hurricanes and tropical storms, on top of the everyday 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, and unsupported by ancient common law precepts, to hold that a public easement can suddenly encumber an entirely new portion of a landowner's property or a different 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 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, as opposed to avulsion, has 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 adjacent 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 and enforce an asserted public right to use the private land.

It would be impractical and 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, and perhaps unlawful, 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 is to have an easement on newly created and privately owned dry beach after an avulsive event, the State must prove it, as with other property. Having divested title to all such West Beach property in the early years of the Republic and of the State of Texas, the State can only acquire or burden private property according to the law. Thus, a public beachfront easement in West

Beach, although dynamic, does not roll under Texas law. 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 to which the easement was originally attached is violently washed away. 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 Flower Mound*, 135 S.W.3d at 634 (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.

We hold that Texas does not recognize a "rolling" easement.[21] Easements for public use of private dry beach property change size and shape along with the gradual and imperceptible erosion or accretion in 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. The division between public and private ownership remains at the mean

[21] This rule is a tenet of Texas common law, subject to ordinary grounds of modification, e.g., where private property rights for given beach areas are altered in conveyances of those lands.

high tide line in the wake of naturally occurring changes, and even when boundaries seem to change suddenly.[22]

Declining to engraft a "rolling easement" theory onto Texas property law does not render the State powerless to regulate Texas shorelines, within constitutional limits. For example, the State, as always, may validly address nuisances or otherwise exercise its police power to impose reasonable regulations on coastal property, or prove the existence of an easement for public use, consistent with constitutional precepts.

The dissents would reach a different result, arguing the public has the right to use the dry beach regardless of the boundaries of private property or the legal 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). Legal scholars have opined on the subject.

> Since a simple legislative declaration of policy, [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.

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[22] We do not address how artificial accretions or other artificial changes in the coastal landscape affect ownership. *See New Jersey v. New York*, 523 U.S. 767, 783–84 (1998) (explaining the littoral boundaries remained as they were before artificial land-filling increased the surface area of Ellis Island).

Elliott, 28 BAYLOR L. REV. at 385–86; *see also* Neal E. Pirkle, *Maintaining Public Access to Texas Coastal Beaches: the Past and the Future*, 46 BAYLOR L. REV. 1093, 1108 (1994) (noting that the consensus is that the OBA "creates no substantive rights for the public," but codifies existing common law). The legislature's Beach Study Committee opined that the OBA "does not and can not, declare that the public has an easement to the beach." BEACH STUDY COMM., FOOTPRINTS 17.

According to JUSTICE MEDINA's and JUSTICE LEHRMANN's dissents, 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. This 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 persuasive Texas authority to support the dissents' 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 or proof under law. *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.

JUSTICE MEDINA's dissent also 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 her parcel, a portion of which is now in the dry beach. It notes the OBA requirement of disclosure in executory 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 factual finding that an easement exists. We have determined that the history of land ownership in West Beach undermines 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 rolling 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 Severance*, 566 F.3d at 503–04.

B. Inherent Limitations on Private Property Rights

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 use even privately owned beachfront property. For example, the Oregon Supreme Court has held that the dry beach is subject to public use because the public use was presumed inherent in the history of title transfers to such lands. *Stevens v. City of Cannon Beach*, 854 P.2d 449, 456 (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.* 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. *See Pub. Access Shoreline Haw. v. Haw. Cnty. Planning Comm'n*, 903 P.2d 1246, 1268 (Haw. 1995). It explained that "the western concept of exclusivity is not universally applicable in Hawai'i" in the context of private property rights. *Id*. New Jersey extends the public trust doctrine to encompass use of the dry beach as well as public ownership of 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, 609 (N.H. 1994). The public trust ends at the high water mark and private property extends landward beyond that. *Id.* at 608. 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.* at 1095, 1102.

C. Custom in Texas

A few Texas courts of appeals have reached results contrary to the holding in this opinion. In *Feinman v. State*, the court held that public easements for use of dry beach can roll with movements of the vegetation line. 717 S.W.2d 106, 110–11 (Tex.App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.). The reasoning in the *Feinman* opinion includes little to support this conclusion in the context of avulsive changes to the oceanfront.[23] *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.[24] *Id.* at 110. Only one of the opinions is from a Texas court, *Luttes*, and neither it nor the other cited cases discuss

[23] To the extent that *Feinman*'s analysis concerns only gradual changes to the beachfront, it is generally consistent with our holding today. *See* 717 S.W.2d at 110. *Feinman* does not consider the legal implications of the difference between avulsive and gradual changes to the coast, concluding the distinction to be immaterial to its decision because it apparently viewed the distinction not relevant to the question of an easement, only title to property. *See* 717 S.W.2d at 114–15. We disagree with the latter conclusion.

[24] 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 v. Mattox*, 711 S.W.2d 95 (Tex.App.—Austin 1986, writ ref'd n.r.e.), and does not cite it for support of a migratory easement. 717 S.W.2d at 113.

rolling easements. *Feinman* further cited no Texas authority for the contention that a continuous right or custom dating from "time immemorial" is a basis to encumber private property rights along West Beach. *Id.* Our decision in *Luttes* established the landward boundary of title to the public trust along Gulf-front beaches and it likewise does not address rolling easements. *See* 324 S.W.2d at 167. 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). And *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 historic Texas law for a continuous legal right or custom on which to ground the existence of a rolling easement. *Feinman's* specific holding is that a rolling easement is "implicit" in the OBA, a conclusion with which we do not agree. *See* 717 S.W.2d at 111.

The State's reliance on *Feinman* for the conclusion that a rolling easement exists by virtue of custom on private beachfront property generates significant tension with the prior decision of *Seaway*, which determined there was no such rule of law.

> It would no doubt have been good policy for the Republic to have reserved the right of ingress and egress [in the Jones and Hall Grant] so the people could more effectively enjoy the State-owned seashore and waters, but the plain language of the grant shows the Republic of Texas did not do so . . . . The sovereign must fully honor its valid conveyances and contracts. We do not know that we clearly comprehend the appellees' position that the judgment can be upheld on the theory that the use of the beach by the public has become a part of our tradition and common law and the easement exists by reason of continuous right in the public. We suppose they seek to have us hold that the seashore is held in trust by the sovereign at common law for the people and to enjoy it there must be a means of egress and ingress to enable them to enjoy such use and therefore the sovereign has no power

> to cut off convenient access. *We know of no such rule of law. In our extensive research we have found no cases so holding nor have any been cited us.*

375 S.W.2d at 929 (emphasis added). *Feinman* reached the same conclusion. 717 S.W.2d at 110–11. *Feinman* did not hold that custom supported imposition of a public easement, explicitly stating it was unnecessary to do so. 717 S.W.2d at 113. Instead, *Feinman* held that an easement by implied dedication had been proven by "[e]vidence show[ing] daily systematic use of the whole area," while the State in this case asserts that such proof is not necessary. *Id.*[25]

One other appellate decision also recognizes a rolling easement, relying on *Feinman* and *Matcha v. Mattox*. *See Arrington v. Tex. Gen. Land Office*, 38 S.W.3d 764, 766 (Tex. App.—Houston [14th Dist.] 2001, no pet.) (citing both *Feinman* for the proposition that a rolling easement is "implicit" in the OBA and *Matcha v. Mattox*, 711 S.W.2d 95, 100 (Tex.App.—Austin 1986, writ ref'd n.r.e.), for the idea that established public beach easements may "shift[] with the natural movements of the beach"). Finally, the *Seaway* opinion did not address the issue of a rolling easement but held that the State proved an easement by evidence submitted to a jury at trial, interestingly relying on testimony that the line of vegetation at issue had remained the same "for at least 200 years." 375 S.W.2d at 927, 930, 939.

The first Texas case to address the concept of a rolling easement in Galveston's West Beach is *Matcha v. Mattox*. In 1983, Hurricane Alicia shifted the vegetation line on the beach such that the Matchas' home had moved into the dry beach. *Id.* at 96. The court held that legal custom—"a

[25] Alternatively, the State contends that this Court should take judicial notice of such evidence discussed in cases several decades old. But even the State's cited authority declined to rely on a trial court judgment purporting to adjudicate the vegetation line because it was "not of record in this appeal." *See Matcha*, 711 S.W.2d at 100.

reflection in law of a long-standing public practice"—supported the trial court's determination that a public easement had "migrate[d]" onto private property. *Id*. at 100. 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. The *Matcha* opinion, as with *Feinma*n, fails to cite any Texas authority holding that custom establishes a rolling beachfront easement.

Even if a custom of public use on West Galveston beaches were recognized, the State would still have to establish the basis in custom of the right in the public to a rolling easement to have existed since time immemorial. The *Matcha* court's upholding, based on proof at trial, of long-standing "custom" in public use of Galveston's beaches would still fall short of establishing that a custom existed to give effect to a legal concept of a rolling easement, which would impose inherent limitations on private property rights. 711 S.W.2d at 100; *see Trepanier v. Cnty. of Volusia*, 965 So. 2d 276, 293 (Fla. App. 2007) (criticizing *Matcha* for making a policy judgment that a public easement migrates and noting the distinction between a custom of use and whether such right of use is migratory); *cf. Scureman v. Judge*, 747 A.2d 62, 67–68 (Del. Ch. 1999) (rejecting application of the "rolling easement" concept in *Feinman*).

None of the four Texas courts of appeals cases cited in support of a rolling easement date back to time immemorial nor do they provide a legal basis for recognizing the claimed inherent limitation on West Galveston property titles or continuous legal right since time immemorial. We disapprove of the 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; *but see* Pirkle, 46 BAYLOR L. REV. at 1106–07 (questioning whether the rolling easement theory should apply to easements by prescription and dedication).

In her dissent, JUSTICE GUZMAN argues that the Court should split the baby by pronouncing that private property owners must forfeit to the State some but not all of their property rights, notwithstanding the absence of proof of an easement and without the payment of just compensation. She contends that the State can order beachfront property owners to let the public use their private land in the dry beach as long as the house on the land is not ordered removed. Her view would create an anomalous circumstance in which a homeowner on the West Galveston beachfront could, sitting in her den, look out her window, without recourse, as strangers play beach volleyball in her yard. Under JUSTICE GUZMAN's dissent, the private homeowner would have no right to keep strangers from using the property she purchased surrounding her beachfront home.

The State's position and the dissents suffer from the same fundamental flaw. They all fail to cite any authority for the proposition that background principles of Texas property law preclude private beachfront property owners from ever having had the right to exclude strangers from their land, as other Texas property owners do. The Texas appellate opinions discussed, being at most a few decades old, are not authority going back to "time immemorial" and they do not cite any authority for such an ancient, inherent limitation. *See* Pirkle, 46 BAYLOR L. REV. at 1108 (stating that "English courts required custom to be immemorial, in other words, dating back to before King Richard I" (King of England from 1189-1199), and in translating the concept of "time immemorial"

to Texas, concluding that if Spanish or Mexican civil law governed at the time of the original grant, "the public would have no customary right" in the lands) (citing *Delaplane v. Crenshaw*, 56 Va. (15 Gratt.) 457, 473 (Va. 1860)). In fact, the one authority to specifically discuss the topic expressly refutes the existence of any such legal authority in Texas. *See Seaway*, 375 S.W.2d at 929.

JUSTICE GUZMAN's dissent cites the *Menard* case and a dissent in *Luttes v. State*, 324 S.W.2d 167, 197 (Tex. 1959) (Smith, J., dissenting, on motion for rehearing), for the proposition that there should be a "balance between public and private use" of the seashore as a predicate for her conclusion that the public has a right to use private property. *See City of Galveston v. Menard*, 23 Tex. 349 (Tex. 1859). She quotes *Menard*, at 394:

> This *species of property*, being land covered with navigable water, embraces several rights that may be separated, and enjoyed by different persons, and may become thereby, *partly private and partly public*; as, the right to the soil, a right to fish in its waters, the right to navigate the waters covering it, etc.

___ S.W.3d ___ (Guzman, J., dissenting) (emphasis added). She then pronounces a "historic presumption of the public's right to use the dry beach." *Id.* at ___. Of course, the dissent in *Luttes* is not precedential. Importantly, the "species of property" in dispute in *Menard* is a grant to "that part of the Galveston bay . . . usually covered with salt water, which constitute[s] what is called the 'flats.'" *Menard*, 23 Tex. at 391. The reasoning in *Menard* concerns property that is entirely underwater or within the wet beach, i.e., property in the public trust owned by the State. It is inapposite to the Kennedy Beach property in the dry beach in this case and does not support the contention that private property owners in the dry beach must share their land with anyone who wishes to use it for beach recreation. While JUSTICE GUZMAN accurately quotes the case, the

Menard opinion makes clear that the "shore" to which she refers does not include the dry beach. *Id*. at 399–400 (noting that the "shore" extended "to the line of the highest tide in winter" under the civil law but only to the "line of ordinary high tide" at common law). The State's and the dissents' contention also fails to explain the source of such limitations on beachfront property rights in light of the Republic's and the State's unrestricted conveyances in the Jones and Hall grant of this previously state-encumbered land to private owners at the inception of the Republic and reaffirmed by the Legislature after Texas became a state. *See Seaway*, 375 S.W.2d at 929 ("We may not imply such a reservation in the face of the language of the grant even though there is evidence that there was a road down the beach at the time of the grant.").

Although not clear, it appears the State and the dissents also contend that Galveston's West Beach property owners lost the right to exclude the public from their private property after Texas became a state through some type of custom, notwithstanding the position's implicit acknowledgment that they have failed to establish such a right "since time immemorial." Their reasoning is hard to discern. They seem to argue that evidence, in other cases, of use of beach parcels washed away decades ago is sufficient to establish a custom justifying encumbrance of private properties on the beachfront today. As pointed out, there is no evidence in this record of such use. However, they attempt to characterize proof in other cases of prior public use on different beachfront properties as a type of legally cognizable custom that is sufficient to pronounce a current right in the public to use private West Galveston property today. Their position juxtaposes evidence of public use with the existence of a legal custom they contend establishes a public easement, arguing that the former proves the latter. That reasoning melds the concept of a legal custom with

proof of an easement and begs the question, why the State does not simply prove up an easement to encumber private homeowners' properties. And they do not explain the logic of extrapolating their view of such a custom from judicially noticed evidence of public use in one area throughout the entirety of Texas' ocean shores. Crediting that view would dispossess many beachfront property owners along the Texas coast of the land they purchased, raise constitutional questions and bring into consideration, potentially, tremendous liability of the State for just compensation.

Alternatively, they seem to theorize that custom is a legal doctrine that need not be proven, just recognized by a judge. That view is unsupported by historic jurisprudence of this State and we decline the invitation to pronounce such a limitation on private property rights today. Their view also raises paramount concern for the constitutions' protection of this individual liberty. Without just compensation for a public purpose, neither the federal nor the state constitution allows a taking nor JUSTICE GUZMAN's theorized partial taking of private property. The Court's holding is consistent with constitutional protections of individual property rights, and effectuates the OBA's protection of public right to use public beachfront property that is either "acquired" by prescription or dedication or "retained by virtue of continuous right in the public since time immemorial . . . ." *See* TEX. NAT. RES. CODE § 61.001(8).

IV. Conclusion

Land patents from the Republic of Texas in 1840, affirmed by legislation in the new State of Texas a few years later, 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. Texas law has not otherwise recognized such an inherent limitation on property rights along the 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 spring 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.[26]

_____

Dale Wainwright
Justice

OPINION DELIVERED: March 30, 2012

[26] We need not address whether the OBA is the exclusive means to establish public beachfront easements.

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

ON CERTIFIED QUESTIONS FROM THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JUSTICE MEDINA, joined by JUSTICE LEHRMANN and, in part, by JUSTICE GUZMAN, 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 Gen.*, 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").

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] 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 id.* § 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

[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" is the mean high tide. *Luttes*, 324 S.W.2d at 187.

have never held 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

[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.

exposure 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*.

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

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[9] *Id.*

[10] *Id.*

[11] The Open Beaches Act recognizes 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). And Texas case law has recognized the rolling nature of public beachfront easements. *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).

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 (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

[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).

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, 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

[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*.

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* note 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

Texas case law not only recognizes the existence of public beachfront access easements but also that such easements "roll" with the movements of their dynamic, natural boundaries.[14] Before

[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.*

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 (after Tropical Storm Frances); *Brannan v. State*, No. 01-08-00179-CV, 2010 WL 375921, at *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."

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* note13, at 994.

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). Applicable law 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 processes* such as shoreline erosion are subject to a lawsuit by the State of Texas to remove the structures.

Id. § 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'l. 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 channel, and within given banks, which are the real international boundary." *Nebraska v. Iowa*, 143 U.S. 359, 362

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 existing easement. Because the Court requires the state to re-establish its easement after avulsive

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(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. Michael Hofrichter, *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).

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: March 30, 2012

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

ON CERTIFIED QUESTIONS FROM THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JUSTICE WILLETT, concurring.

I join the Court's opinion and write separately to underscore a point easily overlooked by casual readers: Today's decision centers on West Galveston Island, not the entire Gulf Coast.

The Fifth Circuit asks broadly whether Texas law mandates an unproven rolling easement on *all* private Gulf-front beaches. While holding generally that such an easement is not embedded in Texas common law (unlike the State's right to submerged land), the Court focuses its analysis on Severance's property, emphasizing the unique historical lineage of title to West Galveston Island. The Court recognizes, if obliquely, that Texas's 367-mile shoreline is governed by different land patents and conveyances that may impose varying limitations, including encumbrances for public use. In short, the absence of a common-law theory of an easement that leaps onto private land upon which the public has never set foot in no way forecloses the State from proving an easement the old-fashioned way, using traditional means. Upshot: Easements may well burden private Gulf Coast properties, including on West Galveston Island—but they must be proved, not merely presumed.

Don R. Willett
Justice

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JUSTICE GUZMAN, dissenting.

The boundaries of Texas's beaches are dynamic, as recognized by the laws of nature and our state's common law, statutes, and Constitution. I therefore join Justice Medina's dissent in part because I agree that (1) Texas common law establishes the concept of a migratory public beachfront access easement that moves in accordance with the ever-shifting boundaries of the dry beach, and (2) the Court's conclusion that *title* shifts due to both avulsive and accretive events, yet that any corresponding *easement* allowing public use of the dry beach shifts only due to accretion but not avulsion, has no basis in logic or Texas law. Thus, the answer to the first certified question must be yes. I further agree with Justice Medina that, in answer to the second certified question, the easement traversing Carol Severance's property is derived from common-law doctrines rather than a construction of the Open Beaches Act.

However, I do not believe that a coastal landowner like Severance, whose property is burdened with an easement, is required to remove or is otherwise unable to use and maintain her home in order to accommodate the easement. The common law of this state has long envisioned a proper balancing between public and private use of the dry beach, and the law of easements does not allow an easement holder to unreasonably burden the servient estate. Thus, in answer to the third certified question, I would hold that while the public's reasonable use of a rolling easement over a private beach does not generally entitle a property owner to compensation, such an easement would unreasonably burden the servient estate if the property owner was unable to use and maintain her home. In those circumstances, the property owner would be entitled to compensation for a taking.

I. Balance of Public and Private Interests at the Seashore

The law of this state has long recognized the need for a balance between public and private use of one of the state's most valuable resources: its seashore. *See City of Galveston v. Menard*, 23 Tex. 349, 393 (Tex. 1859) ("This species of property, being land covered with navigable water, embraces several rights that may be separated, and enjoyed by different persons, and may become thereby, *partly private and partly public*; as, the right to the soil, a right to fish in its waters, the right to navigate the waters covering it, etc." (emphasis added)). The need to balance public and private rights to the seashore dates back even further than the days of the Republic, when the Texas coast was governed by Spanish law. *See Luttes v. State*, 324 S.W.2d 167, 197 (Tex. 1959) (Smith, J., dissenting) ("Every man can build a house or a hut on the seashore where he can find shelter whenever he wishes; he can also build there another edifice whatsoever for his own benefit,

provided the common use (of the seashore) of the people is not hampered; and he can construct galleys and any other kind of ships and dry nets there and make new ones if he desires to do so . . . ." (quoting Law IV, Title 28, PARTIDAS III)).[1]

A customary easement is a recognized common-law principle, *see, e.g.*, *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73, 78 (Fla. 1974); *State ex rel. Haman v. Fox*, 594 P.2d 1093, 1096 (Idaho 1979); *State ex rel. Thornton v. Hay*, 462 P.2d 671, 674 (Or. 1969), and contemplates a balance of private and public property rights, *see City of Daytona Beach*, 294 So. 2d at 78 ("[T]he owner may make any use of his property which is consistent with such public use and not calculated to interfere with the exercise of the right of the public to enjoy the dry sand area as a recreational adjunct of the wet sand or foreshore area."); Mike Ratliff, Comment, *Public Access to Receding Beaches*, 13 HOUS. L. REV. 984, 991 (1975) (observing that only easements of use and passage are obtained by custom, with the fee and rights to profits of the land remaining with the land owner). Custom has deep roots in the English common law. *See* WILLIAM BLACKSTONE, 1 COMMENTARIES *74. The high courts of several states have recognized the proper operation of customary law in the specific context of public beaches. *See City of Daytona Beach*, 294 So. 2d at 78; *In re Application of Ashford*, 440 P.2d 76, 77 (Haw. 1968); *Fox*, 594 P.2d at 1101; *Hay*, 462 P.2d at 673. This Court has also observed that public rights to the shoreline can be established by immemorial custom. *Menard*, 23 Tex. at 393.

A customary easement is tied to a locale and is not vested in a particular piece of property

[1] *See* William Gardner Winters, Jr., *The Shoreline for Spanish and Mexican Grants in Texas*, 38 TEX. L. REV. 523, 528 n.37 (1960) (describing Las Siete Partidas as the basic law of Spain and Mexico until the modern Civil Codes were adopted in the late nineteenth century).

or defined by a particular path of use. *See City of Daytona Beach*, 294 So. 2d at 78 ("This right of customary use of the dry sand area of the beaches by the public does not create any interest in the land itself."). Thus, an easement established by custom is not limited to one particular individual or the owner of a particular estate, nor is it constricted by metes and bounds. Instead, it attaches to a locale, in this case the dry beach. *See* David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 COLUM. L. REV. 1375, 1396 (1996); *see also* WILLIAM BLACKSTONE, 2 COMMENTARIES *263 (observing that custom is applied to a place in general and not to any particular person).

The Court correctly observes that the Republic of Texas granted private title to West Beach property on Galveston Island in the Jones and Hall grant in 1840 without an express reservation of title or public use. *See Seaway Co. v. Att'y Gen.*, 375 S.W.2d 923, 928 (Tex. Civ. App.—Houston 1964, writ ref'd n.r.e.). And it is settled law that the land between the mean high tide line and the vegetation line constitutes the dry beach and may be privately owned. *See Luttes*, 324 S.W.2d at 191–93. But before this Court decided *Luttes*, both property owners and the public apparently assumed the public's right to freely use the dry beach, *see* Neal E. Pirkle, *Maintaining Public Access to Texas Coastal Beaches: The Past and the Future*, 46 BAYLOR L. REV. 1093, 1093 (1994), a right dating back to Spanish law, *see* LAS SIETE PARTIDAS, Third Partida, Title 28, Law IV (Samuel Parsons Scott trans., 1931) ("Every man can build a house or a hut on the sea shore which he can use whenever he wishes . . . provided the common custom of the people is not violated . . . ."); *see also Luttes*, 324 S.W.2d at 197 (Smith, J., dissenting) (observing that "[t]his definition [from the Partidas] is that the seashore is a place where every man may build a house or other building, build

boats and dry nets. Very few men would want to build a house out in the water and none would want to stand in the water while building their boats, and most conclusive of all, none would attempt to dry his nets in water or even on the wet portion of the beach."). Thus, although the Court denies that the public used the beach on Galveston Island dating back to "time immemorial," there are indications of this customary use from even before the existence of the Republic.

The Court concludes that even if such customary use of the beach existed, it was cut off following the Jones and Hall grant of 1840. __ S.W.3d __, __. But it is inaccurate to assume, solely based on the express terms of the Jones and Hall grant, that any right the public had to use the dry beach was completely eradicated in favor of private ownership from that point forward.

First, it is not clear that the Jones and Hall grant cut off any customary right of use the public may have had to West Beach. This Court's *Menard* decision suggests the contrary. Although *Menard* primarily concerned the wet beach on the east end of Galveston Island, its reasoning nonetheless indicates that land grants by the early Republic did not necessarily extinguish customary rights of use. *See Menard*, 23 Tex. at 394–97. There, the Court noted that under the common law, an ordinary grant of the shoreline did not generally "convey the shore or any of the land of the bay covered with water," and under civil law the seashore was generally "reserved for common use." *Id.* at 395. The *Menard* Court went on to conclude that the particular land grant in that case included the shore and water to a fixed point, but only because Menard and the government had specifically negotiated the unusual result. *Id*. at 397. The court considered their shared purpose of creating a city, harbor, and port of entry at Galveston, which required private ownership of "streets and lots running up to, and bordering on the channel of the bay" in order to allow the construction of

wharves. *Id*. The Court observed that the sovereign has the power to convey even submerged lands, and did so in that case because it was the shared purpose of the contracting parties, but explained that such a broad grant was unusual, and that normal grants would not extend so far. *Id.* at 392. Given the historic presumption of the public's right to use the dry beach, dating back to the days before the Republic, *see* LAS SIETE PARTIDAS, Third Partida, Title 28, Law IV (Samuel Parsons Scott trans., 1931), it is hardly definitive that an ordinary grant of the nature of the Jones and Hall grant automatically extinguished all public *use* of the shore, even when title shifted.

But even if any easement of customary use was revoked by the Jones and Hall grant, it was subsequently re-established as to West Beach in general, as demonstrated by the Houston court of appeals' *Feinman* and *Seaway* decisions which painstakingly detailed the public's use of West Beach over the past 150 years. *See Feinman v. State*, 717 S.W.2d 106, 111–13 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.) (surveying evidence and concluding that a public easement was established on West Beach, Galveston Island by implied dedication, with evidence also supporting the trial court's finding of an easement established by prescription and custom); *Seaway*, 375 S.W.2d at 930–39 (surveying evidence and concluding that a public easement was established on West Beach, Galveston Island by prescription and implied dedication).[2] The Court here perfunctorily notes the absence of any historic custom of public use on private West Beach property. But, as mentioned, this Court has observed a public right of use that could be acquired by

[2] Though the *Seaway* court specifically found a public easement established on West Beach by prescription and implied dedication, the detailed evidence surveyed in that opinion just as easily supports an easement established by customary use. *See Matcha v. Mattox*, 711 S.W.2d 95, 98 (Tex. App.—Austin 1986, writ ref'd n.r.e.) (describing elements of easement by customary use as public use that is ancient, peaceable, certain, obligatory, exercised without interruption, and not repugnant with other custom or law) (citing *Hay*, 462 P.2d at 677).

immemorial custom, *see Menard*, 23 Tex. at 393, as have at least two courts of appeals, *see Matcha v. Mattox*, 711 S.W.2d 95, 98 (Tex. App.—Austin 1986, writ ref'd n.r.e.); *Moody v. White*, 593 S.W.2d 372, 379 (Tex. Civ. App.—Corpus Christi 1979, no writ). And the Court could easily take judicial notice of the detailed evidence set forth in *Seaway* and *Feinman* of widespread public use of West Beach over the past 150 years. It is therefore erroneous to conclude that a lack of evidence exists as to the public's customary use of that portion of Galveston Island.[3]

As noted, an easement established by custom is not limited to one particular individual or the owner of a particular estate, nor is it constricted by metes and bounds. Instead, it attaches to a locale, such as the dry beach of a particular area. *See* Bederman, 96 COLUM. L. REV. at 1396; *see also* WILLIAM BLACKSTONE, 2 COMMENTARIES *263.[4] I accordingly agree with Justice Medina that the public holds a dynamic easement on the dry sand of West Beach. But the public's right of use is not absolute. Instead, a private property owner like Severance continues to enjoy a strong property interest in her land that must be balanced with the public's use of the easement traversing her property, as reflected in rulings of this Court dating back to the 1800s, *see Luttes*, 324 S.W.2d

[3] The Court does acknowledge the easement established for use of a privately owned tract seaward of Severance's property in the 1975 default 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. That easement, which extended over the dry beach as demarcated by the vegetation line, was established by prescription, dedication, and continuous use of the public since time immemorial.

[4] The Court seems to also believe that an easement established by prescription or dedication may not shift in sync with the natural movements of the sea, a reasoning contradicted by the Court's conclusion that an easement may shift by accretion even to a previously unencumbered property. __ S.W.3d at __. Justice Medina ably addresses the infirmities of the Court's holding and reasoning, and so I do not replicate those arguments here. I do think it worth reiterating, however, that some portions of West Beach are eroding at a rate of seven feet a year. __ S.W.3d at __ (Medina, J., dissenting). It follows that, in the not-so-far-off future, the rolling easement by accretion that the Court acknowledges will inevitably move far enough to burden previously unencumbered properties.

at 191–93; *Menard*, 23 Tex. at 393, and in the law of easements.

II. The Law of Easements

An easement is a property interest in which the easement holder may use the property of another for a particular purpose. *Marcus Cable Assocs., L.P. v. Krohn*, 90 S.W.3d 697, 700 (Tex. 2002). A grant or reservation of an easement generally 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). Thus, an easement does not allow an easement holder complete and total use of the servient owner's land, nor does an easement enable its holder to use it in any manner, regardless of how burdensome its use is on the servient estate. Instead, the easement holder may only use the easement as is *reasonably* necessary and in a manner that is *as little burdensome* as possible. *See id*. As the Restatement of the Law provides:

> In resolving conflicts among the parties to servitudes, the public policy favoring socially productive use of land generally leads to striking a balance that maximizes the aggregate utility of the servitude beneficiary and the servient estate. Socially productive uses of land include maintaining stable neighborhoods, conserving agricultural lands and open space, and preservation of historic sites, as well as development for residential, commercial, recreational, and industrial uses. Aggregate utility is generally produced by interpreting an easement to strike a balance that maximizes its utility while minimizing the impact on the servient estate.

See RESTATEMENT (THIRD) OF THE LAW, PROPERTY (SERVITUDES) § 4.10, cmt. b.

In order to strike the proper balance between the property owner's interest in her land and the public's interest in its easement, I believe that the public has a right to use the beach around a house on the dry beach, and that a property owner may not erect fences or other barriers that impede the public's use of the easement. But it would unreasonably burden the servient estate to disallow

the property owner from using and maintaining her home. A public-use easement like that at issue here does not cede *exclusive* use of the land to the public, but instead leaves the rights of the property owner, with the exception of the right to exclude the public from access to the beach around the house. *See Coleman*, 514 S.W.2d at 903 ("No interest in real property passes by implication as incidental to a grant except what is reasonably necessary to its fair enjoyment."). If the State could claim a right to the public's absolute use of the private beach, the public's access easement would, in essence, constitute full fee simple title to the land, a result that does not comport with our decision in *Luttes* or Texas easement law. *See Coleman*, 514 S.W.2d at 903; *Luttes*, 324 S.W.2d at 191–93; *Cozby v. Armstrong*, 205 S.W.2d 403, 407 (Tex. Civ. App.—Fort Worth 1947, writ ref'd n.r.e.) ("[T]he owner of an easement does not acquire the right unnecessarily to continue it as originally used, if such use would in effect destroy the right of the owner of the fee to the enjoyment of his property."); *San Jacinto Co., Inc. v. Sw. Bell Tel. Co.*, 426 S.W.2d 338, 345 (Tex. Civ. App.—Houston [1st Dist.] 1968, writ ref'd n.r.e.) ("An easement . . . gives no exclusive dominant right over the servient land unnecessary to the enjoyment of such easement, and the dominant owner (easement owner) must make a reasonable use of the right so as not unreasonably to interfere with the property rights of the owner of the servient estate."); RESTATEMENT (THIRD) OF THE LAW, PROPERTY (SERVITUDES) § 4.10 ("[T]he [easement] holder is not entitled to cause unreasonable damage to the servient estate or interfere unreasonably with its enjoyment.").

The public can easily walk around the house in its ingress and egress to and from the water and enjoy beach recreation in the area around the house. Thus, I would conclude that the public may use the dry beach around Severance's house in order to accomplish the purpose of the easement, but

that enforcing the easement so that Severance no longer has use of her home would unreasonably interfere with her rights as private property owner.

III. Takings Law

The third certified question asks us whether a landowner would be entitled to receive compensation under Texas's law or Constitution for limitations on use of her property effected by the landward migration of a rolling easement onto her property. The Texas Constitution requires the State to compensate a person if the person's property is "taken, damaged or destroyed for or applied to public use," absent the person's consent. TEX. CONST. art. I § 17(a). "An inverse condemnation may occur if, instead of initiating proceedings to condemn property through its powers of eminent domain, the government intentionally physically appropriates or otherwise unreasonably interferes with the owner's right to use and enjoy his or her property." *State v. Brownlow*, 319 S.W.3d 649, 652 (Tex. 2010) (citing *Westgate, Ltd. v. State*, 843 S.W.2d 448, 452 (Tex. 1992)). Moreover, "[w]hen the owner of real property has been called upon to sacrifice *all* economically beneficial uses 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 (1992).

Though I agree with Justice Medina that the right to exclude the public from the dry beach around Severance's property was never part of her bundle of property rights due to the pre-existing dynamic easement on the dry beach, I believe that preventing a property owner from using and maintaining her home would (1) unreasonably interfere with the owner's right to use and enjoy her property, *see Brownlow*, 319 S.W.3d at 652, and (2) require the property owner to sacrifice all

beneficial use of her property, *see Lucas*, 505 U.S. at 1019. If a property owner may not maintain and use her home, the property, in essence, loses all value to the owner. Under either theory, the property owner would be entitled to compensation because she has suffered a taking.

As Justice Medina observes, the Supreme Court enumerated two exceptions to the rule established in *Lucas*. No taking occurs if (1) the regulation restricts a use the owner does not have in her title, or (2) state common-law nuisance or property principles prohibit the desired use of the land. *See id.* at 1027, 1029. Neither of these exceptions applies here.

First, the Open Beaches Act's mandated disclosure, given to all purchasers of property seaward of the Gulf Intracoastal Waterway after 1986, does not constitute an actual divestment from the property owner of a land use in her *title*. The fact that the executory contracts in these sales contain this notice of risk does not constitute a restriction in the title to the property. *See Alvarado v. Bolton*, 749 S.W.2d 47, 48 (Tex. 1988) (noting that the terms of a deed may vary from that of the contract, and that "the deed must be looked to alone to determine the rights of the parties" (quoting *Baker v. Baker*, 207 S.W.2d 244, 249 (Tex. Civ. App.—San Antonio 1947, writ ref'd n.r.e.))).

Second, nothing in Texas property principles prohibits a property owner from maintaining and using her home on the beach, even when the property is burdened by an easement of public use. Rather, as discussed, Texas common law mandates the necessity of balancing private and public interests in beach property, and easement law does not require the servient landowner to yield all private interest in her property to the public use of the beach. *See Brownlow*, 319 S.W.3d at 656 (observing that an unlimited easement "carries with it all rights as are reasonably necessary for enjoyment consistent with its intended use," but "the rights reasonably necessary for full enjoyment

of an easement are limited").

Third, the mere presence of a house on the dry beach does not automatically constitute a public nuisance. All property is held subject to the valid exercise of the government's police powers. *City of Dallas v. Stewart*, __ S.W.3d __, __ (Tex. 2012). Flowing from this, the government does not commit a taking when it abates that which is, in fact, a nuisance. *Id.* The government may—and has—used its valid police powers to impose reasonable regulations on coastal property. *See, e.g.*, TEX. NAT. RES. CODE §§ 61.011(d)(6), 61.015(g). But the Legislature has not declared the mere presence of a house on the dry beach a nuisance. And, even if it did, it is unlikely the mere presence of a house on the dry beach would constitute a nuisance in fact. *See City of Houston v. Lurie*, 224 S.W.2d 871, 874 (Tex. 1949) (observing that "even the State may not denounce that as a nuisance which is not in fact"); *see also State v. Spartan's Indus., Inc.*, 447 S.W.2d 407, 413 (Tex. 1969) (describing a nuisance in fact as a condition that "endangers the public health, public safety, public welfare, or offends the public morals"). Thus, I would conclude that a private owner of dry beach suffers a taking if she is forced to remove her home or is prohibited from using and maintaining her home, even if her property is burdened by a public-use easement.

IV. Conclusion

Because I agree with Justice Medina that a public use easement migrates with the dry beach boundaries, regardless of whether that movement is due to accretion or avulsion, and that such an easement is established under common-law principles, I join his dissent in part. However, I write separately because I also believe that a taking occurs when the government forbids a property owner from using and maintaining her home, even if the property is burdened by a public-use easement.

A public-use easement to the dry beach is not a total interest in a property owner's land, and as such cannot be used to divest the property owner of all use of her property. Accordingly, I join Justice Medina's dissent in part.

_____

Eva M. Guzman
Justice

OPINION DELIVERED: March 30, 2012

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, RESPONDENT

ON CERTIFIED QUESTIONS FROM THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JUSTICE LEHRMANN, joined by JUSTICE MEDINA, dissenting.

From the West Beach on Galveston Island to South Padre, the use and enjoyment of Texas public beaches by its citizens has a rich history. Today's decision casts that legacy aside, contrary to well-established easement law and supported by no coherent rationale. The Court acknowledges that littoral property owners may lose *title* to property due to changes in the shoreline, even sudden changes, as an "ordinary hazard of owning littoral property." ___ S.W.3d ___, ___. It also recognizes that the boundaries of public easements along the shoreline are dynamic and may be changed as a result of gradual shifts in the extent of the dry beach. *Id.* at ____. Yet the Court concludes that identical changes in the dry beach resulting from sudden, avulsive events do not shift the boundaries of the public's easement. *Id.* at ___. The Court's decision threatens to "exacerbate[] the degradation of Texas beaches." Richard J. McLaughlin, *Rolling Easements as a Response to Sea*

Level Rise in Coastal Texas: Current Status of the Law After Severance v. Patterson, 26 J. LAND USE & ENVTL. L. 365, 383 (2011).[1] It undermines the public interest in beach access, the ability of the State and local governments to protect coastal resources, and the private property interests of nonlittoral Galveston homeowners. And the Court does so in deciding a certified question that will not be determinative of the parties' legal rights. I join Justice Medina's dissenting opinion, but write separately to emphasize a few additional points.

I. Easement Principles

A. An easement attached to Severance's property, and has not been abandoned

The Court devotes much of its attention to debunking the notion that an easement attached to Severance's property when the Republic of Texas granted the land to Edward Hall and Levi Jones in 1840. The Court reasons that no easement attached to the land at that time because the grant contained no express reservation of rights, and the Texas Legislature later disclaimed any title to the property. But regardless of the omission of language expressly reserving an easement or the Legislature's treatment of the entirely separate issue of title, a public easement on Galveston's West Beach by prescription, custom, or use under the common law has been recognized in several cases, based in part on historical records of public enjoyment of the beach extending back to years before the land grant. *See, e.g.*, *Matcha v. Mattox*, 711 S.W.2d 95, 99 (Tex. App.—Austin 1986, writ ref'd n.r.e.) (noting that since at least 1836 the public has consistently used the beach for travel); *Feinman v. State*, 717 S.W.2d 106, 111–13 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.). The public's use of the beach has continued to this day, and it is a fundamental tenet of easement law that

[1] Professor McLaughlin has submitted an amicus brief reiterating many of the points his article articulates.

there must be clear evidence of intent before an easement will be found to have been abandoned. *See Dallas Cnty. v. Miller*, 166 S.W.2d 922, 924 (Tex. 1942) (abandonment of an easement requires a "definite act showing an intention to abandon and terminate the right possessed by the easement owner"). There is no such clear indication of abandonment in this case.

More importantly, the lack of any expressly reserved easement may be inconsequential once the record in the federal court is fully developed: according to the district court, Severance admitted that her property was subject to an easement. *Severance v. Patterson*, 485 F. Supp. 2d 793, 803 (S.D. Tex. 2007). The Court's extended historical discussion thus serves no purpose. Instead, it merely obscures the Court's error in departing from longstanding case law in resolving the real issue: whether the public's easement on the dry beach rolls.

B. Easements can roll

The Court's decision appears to be predicated upon the assumption that an easement's boundaries must be fixed to a specific metes and bounds location. If this were the case, an oceanfront easement could never be proven.[2] Littoral boundary markers continually shift, although often imperceptibly, due to wind, waves, and weather. A beachfront easement cannot be fixed in place any more than the migratory seashore itself can be frozen. *See Matcha*, 711 S.W.2d at 100. In doing so, the Court renders the Open Beach Act's invitation to prove the existence of an easement "by prescription, dedication, [or] . . . continuous right in the public" meaningless.

[2] The Court recognizes as much in holding that changes in the vegetation line resulting from erosion or accretion do not require proof of a new easement.

No case law compels the Court's decision; to the contrary, every Texas appellate court that has considered the issue has concluded that the public's easement on the dry beach rolls, even if they have not used the term "rolling easement." *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; *Matcha*, 711 S.W.2d at 98–100; *see also Mikeska v. City of Galveston*, 451 F.3d 376, 378 (5th Cir. 2006) ("To prevent destruction of the public beach from a landward shift of the mean low tide line, the legal boundaries of the public easement change with their physical counterparts.").

The idea that an easement's boundaries may not be fixed at a specific metes and bounds location, particularly an easement dictated by the contours of a body of water, is not novel. For example, the United States exercises a navigable servitude over the nation's navigable waters that extends to the waterway and its bed below the ordinary high-water mark. *United States v. Rands*, 389 U.S. 121, 123 (1967) (citing *Fed. Power Comm'n v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 249 (1954)). In real terms, the navigable servitude gives the federal government the power to change the course of a navigable stream or utilize the stream of water for power generation without compensating riparian owners for diminution in the market value of their lands. *Id.* The servitude's boundary is natural and dynamic, responding to the ever-changing course of a navigable waterway. *Philadelphia Co. v. Stimson*, 223 U.S. 605, 634–35 (1912). The United States Supreme Court has long recognized that the easement moves in response to changes in the bed and banks of the stream. "The public right of navigation follows the stream and the authority of Congress goes with it." *Id.* (citations omitted).

Moreover, this Court's decision is contrary to other fundamental precepts of the law governing easements. In construing an easement, including its geographic extent, the easement's purpose is paramount. *See Marcus Cable Assocs., L.P. v. Krohn*, 90 S.W.3d 697, 701 (Tex. 2002); RESTATEMENT (THIRD) OF PROP.: SERVITUDES §§ 4.1, 4.8 (2000). Here, the easement provided the public with access to the Gulf and the associated recreational opportunities. The specific metes and bounds location of the easement is unimportant to that purpose; instead, proximity to the Gulf is the critical determinant of its utility and thus its location. *Cf.* Joseph L. Sax, *The Accretion/Avulsion Puzzle: Its Past Revealed, Its Future Proposed*, 23 TUL. ENVTL. L.J.. 305, 353–54 (2010) (noting that "maintaining water adjacency for riparian/littoral landowners and assuring public use of overlying water (and some part of the foreshore) are the central goals of the law relating to migratory waters, and title should therefore follow a moving water boundary without regard to the rate, perceptibility, or suddenness of the movement"). We have acknowledged that the common law allows some flexibility in determining an easement holder's rights, although an easement's purposes may not be expanded. *Marcus Cable*, 90 S.W.3d at 701; *see also* JON W. BRUCE & JAMES W. ELY, JR., THE LAW OF EASEMENTS AND LICENSES IN LAND § 7:3 (2009) (noting that the nature of certain easements for recreational purposes means that they "cannot be located with precision [and] often entitle the holder to use the entire servient estate"). Furthermore, easements should be interpreted to preserve their utility over time. *See Mikeska*, 451 F.3d at 378; *Arrington*, 38 S.W.3d at 765 (holding that the public beach access easement shifted with the vegetation line affected by Tropical Storm Frances); *Bess v. Cnty. of Humboldt*, 5 Cal. Rptr. 2d 399, 403 (Cal. Ct. App.1992) (recognizing continued public access easement to gain entry to river despite shifts in river bed);

Bruce v. Garges, 379 S.E.2d 783, 785 (Ga. 1989) (concluding that rights of holders of recreational use and access easements to beach area expanded as rights of holder of underlying fee expanded with accreted land). In holding that the storms that routinely alter the Gulf shoreline can eliminate the public's easement on the dry beach, the Court violates these fundamental principles.

C. No legal support exists for the distinction between gradual and sudden movement

While Texas appellate courts have applied the avulsion/accretion distinction to changes in riparian boundaries, no appellate court in Texas has heretofore applied that distinction to littoral easements. That no court has applied the avulsion doctrine to littoral property is not surprising; the doctrine is simply incompatible with the types of changes that Gulf storms cause on Texas beaches. In an avulsive event, "a solid and compact mass . . . a solid body of earth" is moved by floodwaters and "instantaneous[ly] and visibl[y] creat[es]" a new bank. *Nebraska v. Iowa*, 143 U.S. 359, 369 (1892). In contrast, the landward movement of a littoral vegetation line occurs, not as the result of the movement of a discernable chunk of land, but instead as the result of "waves reaching above the normal wet line on the beach and eroding the vegetated sand, burying vegetation with eroded sand, or both." McLaughlin, *supra*, at 382.

The rule announced by the Court — that the public easement may shift if the shoreline boundaries move slowly, but not if the change occurs suddenly — is supported solely by the Court's conclusion that it would not be "reasonable . . . to hold that a public easement can suddenly encumber an entirely new portion of a landowner's property or a different landowner's property that was not previously subject to that right of use." ___ S.W.3d at ___. To the extent that "reasonableness" is an appropriate factor to consider in determining where an easement lies, the

Court should look to the impact on the easement holder as well as the burden on the owner of the servient estate. Severance, like all purchasers of beachfront property, took the property knowing that it could eventually become submerged.[3] She was expressly warned that the property she was purchasing "may come to be located on the public beach because of coastal erosion and storm events," *see* TEX. NAT. RES. CODE § 61.025, and, in fact, the property was already on a list of island properties that were wholly or partially within the public easement published by the Land Commissioner. The Court's decision provides Severance with a windfall she clearly did not bargain for — an encumbrance-free parcel of seafront property. The burden on a property owner in Severance's position pales in comparison to the burden the Court imposes on the public by requiring the State to pay for a new easement when vegetation lines inevitably shift due to hurricanes and tropical storms. As one author has noted, the balance struck by the Court's "approach fails to consider the nature and purpose of the public right of access, which is unique to the coast." McLaughlin, *supra*, at 386.

II. Practical Implications of the Court's Decision

A. The Court's ill-founded decision will contribute to the degradation of Texas's beaches, ultimately to the detriment of littoral property owners

The Court's decision rests on its application of a distinction that has been described as a "baffling riddle[]" in general, Sax, *supra*, at 306, and "unwarranted" as applied in this case. McLaughlin, *supra*, at 386. The Court's application of the avulsion/erosion distinction in its original

[3] Express warnings aside, a purchaser of beachfront property "should be aware[] of the risks involved. The beach is a constantly changing, dynamic phenomenon. While its enchantment demands the highest prices, its instability carries with it the greatest risks. Purchase of beachfront realty is little more than a calculated gamble." Mike Ratliff, Comment, *Public Access to Receding Beaches*, 13 HOUS. L. REV. 984, 1013 (1976) (footnote omitted).

opinion in this case has been roundly criticized. According to Professor Richard McLaughlin of the Harte Research Institute for Gulf of Mexico Studies at Texas A&M University-Corpus Christi, the Court's

> approach . . . does not accurately reflect geologic reality along the Texas coast. No coastline can be viewed through the "snapshot" of a limited span of time. Coastal erosion is episodic, not either "imperceptible" or "avulsive" as indicated in the court's majority opinion.
>
> . . .
>
> The ongoing nature of erosion [on Texas's Gulf beaches] causes a narrower beach and a situation where a relatively small storm event may cut back the vegetation line. Any significant landward movement of the vegetation line is normally rare, but is often indistinguishable from an event that may be termed avulsive, except in degree.

Id. at 382–83.

The Court's decision is likely to "exacerbate[] the degradation of Texas beaches." *Id.* at 383. Under the Court's decision, the State's ability to enforce the Open Beaches Act's restrictions on the placement of structures on the dry beach will be severely hampered, if not eliminated. See TEX. NAT. RES. CODE §§ 61.013, 61.018. The placement of structures on newly exposed dry beach will discourage the growth of vegetation that would normally "captur[e] windblown sand and establish[] stable dunes that help protect landward areas from storm impacts and slow the rate of shoreline retreat." McLaughlin, *supra*, at 382.

Furthermore, several provisions of the Texas Constitution restrict or prohibit the expenditure of public funds for private purposes. *See, e.g.*, TEX. CONST. art. III, §§ 50–52. Several amici have argued that the Court's decision will prevent the State and local governments from funding vital

beach renourishment programs since they will benefit beaches from which the public is excluded.[4] The Court's decision thus threatens to accelerate the degradation of Texas's Gulf beaches. McLaughlin, *supra*, at 386. As a result, littoral property owners like Severance may find that, though their property is no longer burdened by a public easement when the vegetation line shifts landward, they face the impending loss of their title as the mean high tide line also shifts landward.

B. The Court's decision disserves the interests of owners of nonlittoral Galveston property

Finally, the Court's decision is almost surely detrimental to the interests of nonlittoral Galveston property owners. As one author observed more than thirty-five years ago, "What good would it do to buy real estate near the beach, if you lack access to it? 'You might as well buy land in Midland, as buy halfway behind the beach front if you can't get to the beach anyway.'" Ratliff, *supra* note 3, at 1014 (quoting Eckhardt, *The National Open Beaches Bill*, in TEXAS LAW INSTITUTE OF COASTAL AND MARINE RESOURCES CONFERENCE ON THE BEACHES: PUBLIC RIGHTS AND PRIVATE USE 41 (1972)). More than five million tourists visit Galveston Island each year, and many of them rent vacation properties on Galveston. *See* Brief of Amicus Curiae Galveston Chamber of Commerce at 12. Gulf-front properties, of course, attract the highest rent. *See, e.g.*, Galveston West End Rentals, http://www.galvestonwestendrentals.com (last visited Mar. 16, 2012). But other properties, more distant from the beach, rely on public access to the beach as an enticement to potential renters. For example, one second row property advertises, "Whether you're enjoying the

[4] In the wake of the Court's initial opinion, the General Land Office cancelled a $40 million beach renourishment program after concluding that the vegetation line had shifted after Hurricane Ike. Harvey Rice, *Appeals Court Upholds Beach Act Challenge*, HOUSTON CHRONICLE, Sept. 28, 2011, http://www.chron.com/news/houston-texas/article/Appeals-court-upholds-beach-act-challenge-2193558.php

gulf breeze or *taking a walk along the nearby beach*, this home is perfect for a family get-a-way." Galveston West End Rentals, http://www.galvestonwestendrentals.com/sealegacy.htm (last visited Mar. 16, 2012) (emphasis added). It seems likely that the Court's decision restricting beach access will decrease the rental value of non-beachfront properties and thus their property value. Further, nonlittoral property owners in the Sea Isle subdivision in which Severance's former property lies likely believed that their purchase included an interest in the dry beach as common property.

III. The Court Should Decline to Answer the Certified Question

Finally, in light of recent developments, the Court should decline to answer the certified question. After this Court granted the public officials' motion for rehearing, Severance took advantage of a Federal Emergency Management Agency hazard mitigation grant program and sold her Kennedy Drive home to the City of Galveston. The Fifth Circuit determined that the sale did not moot the controversy because Severance might still be liable for penalties for past violations of the Open Beaches Act. The Fifth Circuit's short memorandum order did not offer any statutory analysis underlying its conclusion, but I believe it is founded on a misreading of the Act's penalty provisions. And even if the case is not moot in a technical sense, the Court's opinion decides a question of law that is determinative of no live controversy. Under these circumstances, the Court should exercise the discretion our rules afford it and decline to answer the certified question.

In 1985, Texas voters approved an amendment to the Constitution to allow both this Court and the Court of Criminal Appeals to answer certified questions. TEX. CONST. art. V, § 3-c(added Nov. 9, 1985). The amendment also authorized this Court to promulgate rules governing acceptance of certified questions. Tex. Const. art. V, § 3–c. Texas Rule of Appellate Procedure 58.1 provides

that the Court may accept and answer certified questions if the certifying court is presented with "determinative questions of Texas law having no controlling Supreme Court precedent." TEX. R. APP. P. 58.1. The rule expressly provides that the Court may decline to answer questions certified to it. *Id.* In my view, because the Court's decision will not be determinative of any pending controversy, the Court should decline to answer the certified question.

First, even assuming that an as-yet-unfiled penalty action could make the Court's answer determinative of the parties' rights, I do not believe that Severance is subject to penalties under the Open Beaches Act. The Act allows State officials and local prosecutors to recover statutory penalties in a judicial proceeding. TEX. NAT. RES. CODE § 61.018(b). However, the statute provides for recovery of those penalties only in conjunction with an action to obtain an injunction to remove or prevent the construction of structures on the beach. *Id.* § 61.018(a). Since Severance no longer owns the property, she would not be a proper party in such a suit. The Act also provides for the imposition of administrative penalties. *Id.* § 61.0184. But the administrative penalties provision applies to parties who presently own or are building or maintaining a structure on the public beach. *Id.* (requiring the Land Office Commissioner to give notice and an opportunity for a hearing to "a person who is constructing, maintains, controls, owns, or possesses the structure, improvement, obstruction, barrier, or hazard on the public beach"). Since Severance no longer owns the Kennedy Drive property, she no longer maintains or possesses it. It seems clear that she would not be subject to administrative penalties under the statute.

The Court should exercise the discretion afforded it by Rule 58.1 and decline the certified question. Though this Court has not defined "determinative" in the context of certified questions,

the commonly understood meaning of the word should apply. *See Gilbert v. El Paso Cnty. Hosp. Dist.*, 38 S.W.3d 85, 89 (Tex. 2001) (citing *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 865 (Tex. 1999)) (noting that in cases involving statutory interpretation, where a term is undefined we apply its common accepted meaning). Therefore, under the common meaning of determinative, the Court should only answer questions that will "fix, settle, or define" the outcome of federal litigation. Determinative Definition, MERRIAM-WEBSTER ONLINE, http://www.merriam-webster.com/dictionary/determinative (last visited Mar. 16, 2012); *see also* TEX. R. APP. P. 58.1. The Fifth Circuit characterized Severance's claims as an assertion that, "as applied to her properties, the migration of the rolling easement without a finding of prescription, dedication or custom, and without compensation, effects an unconstitutional taking and seizure." *Severance v. Patterson*, 566 F.3d 490, 494–95 (5th Cir. 2009), *certified questions accepted*, 52 Tex. Sup. Ct. J. 741 (May 15, 2009). As to the takings claims, the Fifth Circuit held that Severance's federal claims were not ripe because "[a Texas court] might award relief under the facts Severance has alleged" under state law. *Id.* at 500 (citing *Rolf v. City of San Antonio*, 77 F.3d 823, 827 (5th Cir. 1996) (holding that two of plaintiff's claims were unripe where Supreme Court of Texas had expressly declined to address those exact claims)). As to the seizure claims, it held that the ripeness of Severance's seizure claims could not yet be determined because "[w]hether a 'reasonable' seizure has been accomplished by the Officials here depends on a definitive construction of Texas law." *Id.* at 503. Accordingly, the certified questions only encompass Severance's seizure claim as it relates to the Kennedy Drive property. The fact that Severance no longer owns the Kennedy Drive property means that the Court's opinion no longer answers questions that are determinative to the

outcome of Severance's seizure claim. Because any opinion this Court delivers would not be determinative of the parties' rights in the lawsuit as it is currently framed, the Court should decline to answer the certified questions and withdraw its original opinion.

IV. Conclusion

The Court's original opinion, which differs little from the replacement issued today, has drawn a storm of criticism from academics and a torrent of amicus curiae briefs from governmental entities and ordinary citizens imploring the Court to preserve the public's cherished right to access the seashore. In deciding whether, under the common law, a littoral easement can roll when natural processes shift an easement's boundary markers, the Court takes a course that diverges from the relevant precedents: Texas courts have long recognized the migratory nature of the public's easement on the dry beach and the Court's application of the avulsion/accretion distinction to seashores is equally unsupported. At a minimum, the Court should decline to answer any question that is certified to it, since its answer will not resolve any live controversy. I respectfully dissent.

_____

Debra H. Lehrmann
Justice

OPINION DELIVERED: March 30, 2012

IN THE SUPREME COURT OF TEXAS

NO. 09-0506

JAYANTI PATEL, PETITIONER,

v.

CITY OF EVERMAN, RESPONDENT

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

PER CURIAM

A property owner appealed an administrative determination that his property was a nuisance, and he also asserted a takings claim. He then nonsuited the case. He later filed this suit, again alleging that the government illegally took his property. Because he is collaterally estopped from doing so, we affirm the court of appeals' judgment.

Jayanti Patel owned twenty buildings in the City of Everman. The City notified Patel that it intended to demolish fifteen of his buildings because they were substandard. After a hearing, the City Council adopted the Planning and Zoning Commission's recommendation that the buildings be demolished.

Patel sued to enjoin the demolition, and the trial court signed an agreed order requiring him to bring all fifteen buildings into compliance with the City's code. Patel did not honor his commitment, and the City again notified him that his buildings were substandard. The City held

another hearing, and the administrative board voted to demolish all twenty of Patel's buildings. Patel again sued to stop the demolition. He also alleged a taking and asked the trial court to issue a writ compelling the administrative board to review its demolition decisions. *See* TEX. LOC. GOV'T CODE § 214.0012 (prescribing judicial review procedures for administrative nuisance determinations). Patel later nonsuited the case, and the City demolished all but two of the buildings.

Patel sued the City in federal court, asserting claims under 42 U.S.C. § 1983 for deprivations of rights guaranteed by the Fourth, Fifth, and Fourteenth Amendments of the U.S. Constitution. The federal district court granted the City's motion for summary judgment,[1] the Fifth Circuit affirmed, and the Supreme Court of the United States denied Patel's petition for writ of certiorari. *Patel v. City of Everman*, No. 4:99CV-982-BE, 2001 U.S. Dist. LEXIS 34, at *17(N.D. Tex. Jan. 3, 2001), *aff'd*, 275 F.3d 46 (5th Cir. 2001), *cert. denied*, 535 U.S. 954 (2002). Patel also filed this suit in state court, alleging an unconstitutional taking. The trial court granted the City's summary judgment motion, and the court of appeals affirmed as to fifteen of the buildings and remanded as to the four buildings that were demolished but were not subject to the agreed order. *Patel v. City of Everman*, 179 S.W.3d 1, 18 (Tex. App.—Tyler 2004, pet. denied) (holding that Patel consented to the destruction of the fifteen buildings subject to the agreed order when he failed to comply with the order). The court of appeals concluded that as to those four buildings, fact issues remained regarding the existence of violations of the City's building ordinances. *Id.* On remand, the City moved for summary judgment as to all four properties, as well as no-evidence summary judgment

[1] The district court dismissed as premature Patel's takings and procedural due process claims, as well as his challenges to Local Government Code section 214.001. *Patel v. City of Everman*, No. 4:99CV-982-BE, 2001 U.S. Dist. LEXIS 34, at *4 n.3 (N.D. Tex. Jan. 3, 2001), *aff'd*, 275 F.3d 46 (5th Cir. 2001), *cert. denied*, 535 U.S. 954 (2002).

as to Patel's two properties that were not demolished. The trial court granted the City's motion and the court of appeals affirmed, holding that Patel's failure to pursue an appeal of the administrative nuisance finding barred his takings claim.[2] 2009 Tex. App. LEXIS 2203, at *20 ("Having nonsuited his direct attack on the ruling of the Board regarding his buildings, and not having otherwise sought judicial review of the Board's order within the thirty-day period prescribed by [Local Government Code] section 214.0012, Patel is collaterally estopped from now bringing this suit.").

Patel argues that the court of appeals wrongly concluded that collateral estoppel precludes his takings claim. We disagree. We recently held that a party asserting a taking based on an allegedly improper administrative nuisance determination must appeal that determination and assert his takings claim in that proceeding. *See City of Dall. v. Stewart*, ___ S.W.3d ___ (Tex. 2012). We noted that "[a]lthough agencies have no power to preempt a court's constitutional construction, a party asserting a taking must first exhaust its administrative remedies and comply with jurisdictional prerequisites for suit." *Id*. (footnote omitted). We also held that "a litigant must avail [himself] of statutory remedies that may moot [his] takings claim, rather than directly institute a separate proceeding asserting such a claim." *Id*. (citing *City of Dall. v. VSC*, 347 S.W.3d 321 (Tex. 2011)). Here, Patel appealed the administrative nuisance determination. Although that was the proper forum for litigating his takings claim, he nonsuited the case. Patel cannot attack collaterally what he declined to challenge directly. *See id.* (noting that a failure to assert a constitutional claim on appeal

[2] This appeal concerns only the four buildings that were demolished but not subject to the agreed order or the no-evidence motion for summary judgment.

from an administrative determination precludes a party from raising the issue in another proceeding). We agree with the court of appeals: Patel's takings claim is barred.

Accordingly, without hearing oral argument, TEX. R. APP. P. 59.1, we grant the petition for review and affirm the court of appeals' judgment.

OPINION DELIVERED: January 27, 2012

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.

We deny Rex Cook's motion for rehearing. We withdraw our opinion of June 24, 2011 and substitute the following in its place.

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 will not withhold from the servant instruction in the secrets of his trade, and the communication of his

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, combination, or conspiracy in restraint of trade or commerce is unlawful." *Id.* Our cases recognize

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> 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 (6th Cir. 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).

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. Johnson *Moves Back to the Basics of Covenants Not to Compete*, 38 ST. MARY'S

[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.

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 nondisclosure agreement is an "otherwise" enforceable agreement. *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 "part of and subsidiary to" the employment relationship

giving rise 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); s*ee 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. Awarding to Cook stock options to purchase MMC stock at a discounted price provided the required statutory nexus between the noncompete and the company's interest in protecting its goodwill. Exercising the stock options to purchase MMC stock triggered the restraints in the noncompete.

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 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

[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).

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 Franfort, 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 it reads 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: December 16, 2011

IN THE SUPREME COURT OF TEXAS

NO. 09-0715

MABON LIMITED, PETITIONER,

v.

AFRI-CARIB ENTERPRISES, INC., RESPONDENT

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

PER CURIAM

JUSTICE GUZMAN did not participate in the decision.

In this case, we consider whether a corporation seeking a bill of review is required to prove its diligence in monitoring the status of its underlying case when that bill-of-review plaintiff was represented by counsel but proves that, through no fault of its own, it did not receive notice of the trial setting that led to a default judgment. It is well established that once a bill-of-review plaintiff proves the absence of service or the lack of notice of the dispositive trial setting, the plaintiff is then relieved of proving the traditional bill-of-review elements and the court should grant the plaintiff's bill of review. *See, e.g.*, *Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 84, 87 (1988); *Caldwell v. Barnes (Caldwell II)*, 154 S.W.3d 93, 96 (Tex. 2004) (per curiam); *Lopez v. Lopez*, 757 S.W.2d 721, 722–23 (Tex. 1988) (per curiam). We hold that once a bill-of-review plaintiff proves it had no

notice of the trial setting or the default judgment, it need not establish that it diligently monitored the status of its case. Accordingly, we reverse the court of appeals' judgment and reinstate the judgment of the trial court.

This appeal arises from a 1996 breach-of-contract suit filed in Harris County by Afri-Carib Enterprises, a Texas oil and gas exploration corporation doing business in Africa, against Mabon Limited, a Nigerian corporation. Afri-Carib entered into a joint venture with Mabon, which provided that the companies would share business information and contacts with one another for commissions. Pursuant to their agreement, Afri-Carib introduced Mabon to TGS International Geophysical Company (TGSI). Subsequently, Mabon entered a joint venture with TGSI and terminated its relationship with Afri-Carib.

After Mabon repudiated the joint venture agreement, Afri-Carib brought a breach-of-contract action, claiming Mabon never paid it commissions owed from Mabon's venture with TGSI. Because Mabon does not maintain offices or a designated agent for service in Texas, Afri-Carib served Mabon with process through the Texas Secretary of State. Upon receiving service, Mabon hired a Texas attorney to serve as its defense counsel. Mabon's attorney filed an answer and special appearance on behalf of Mabon. Pursuant to the Texas Rules of Civil Procedure, Mabon's attorney was sent notice of the trial setting. TEX. R. CIV. P. 21a. Notice was not sent to Mabon directly, and Mabon's attorney failed to notify Mabon of the trial setting. When the case was called to trial, neither Mabon nor its counsel appeared. In September 1998, the trial court entered a default judgment against Mabon in the amount of $1,098,520.40, plus $300,000.00 in attorney's fees. Although the trial court clerk sent notice of the default judgment to Mabon's counsel, Mabon's

counsel failed to notify Mabon of the default judgment or challenge the judgment. Mabon learned of the default judgment in early 1999 after Afri-Carib began collection efforts.

The parties later discovered that throughout all proceedings in the breach-of-contract suit, Mabon's attorney was suspended from the practice of law. Unbeknownst to Mabon, the State Bar of Texas had suspended the attorney's license because of his failure to pay the state occupation tax and State Bar dues and failure to comply with the minimum continuing legal education requirements.

Upon learning of the default judgment, Mabon hired new counsel who timely filed a restricted appeal on its behalf, claiming that the underlying contract was unenforceable. The Fourteenth Court of Appeals affirmed the default judgment in all respects, but reduced the amount of attorney's fees awarded to Afri-Carib. *Mabon Ltd. v. Afri-Carib Enters., Inc. (Mabon I)*, 29 S.W.3d 291, 299, 301–02 (Tex. App.—Houston [14th Dist.] 2000, no pet.). Mabon then challenged the default judgment by filing a petition for bill of review with the trial court, claiming that it had no notice of the trial setting or subsequent default judgment. The trial court denied Mabon's petition for bill of review, but the First Court of Appeals reversed and remanded the case to the trial court. *Mabon Ltd. v. Afri-Carib Enters., Inc. (Mabon II)*, No. 01-03-01219-CV, 2005 WL 1117983, at *4 (Tex. App.—Houston [1st Dist.] May 12, 2005, pet. denied) (mem. op.). After we denied Afri-Carib's petition for review, 49 TEX. SUP. CT. J. 273 (Jan. 30, 2006), the parties continued their proceedings before the trial court.

On remand, the trial court granted Mabon's bill of review, vacated the previous default judgment, and ordered the parties returned to their original status, with Afri-Carib bearing the

burden of proof on the breach-of-contract issue. Because the trial court found that Mabon had no actual or constructive notice of the trial setting or default judgment, it held that Mabon was relieved of proving the first two bill-of-review elements, and the third element, lack of negligence, was conclusively established as a matter of law. After a period of discovery, the trial court granted Mabon's motion for summary judgment on the merits, finding that Afri-Carib's 1996 breach-of-contract claim was untimely and barred by limitations. Afri-Carib appealed and argued that the trial court should not have granted summary judgment in the first place; however, Afri-Carib did not contest the merits of the trial court's ruling on Mabon's motion for summary judgment—effectively conceding that its original claim was barred by limitations. 287 S.W.3d 217, 223 (Tex. App.—Houston [14th Dist.] 2009).

The Fourteenth Court of Appeals affirmed the trial court's finding that Mabon had no notice of the trial setting or the default judgment, but remanded the case to the trial court to determine whether Mabon was "diligent in monitoring the case status." *Id.* at 222. Citing one of its prior, unreported opinions, the court of appeals stated that "[a] bill of review plaintiff's obligation of non-negligence includes a duty of diligence in not allowing a default judgment to be taken against him." *Id.* at 221 (citing *Abou-Trabi v. Best Indus. Unif. Supply, Inc.*, No. 14-02-01000-CV, 2003 WL 22252876, at *3 (Tex. App.—Houston [14th Dist.] Oct. 2, 2003, no pet.) (mem. op.)). Because the trial court did not hear evidence of Mabon's diligence in monitoring the status of its pending litigation, the court of appeals reversed the trial court's judgment and remanded the case for further proceedings. *Id.* at 222.

Both parties petitioned this Court for review. Mabon argues that the court of appeals erred in creating a new diligence standard for bill-of-review plaintiffs and that once the court of appeals found no notice, it should have affirmed the trial court's judgment. In its petition, Afri-Carib does not contest the court of appeals' decision on the diligence issue, but claims that the court of appeals should have decided the issue as a matter of law instead of remanding to the trial court and giving Mabon a second chance to correctly present its bill-of-review case. Additionally, and in reply to Mabon's petition, Afri-Carib claims that the court of appeals erred in finding that Mabon had no notice of the underlying default judgment. We denied both petitions on February 25, 2011, and subsequently granted both parties' motions for rehearing. 55 TEX. SUP. CT. J. 30 (Oct. 24, 2011).

A bill of review is an equitable proceeding, brought by a party seeking to set aside a prior judgment that is no longer subject to challenge by a motion for a new trial or direct appeal. *Caldwell II*, 154 S.W.3d at 96. Ordinarily, a bill-of-review plaintiff must plead and prove: "(1) a meritorious defense to the underlying cause of action, (2) which the plaintiff[] [was] prevented from making by the fraud, accident or wrongful act of the opposing party or official mistake, (3) unmixed with any fault or negligence on [its] own part." *Id.* Courts narrowly construe the grounds on which a plaintiff may obtain a bill of review due to Texas's fundamental public policy favoring the finality of judgments. *See, e.g., King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003); *Alexander v. Hagedorn*, 226 S.W.2d 996, 998 (Tex. 1950). But when a bill-of-review plaintiff claims a due process violation for no service or notice, it is relieved of proving the first two elements set out above. *See, e.g., Peralta*, 485 U.S. at 84, 87; *Caldwell II*, 154 S.W.3d at 96–97. And the third element, lack of negligence, is conclusively established if the bill-of-review plaintiff can prove it

was never served with process. *Caldwell II*, 154 S.W.3d at 97 (citing *Caldwell v. Barnes (Caldwell I)*, 975 S.W.2d 535, 537 (Tex. 1998)); *see also Peralta*, 485 U.S. at 84, 87 (holding that "a judgment entered without notice or service is constitutionally infirm," and "only 'wip[ing] the slate clean . . . would have restored the petitioner to the position he would have occupied had due process of law been accorded to him in the first place'" (alterations in original) (citations omitted)). *But cf. Campus Invs., Inc. v. Cullever*, 144 S.W.3d 464, 466 (Tex. 2004) (per curiam) (affirming the trial court's denial of a bill of review where the petitioner never received service that was properly sent by the Texas Secretary of State because the petitioner was negligent in failing to update the addresses for its registered agent and registered office); *Gold v. Gold*, 145 S.W.3d 212, 214 (Tex. 2004) (per curiam) (noting that a bill-of-review plaintiff's failure to seek reinstatement, new trial, or a direct appeal, if available, would normally constitute negligence).

Similar to situations in which a defendant was not properly served with process, when the defendant did not receive proper notice of the trial setting, we have modified the traditional requirements for a restricted appeal and motion for new trial to set aside a post-answer default judgment. *See, e.g.*, *LBL Oil Co. v. Int'l Power Servs., Inc.*, 777 S.W.2d 390 (Tex. 1989) (per curiam) (restricted appeal); *Lopez*, 757 S.W.2d at 722 (motion for new trial). Entry of a post-answer default judgment against a defendant who did not receive notice of the trial setting or dispositive hearing constitutes a denial of due process under the Fourteenth Amendment of the United States Constitution. *LBL Oil Co.*, 777 S.W.2d at 390–91; *see also Lopez*, 757 S.W.2d at 722 (modifying the *Craddock* factors for a motion for new trial when a post-answer defendant had no actual or

constructive notice of the trial setting, and holding that the defendant was entitled to a new trial (citing *Craddock v. Sunshine Bus Lines*, 133 S.W.2d 124, 126 (1939))).

While the third bill-of-review element, lack of fault or negligence, requires a party to show that it diligently pursued all adequate legal remedies, we have never held that a party must show that it diligently monitored the case status, especially after a party hires an attorney to represent it. In *Wembley Inv. Co. v. Herrera*, 11 S.W.3d 924 (Tex. 1999) (per curiam), the Court recognized that, generally, a bill of review "is available only if a party has exercised due diligence in pursuing all adequate legal remedies against a former judgment and, through no fault of its own, has been prevented from making a meritorious claim or defense by the fraud, accident, or wrongful act of the opposing party." *Id.* at 927 (holding that the defendant's failure to obtain a ruling on a motion for new trial was not lack of diligence when its attorney had no reason to know the judgment had become final). Following *Wembley*, we clarified the meaning of "due diligence in pursuing all adequate legal remedies" and noted that "we have only applied this rule to motions that could have been filed in the trial court's first proceeding." *Gold*, 145 S.W.3d at 214 (quoting *Wembley*, 11 S.W.3d at 927); *see also Caldwell I*, 975 S.W.2d at 538 (finding no lack of diligence despite a nearly two-year delay in bringing a petition for bill of review after learning of the default judgment). Here, the record indicates that Mabon was diligent in pursuing all available legal remedies to challenge the default judgment. Once Mabon learned of the default judgment, it timely filed a restricted appeal to contest aspects of the judgment and, because the time for filing a motion for new trial had passed, it timely filed its petition for bill of review. *See* TEX. R. CIV. P. 329b(a), (f); *Mabon I*, 29 S.W.3d at 302; *Mabon II*, 2005 WL 1117983, at *1. Moreover, nothing in the record suggests

that Mabon was negligent in its failure to receive notice of the trial setting or default judgment. The law requires no further showing of diligence.

The Due Process Clause of the Fourteenth Amendment requires that once a defendant makes an appearance, that defendant is entitled to notice of the trial setting. *See, e.g.*, *LBL Oil Co.*, 777 S.W.2d at 390–91 (citing *Peralta*, 485 U.S. at 86–87); *Lopez*, 757 S.W.2d at 722. Here, both the trial court and court of appeals found that Mabon had no notice of the trial setting or the default judgment. 287 S.W.3d at 221. Because Mabon proved that (1) it had no notice of the trial setting or the default judgment within an adequate time to pursue alternative legal remedies, and (2) the lack of notice was not because of its own fault or negligence, the first two traditional bill-of-review requirements—that Mabon show proof of a meritorious defense to the underlying cause of action, which it was prevented from making by fraud, accident, or wrongful act of the opposing party or by official mistake—are rendered unnecessary, and the final traditional requirement—lack of negligence—is conclusively established. *See, e.g.*, *Peralta*, 485 U.S. at 84–85; *Caldwell II*, 154 S.W.3d at 97; *Lopez*, 757 S.W.2d at 723. Finally, to the extent that it conflicts with this opinion, we expressly disapprove of the appellate court's decision in *Abou-Trabi v. Best Industrial Uniform Supply, Inc.*, No. 14-02-01000-CV, 2003 WL 22252876, at *3 (Tex. App.—Houston [14th Dist.] Oct. 2, 2003, no pet.) (mem. op.).

Accordingly, without hearing oral argument, we grant Mabon's petition for review, reverse the court of appeals' judgment, and reinstate the judgment of the trial court. *See* TEX. R. APP. P. 59.1.

OPINION DELIVERED: February 17, 2012

IN THE SUPREME COURT OF TEXAS

NO. 09-0745

FREEDOM COMMUNICATIONS, INC., D/B/A THE BROWNSVILLE HERALD AND VALLEY MORNING STAR, PETITIONER,

v.

JUAN ANTONIO CORONADO, ET AL., RESPONDENTS

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

PER CURIAM

This interlocutory appeal is from the denial of a media defendant's motion for summary judgment regarding claims that it defamed the plaintiffs and invaded their privacy by publishing a political advertisement. We conclude that neither the court of appeals nor this Court has jurisdiction to consider the merits of the parties' arguments because the trial court judge accepted a bribe for ruling on the summary-judgment motion, constitutionally disqualifying him from this case and thus making his order void. We vacate the judgment of the court of appeals and remand the case to the trial court for further proceedings.

In 2008 Peter Zavaletta sought election to the position of Cameron County District Attorney. During the course of his election campaign he advertised in the Brownsville Herald and Valley Morning Star, two Freedom Communications, Inc. (Freedom) newspapers, that the incumbent

District Attorney failed to prosecute child abuse cases. The advertisement included the names of individuals who were arrested, but not prosecuted, for alleged child abuse. Juan Antonio Coronado, Francisco Solis Ramirez, Roberto Rivera III, and Ruben Contreras (collectively, Coronado) were among the persons identified in the advertisement. They sued Zavaletta, Freedom, and former District Attorney Yolanda DeLeon, contending that the advertisement defamed them and invaded their privacy. Freedom moved for summary judgment on the grounds that the advertisement was accurate, true, and non-actionable under the United States and Texas Constitutions and Texas statutory and common law. The trial court judge, Abel Limas, denied the motion and Freedom filed an interlocutory appeal. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(6) (allowing for an appeal from an interlocutory order that denies a motion for summary judgment based upon a claim against a member of the electronic or print media arising under the free speech clause of the First Amendment to the United States Constitution or Article I, Section 8, of the Texas Constitution). The court of appeals affirmed, with one justice dissenting. 296 S.W.3d 790.

Freedom filed a petition for review in this Court and as part of its briefing provided a copy of a plea agreement filed in the United States District Court for the Southern District of Texas. The agreement shows that after the court of appeals issued its decision, Limas pleaded guilty to federal racketeering charges. He admitted in the plea that on May 8, 2008, he accepted $8,000 in cash for, in part, making rulings favorable to the plaintiffs in this case, including "denying [Freedom's] Summary Judgment [motion] on November 26th." The plea agreement is not in the appellate record and Coronado urges us not to consider it, arguing that Freedom's reference to the plea amounts to an impermissible attempt to obtain sanctions against them in this Court. Freedom maintains that the

facts contained in the plea agreement are appropriate for judicial notice and it is not seeking sanctions or any other relief based on Limas's motives in ruling on the summary-judgment motion. Instead, Freedom argues that we should decide the merits of this appeal, but do so using "close appellate scrutiny" because Limas's guilty plea suggests his ruling on the summary-judgment motion was not the product of good faith.

An appellate court may take judicial notice of a relevant fact that is "either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." TEX. R. EVID. 201(b); *see Office of Pub. Util. Counsel v. Pub. Util. Comm'n of Tex.*, 878 S.W.2d 598, 600 (Tex. 1994) (per curiam). Judicial notice of such a fact is mandatory if a party requests it and supplies "the necessary information." TEX. R. EVID. 201(d). Under this standard, a court will take judicial notice of another court's records if a party provides proof of the records. *See, e.g.*, *MCI Sales & Serv., Inc. v. Hinton*, 329 S.W.3d 475, 497 n.21 (Tex. 2010); *WorldPeace v. Comm'n for Lawyer Discipline*, 183 S.W.3d 451, 459 (Tex. App.—Houston [14th Dist.] 2005, pet. denied). Here, Freedom has provided a copy of Limas's plea agreement in federal district court and urges us to take judicial notice of the facts in the agreement.

Freedom's request leads us to question whether we have jurisdiction to decide this appeal. That is because appellate courts do not have jurisdiction to address the merits of appeals from void orders or judgments; rather, they have jurisdiction only to determine that the order or judgment underlying the appeal is void and make appropriate orders based on that determination. *See State ex. rel. Latty v. Owens*, 907 S.W.2d 484, 486 (Tex. 1995); *see also Univ. of Tex. Sw. Med. Ctr. of*

Dallas v. Margulis, 11 S.W.3d 186, 187 (Tex. 2000) (per curiam) ("[E]ven when an appeal is interlocutory, we have jurisdiction to determine whether the court of appeals [had] jurisdiction of the appeal."). And we must consider our jurisdiction, even if that consideration is sua sponte. *See Tex. Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 517 n.15 (Tex. 1995).

The Texas Constitution provides that "[n]o judge shall sit in any case wherein the judge may be interested." TEX. CONST. art. V, § 11. A judge is "interested" in a case—and thus disqualified under Article V, Section 11—if an order or judgment in the case will directly "affect him to his personal or pecuniary loss or gain." *Elliot v. Scott*, 25 S.W.2d 150, 152 (Tex. 1930) (quoting *City of Oak Cliff v. State*, 79 S.W. 1068, 1069 (Tex. 1904)). A disqualified judge has no power to act in the case. *Postal Mut. Indem. Co. v. Ellis*, 169 S.W.2d 482, 484 (Tex. 1943). Discretionary judicial acts by a disqualified judge are void. *Tesco Am., Inc. v. Strong Indus., Inc.*, 221 S.W.3d 550, 555 (Tex. 2006); *Buckholts Indep. Sch. Dist. v. Glaser*, 632 S.W.2d 146, 148 (Tex. 1982). Thus, the disqualification of a judge is a jurisdictional issue that cannot be waived. *Postal Mut. Indem. Co.*, 169 S.W.2d at 484; *see Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 445 (Tex. 1993).

Limas's order denying Freedom's summary-judgment motion is the sole basis for appellate jurisdiction over this interlocutory appeal. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(6); TEX. GOV'T CODE § 22.225(c), (d). If Limas's order is void, then the court of appeals did not have authority to consider the merits of Freedom's appeal from the order denying summary judgment, and neither do we. In these circumstances the facts in Limas's plea agreement are relevant, it is appropriate for us to take judicial notice of them, and we do so. *See* TEX. R. EVID. 201(b), (d), (f); TEX. CIV. PRAC. & REM. CODE § 51.014(a)(6); TEX. GOV'T CODE 22.225(c), (d); *see also SEI Bus.*

Sys., Inc. v. Bank One Tex., N.A., 803 S.W.2d 838, 841 (Tex. App.—Dallas 1991, no writ) ("As a general rule, appellate courts take judicial notice of facts outside the record only to determine jurisdiction over an appeal or to resolve matters ancillary to decisions which are mandated by law . . . .").

The facts in the plea agreement show that Limas had an interest—an illegal interest, no less—in this case because he obtained a pecuniary gain as a direct result of his rulings, including his order denying Freedom's summary-judgment motion. *See Elliot*, 25 S.W.2d at 152. Therefore, he was disqualified and his discretionary ruling on the summary-judgment motion was void. *See* TEX. CONST. art. V, § 11; *Tesco Am., Inc.*, 221 S.W.3d at 555. Because the order on which Freedom bases its appeal is void, we cannot address the merits of the appeal and the court of appeals did not have authority to do so either—even though it had no way of knowing so. *See Univ. of Tex. Sw. Med. Ctr. of Dallas*, 11 S.W.3d at 187; *Postal Mut. Indem. Co.*, 169 S.W.2d at 484.

Accordingly, without hearing oral argument, we vacate the court of appeals' judgment and opinion. TEX. R. APP. P. 59.1; *see, e.g.*, *Valley Baptist Med. Ctr. v. Gonzalez*, 33 S.W.3d 821, 822 (Tex. 2000) (per curiam) (vacating the judgment and opinion of the court of appeals as advisory when the case had become moot before the opinion issued). We remand the case to the trial court for further proceedings. TEX. R. APP. P. 60.6.

OPINION DELIVERED: June 22, 2012

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.

We deny the motion for rehearing. We withdraw our opinion of August 26, 2011 and substitute the following in its place.

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

[1] TEX. CONST. art. I, § 17(a); *see also infra* note 13 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).

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, one "limited in [its] use to the wells, stations, plants, and refineries of the owner."[5] A common carrier transporting gas for hire implies a customer other than the pipeline owner itself.

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

[4] TEX. NAT. RES. CODE § 111.002(6).

[5] *Id.* § 111.003(a).

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,[6] 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."

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.[7] 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

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[6] TEX. NAT. RES. CODE § 111.002(6). Unless otherwise indicated, all statutory references below are to the Natural Resources Code, Chapter 111 of which governs common carriers of CO_2 and other substances.

[7] 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.

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.

The court of appeals affirmed, concluding that Denbury Green had established as a matter of law its common-carrier status.[8] The court relied on the fact that the pipeline "will be available for public use from the outset of its operation."[9] One justice dissented, believing genuine issues of material fact precluded summary judgment.[10] 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."[11]

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

[8] 296 S.W.3d 877, 878, 881.

[9] *Id.* at 881.

[10] *Id.* at 881, 884 (Gaultney, J., dissenting).

[11] *Id.* at 883.

> 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.
>
> 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[12] 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."[13]

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[12] *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).

[13] *Maher v. Lasater*, 354 S.W.2d 923, 924 (Tex. 1962). Denbury and certain amici curiae supporting Denbury contend that their positions are buttressed by the passage of Senate Bill 18 in the last session. Act of May 6, 2011, 82d Leg., R.S., ch. 81, 2011 Tex. Gen. Laws 354. This bill amended various statutory provisions relating to eminent domain, including Section 2206.001 of the Government Code. That section previously provided that "[a] governmental or private entity may not take private property through the use of eminent domain if the taking . . . confers a private benefit on a particular private party through the use of the property" or "is for a public use that is merely a pretext to confer a private benefit on a particular private party." This provision is consistent with our view, stated above, that the taking of property for private use is constitutionally proscribed. Section 2206.001 was amended to add a new subsection providing that a government or private party may not take private property if the taking "is not for a public use," and S.B. 18 replaced references to "public purpose" in several provisions with "public use," again consistent with our above-stated view. As

The legislative grant of eminent-domain power is strictly construed in two regards. First, strict compliance with all statutory requirements is required.[14] 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."[15]

B. The T-4 Permit Granted By the Railroad Commission Does Not Conclusively Establish Eminent-Domain Power

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

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before, Section 2206.001(c) states that the entirety of Section 22.6.001 does not apply to certain entities including common carrier pipelines. However, S.B. 18 added Section 2206.002 to the Government Code, which increases the rights of property owners subject to pipeline easements by providing that the owner can build roads over the easement. S.B. 18 also added procedural protections for property owners, now set out in Sections 2206.051–.053 and elsewhere, such as a requirement in Section 2206.053 that governments must now authorize the initiation of a condemnation proceeding at a public meeting. There is no question that S.B. 18 was intended to increase the rights of property owners facing condemnation proceedings. Denbury concedes that the bill "reformed eminent domain law by imposing new requirements that further protect landowners' rights." It specifically gave property owners new rights with respect to pipeline easements. The fact that the bill left intact a provision exempting common carrier pipelines from one section of the Government Code does not persuade us that we are misreading the Constitution or the Natural Resources Code. The Legislature's desire through S.B. 18 to give *more* protection to some landowners does not imply that it intended to *dilute* the extant property rights of others. S.B. 18 did not diminish Texas Rice's property rights.

[14] *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.").

[15] *Coastal States Gas Producing Co. v. Pate*, 309 S.W.2d 828, 831 (Tex. 1958).

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."[16] We have also held in numerous contexts that the Commission does not have authority to determine property rights.[17] We presume the Legislature is aware of relevant caselaw when it enacts statutes.[18] Had the Legislature intended a T-4 permit to render a company's common-carrier status and eminent-domain power unchallengeable, it would 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."[19]

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

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[16] *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").

[17] *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.").

[18] *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.").

[19] *Amarillo Oil*, 794 S.W.2d at 26.

authority to regulate any pipelines with respect to the exercise of their eminent domain powers."[20] 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."[21] 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 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 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

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[20] 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 Feb. 14, 2012).

[21] 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).

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.[22] 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. 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

To qualify as a common carrier with the power of eminent domain, the pipeline must serve the public; it cannot be built only for the builder's exclusive use. 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 use if it were built and maintained only to transport gas belonging to Denbury from one Denbury site to another. In such

[22] 16 TEX. ADMIN. CODE §§ 3.70(a), 8.1(a)(1)(C), 8.1(b)(2)–(3).

circumstances, and in the absence of compelling legislative findings and declaration of public purpose, we can see no purpose other than a purely private one.[23]

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.[24] 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 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

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[23] *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. Moreover, even if the Legislature included findings and an explicit declaration of public purpose, such material, while undeniably instructive, would not be entitled to insurmountable deference.

[24] *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").

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;[25] and (2) that strict compliance with all statutory requirements is required to exercise eminent domain.[26] Even absent these rules, the use of "but only if" in the statute suggests that a pipeline operator must meet two requirements to obtain

[25] *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.").

[26] *See supra* note 14 and accompanying text.

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 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 . . . ."[27] 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 for a person intending to build a CO_2 pipeline to qualify as a common carrier under Section 111.002(6),[28] a reasonable probability[29] must exist that the pipeline will at some point after construction serve the public by transporting gas for one or more customers who will either retain ownership of their gas[30] or sell it to parties other than the carrier.

Consistent with judicial review of Commission determinations generally, a permit granting common-carrier status is prima facie valid.[31] But once a landowner challenges that status, the

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[27] *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)).

[28] Our decision today is limited to persons seeking common-carrier pipeline status under Section 111.002(6). We express no opinion on pipelines where common-carrier status is at issue under other provisions of the Natural Resources Code or elsewhere.

[29] In this context, a reasonable probability is one that is more likely than not.

[30] 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.

[31] *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 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."

burden 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 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 . . . ."[32] Denbury Green's representations suggesting that it (1) owns most or all of the 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

[32] 296 S.W.3d at 882 (Gaultney, J., dissenting).

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

Pipeline development is indisputably important given our State's fast-growing energy needs, but economic dynamism—and more fundamentally, freedom itself—also demand strong protections for individual property rights. Locke deemed the preservation of property rights "[t]he great and chief end" of government,[33] a view this Court echoed almost 300 years later, calling it "one of the most important purposes of government."[34] Indeed, our Constitution and laws enshrine landownership as a keystone right, rather than one "relegated to the status of a poor relation."[35]

A private enterprise cannot acquire unchallengeable condemnation power under Section 111.002(6) merely by checking boxes on a one-page form and self-declaring its common-carrier status. Merely holding oneself out is insufficient under Texas law to thwart judicial review. While neighboring states impose fewer restrictions on the level of public use required for such takings,[36]

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[33] JOHN LOCKE, SECOND TREATISE OF GOVERNMENT Chap. IX, Sec. 124 (C.B. McPherson, ed., Hackett Publishing Co. 1980) (1690).

[34] *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 140 (Tex. 1977). Private property rights have been described as "fundamental, natural, inherent, inalienable, not derived from the legislature and as preexisting even constitutions." *Id.* They are, in short, a foundational liberty, not a contingent privilege.

[35] *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994); *see also generally* JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS (3d ed. 2008).

[36] LA. REV. STAT. ANN. § 19:2; MISS. CODE ANN. § 11-27-47.

meaning companies may seize land to build pipelines for their exclusive use,[37] the Texas Legislature enacted a regime more protective of landowners. If a landowner challenges an entity's common-carrier designation, the company must present reasonable proof of a future customer, thus demonstrating that the pipeline will indeed transport "to or for the public for hire" and is not "limited in [its] use to the wells, stations, plants, and refineries of the owner." We reverse the court of appeals' judgment, and remand this case to the district court for further proceedings consistent with this opinion.

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Don R. Willett
Justice

OPINION DELIVERED: March 2, 2012

[37] *See ExxonMobil Pipeline Co. v. Union Pac. R.R. Co.*, 35 So.3d 192, 199 (La. 2010) (holding that "any allocation to a use resulting in advantages to the public at large will suffice to constitute a public purpose").

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 MOTION FOR REHEARING

JUSTICE WAINWRIGHT, joined by JUSTICE JOHNSON, concurring.

I join the Court's opinion but write separately to address the scope of the Court's holding.

The Court holds that to be a "common carrier" carbon dioxide pipeline, and endowed by the Natural Resources Code with the power to exercise eminent domain for public use, it must do more than check a box on a government form. ___ S.W.3d ___. I agree. The right of private property is a fundamental right expressly protected in the constitution. *Severance v. Patterson*, ___ S.W.3d ___ (Tex. 2012) (citing *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 140 (Tex. 1977)). The Court also holds that for a carbon dioxide pipeline owner to be a common carrier engaged in transporting the resource to or for the public, the pipeline's only users must be more than a "corporate parent or affiliate." ___ S.W.3d ___. Denbury Green Pipeline-Texas, LLC (Denbury Green), the pipeline owner and common carrier applicant, filed a second motion for rehearing solely on the issue of the breadth of the Court's use of the term "affiliate" under sections 111.002(6) and 111.019 of the Texas Natural Resources Code. The Court denies Denbury's second motion for rehearing in this cause.

I concur that some affiliate relationships will not suffice to make the transport of gas for the benefit of the public, but I also believe that in providing guidance we should take care not to issue pronouncements exceeding the scope of the facts in dispute. *See, e.g., Upjohn Co. v. U.S.*, 449 U.S. 383, 386 (1981) ("[W]e sit to decide concrete cases and not abstract propositions of law" and "decline to lay down a broad rule or series of rules to govern all conceivable future questions."). I, therefore, respectfully disagree and would address the concerns raised on rehearing by Denbury

Denbury takes issue with footnote 23 of the opinion, arguing that we should not have included language stating blanketly that transporting gas for undefined affiliates is not a public use for purposes of the common-carrier test. Although I agree with the Court that evidence of public use and the relatedness of affiliated entities may be necessary to ensure that common carrier carbon dioxide pipelines are, in fact, used to transport gas for the public rather than to benefit close-knit families of companies under common control, I would refine the Court's discussion of "affiliate."

* * *

The Legislature delegated to a common carrier the power of eminent domain under specified circumstances. TEX. NAT. RES. CODE § 111.019(a) ("Common carriers have the right and power of eminent domain."); *see also* Tex. Const. art. 1, § 17(a)(1)(B), (c) (providing that the Legislature may grant "an entity" the power of eminent domain for public use.). A common carrier of carbon dioxide, the resource at issue in this case, is a person who "owns, operates, or manages, wholly or partially, pipelines for the transportation of carbon dioxide or hydrogen in whatever form to or for

the public for hire . . . ." *Id.* § 111.002(6).[1] However, as the Court's opinion indicates, section 111.002(6) indicates that a carbon dioxide pipeline owner is not a common carrier if the pipeline's only end user is a corporate parent or an entity related to it in some degree. __ S.W.3d __. This implies the converse—if a pipeline transports carbon dioxide for persons other than a corporate parent or affiliate, it may serve a public use.

As the Court explains, Denbury Green, the pipeline owner and applicant, is a wholly owned subsidiary of a wholly owned subsidiary of Denbury Resources, Inc. (Denbury). __ S.W.3d __. Denbury's ownership and control of the pipeline owner clearly makes Denbury an affiliate and unhelpful in satisfying the public-use requirement necessary for common-carrier status. Nevertheless, in discussing the test for common-carrier status, the Court observes "the pipeline does not serve a public use if it only transports gas for a corporate parent or affiliate." *Id.* n.23. The Court includes no limitations on the scope of an affiliate, which could expand dramatically the number of end users that would exclude a pipeline from common-carrier status.

"Affiliate" is not a term used or defined in Chapter 111 of the Natural Resources Code, the chapter governing this case. *See* TEX. NAT. RES. CODE §§ 111.001–.406. "Affiliate" is commonly understood to mean "a subsidiary, parent, or sibling corporation" or a corporation "related to another corporation by shareholdings or other means of control." BLACK'S LAW DICTIONARY 67 (9th ed. 2009). Given the undefined ownership interest and extent of control implicated by the definition of "affiliate," the Court's use of this broad term could result in a conclusion that an entity owning just

[1] The person must also file a written acceptance agreeing to be subject to the duties and obligations conferred or imposed by the chapter. *Id.*

one share of the pipeline owner's stock is an "affiliate" and the pipeline owner is therefore not a common carrier, without any evidence of control.[2] We need not go that far under the facts of this case. Because "affiliate" is not defined in the statute and the common meaning of the word is very broad, I agree that the opinion could be read more broadly than intended by the Legislature or reason dictates.

* * *

There is no discussion in Chapter 111 of how related persons and business entities must be to trigger exclusion on public-use. The Legislature defined the term "affiliate" in other statutory provisions addressing the regulation of minerals by the Texas Railroad Commission, and they provide some insights.

While not governing carbon dioxide pipelines, Chapter 111's definition of "common purchaser" refers to corporate affiliation, including within its reach "every person that purchases crude oil or petroleum produced within the limits of this state and that is *affiliated through stock ownership, common control, contract*, *or in any other manner* with a common carrier by pipeline or is itself a common carrier." TEX. NAT. RES. CODE § 111.081(a)(1) (emphasis added).

"Common purchaser" is very broadly defined and suggests that, among other considerations, nominal stock ownership would confer affiliate status. However, regulations of the Commission's Oil and Gas Division suggest that some degree of operational control or threshold percentage ownership interest is required for affiliate status. One example is the Commission's organization-

[2] "Corporate parent" is also undefined and raises similar questions.

report rule, requiring persons and business organizations to submit directory and ownership information for any person or organization "performing operations within the jurisdiction of the Commission." 16 TEX. ADMIN. CODE § 3.1(a)(1), (4). In discussing notices of bankruptcy for organizations required to file organization reports, the Commission requires thirty-days notice by "the organization or the affiliate" filing for bankruptcy. *Id.* § 3.1(f). "Affiliate" means, for the purpose of this section, "an organization that is effectively controlled by another." *Id.*

Focusing on both control and a percentage ratio of ownership, the rule on ratable production of natural gas defines "affiliate" as "[a] person or entity that owns, is owned by, or is under common ownership with another person or entity to the extent of 50% or more or that otherwise controls or is controlled by another person or entity." *Id.* § 3.34(a)(1). The rule for forms, applications, and filing requirements does not refer directly to an "affiliate," but does proscribe organization reports and applications for permits by certain owners holding "a position of ownership or control" in an organization that previously violated Commission requirements. *Id.* § 3.80(c)(2). Defining "position of ownership or control" as an officer, general partner, sole proprietor, owner of more than twenty-five percent of the organization, or designated trustee, the regulation repeats the dual characteristics of operational control and threshold ownership interest. *See id.* § 3.80(b)(5). The rule for fees and financial-security requirements similarly defines officers and owners as persons "owning or controlling an organization including officers, directors, general partners, sole proprietors, owners of more than 25% ownership interest, any trustee of an organization, and any person determined by a final judgment or final administrative order to have exercised control over the organization." *Id.* § 3.78(a)(8).

The rules of the Gas Services Division also define "affiliate" both in terms of a percentage ratio of ownership or operational control. The procedural rule for the Gas Services Division references the definition of "affiliate" at section 101.003 of the Texas Utilities Code. *Id*. § 7.115(1). Section 101.003 defines "affiliate" as a person owning, directly or indirectly, at least five percent of the voting securities of the gas utility, a corporation with at least five percent of its voting securities owned by a gas utility, an officer or director of a corporation in a chain of successive ownership of at least five percent of the voting securities of a gas utility, or a person determined to be an affiliate under section 101.004. TEX. UTIL. CODE § 101.003(2). Section 101.004 focuses on operational control, allowing the Commission to deem a person an affiliate if the Commission finds, after notice and hearing, that the person exercises "substantial influence or control over the policies of a gas utility," is under the "substantial influence or control" of a gas utility, is under "common control with a gas utility," or "actually exercises substantial influence over the policies and actions of a gas utility in conjunction with" a business partner or blood relation. *Id*. § 101.004(a)(1)–(4).

* * *

Chapter 111, as well as gas-services statutes and the Commission's regulations, generally predicate "affiliate" status either on some degree of operational control or some defined percentage of ownership interest in the other entity, or both. The scope of the term as used in the Court's opinion is broader than all the referenced affiliate definitions in the natural resources statutes and regulations. We can protect property rights under the Constitution without undermining the recognition in Texas law of the separateness of corporate entities. And we should not leave the

breadth of the disqualifying affiliate relationships unbounded when it is so important to both property owners and the energy industry.[3]

_____

Dale Wainwright
Justice

OPINION DELIVERED: August 17, 2012

[3] The Court received briefing from fourteen amici in this case, including property owners and oil and gas companies, and several have expressed concern over confusion, lack of predictability and the risk of variant judicial opinions that could arise from some of the language of the opinion. This is a matter the Legislature could address.

IN THE SUPREME COURT OF TEXAS

NO. 09-0905

LARRY YORK D/B/A YORK TANK TRUCKS, PETITIONER,

v.

STATE OF TEXAS AND WISE COUNTY, TEXAS, RESPONDENT

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

Argued December 6, 2011

JUSTICE HECHT delivered the opinion of the Court.

Petitioner sued for a declaration that a final judgment awarding his property to the State was rendered in violation of the Bankruptcy Code's automatic stay[1] and therefore void. Petitioner also sued for damages for the lost use of his property as a constitutionally compensable taking. We hold that a judgment that violates the automatic stay is void and subject to collateral attack in state court, but that a judicial award of property to the State is not, in these circumstances, a taking. We reverse the judgment of the court of appeals[2] and remand the case to the trial court.

[1] 11 U.S.C. § 362 (2012). Section 362 provides that the filing of a bankruptcy petition "operates as a stay . . . of . . . any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate". *Id.* § 362 (a)(3).

[2] 298 S.W.3d 735 (Tex. App.–Fort Worth 2009).

I

In October 2006, Trooper Tim Godwin of the Department of Public Safety ("DPS"), in his words, "stopped a York water Tanker" in Paradise, Texas, in Wise County.[3] The investigative report by Sergeant David Martinez states that the 1981 M&D model tank trailer was being operated by York Tank Truck, a local oilfield business owned by Larry York. The York name was emblazoned on the side of the trailer. The trailer's registration receipt designated the renewal recipient as York Vacuum, another name for York's business, and listed the trailer's owner as the McNutt Co. in Snyder, Texas.[4] But the trailer had no vehicle identification number (VIN), so Martinez impounded it, as a peace officer is authorized to do by Texas law, which then permits the seized vehicle to be treated as stolen for purposes of custody and disposition.[5]

DPS contacted York, who not surprisingly claimed the trailer was his. Harold McNutt, owner of the McNutt Co., had sold the trailer to York's father in the late 1980s or early 1990s, and York had acquired it when he bought his father's business in 1993. York stated the trailer was his,

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[3] According to the 2010 census, the population of Paradise is 441 and the population of Wise County is 59,127.

[4] According to the 2010 census, the population of Snyder is 11,202.

[5] 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. (b) A vehicle or part seized under this section may be treated as stolen property for purposes of custody and disposition of the vehicle or part."). *See City of Dallas v. VSC, LLC*, 347 S.W.3d 231, 234 (Tex. 2011). Knowingly possessing a vehicle without a serial number or permanent identification marking is a Class A misdemeanor, TEX. PENAL CODE § 31.11(a)(2), but it is an affirmative defense to prosecution that the possessor was "the owner or acting with the effective consent of the owner", *id*. § 31.11(b)(1). *See also id*. § 501.158 31.11 (b)(3)(B)(providing a defense for an applicant for an assigned number); *id*. § 501.032 (providing in part that on proper application the department shall assign a VIN to a trailer when the manufacturer's original die-stamped number has been lost, removed or obliterated); *id*. § 501.033 (providing, generally, that a person determined to be the owner can apply for an assigned number).

but that the registration had just not been transferred yet. McNutt *had* in fact assigned title to York, and York had pledged and delivered the original title to the Roscoe State Bank to secure the loan he had used to buy his father's business. DPS did not attempt to contact the McNutt Co.[6] York told DPS he thought the VIN plate had been removed and destroyed while the trailer was being repaired. A painter in Snyder later provided an affidavit stating that the VIN plate had been discarded in the process of repainting the trailer. DPS determined that no similar trailer had been reported stolen in Texas.

Though no one but York claimed the trailer, in February 2007 the State petitioned the justice court under Chapter 47 of the Texas Code of Criminal Procedure to determine who should have possession. The State asserted that "each person or company known . . . as being a reasonably likely party to have an interest in [the trailer]" was listed in its pleading. The only party listed was York Vacuum Service. Notice of the proceeding was given to York but not to the McNutt Co. York appeared *pro se* and produced registration renewal receipts, inspection records, insurance cards, repair records, and photographs to show that the trailer was his, but he did not and could not produce the title certificate since it was held by the Roscoe State Bank. The only evidence offered by the State was that the VIN was missing. No other evidence was offered to show that this 1981 trailer

[6] David McNutt was by then deceased, but his widow later confirmed by affidavit that he had sold the trailer to York's father, and attached to the affidavit a copy of the title McNutt had endorsed to York.

was stolen property. Following the hearing, the justice court awarded the trailer to the State for use or disposal by the Sheriff of Wise County.[7] The County stored the trailer.

A few days later, York, now with legal counsel, attempted to appeal, but notice of appeal in such proceedings must be given orally at the conclusion of the hearing,[8] which York did not know to do, and therefore his appeal was untimely. York also filed a bill of review to set aside the judgment, but it was denied.

Years earlier, in January 2003, York had filed for protection under Chapter 13 of the Bankruptcy Code, and that case remained pending in 2007. York scheduled the trailer as an asset of his estate and listed Roscoe State Bank as a secured creditor. York says that he did not inform DPS or the justice court of the bankruptcy case because he did not know until after he retained counsel that it might have afforded him protection from the justice court proceeding. In August 2007, York brought this action against the State and Wise County to declare the justice court judgment in violation of the Bankruptcy Code's automatic stay and therefore void. He also alleged that the defendants had intentionally misused the Chapter 47 proceeding to deprive him of his property and asserted damages for the loss of its use as a compensable taking under Article I, Section 17(a) of the Texas Constitution.[9]

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[7] The judgment stated: "IT IS ACCORDINGLY ORDERED, ADJUDGED AND DECREED by the Court that the Plaintiff STATE OF TEXAS, do have and recover of and from the Defendant, the trailer, thereon from the date of this judgment. Item to be awarded to The State of Texas and to be disposed to the Wise County Sheriff Department to be used or disposed with the discretion of the department."

[8] TEX. CODE CRIM. PROC. art. 47.12(c).

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

The defendants asserted immunity, and York moved for partial summary judgment on his claim for declaratory relief. The trial court dismissed the case for want of jurisdiction, concluding that the justice court judgment was not void but was only voidable, and only if the bankruptcy court, rather than the state court, determined (i) that the trailer was not stolen but was part of York's estate, and (ii) that the justice court proceeding did not fall within the police power exception to the automatic stay.[10] The trial court's findings and conclusions did not mention York's takings claim.

A divided court of appeals reversed and remanded.[11] The court held that a judgment rendered in violation of the automatic stay is void, not merely voidable, and that a state court has jurisdiction to make that determination, even though the bankruptcy court might later disagree.[12] But the court also held that a challenge to a judgment based on the automatic stay is subject to the general rule in Texas that a final judgment cannot be collaterally attacked with extrinsic evidence.[13] Nothing in the parts of the justice court record presented as evidence showed that York had filed for bankruptcy, or that the automatic stay affected the proceeding.[14] Because a violation of the automatic stay could be shown only with extrinsic evidence, the court of appeals concluded that the justice court judgment could not be collaterally attacked.[15]

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[10] 11 U.S.C. § 362(b)(4) (2012).

[11] 298 S.W.3d 735 (Tex. App.–Fort Worth 2009).

[12] *Id*. at 745.

[13] *Id*. at 746-747.

[14] *See* TEX. R. CIV. P. 525 (providing for oral pleadings in justice court).

[15] 298 S.W.3d at 747.

As to York's takings claim, the court of appeals concluded that subsisting fact issues precluded dismissal. "The crux of York's complaint," the court stated, was whether the State and County, "with knowledge that York actually owned the trailer, intentionally utilized [the Chapter 47 proceeding] to divest him of ownership."[16] "A fair reading of his complaint", the court continued, "is that the county, at least, has been using the statute as a means to take physical possession of property owned by private citizens without compensation."[17] The court observed that the defendants' faulty interpretation of Chapter 47 as a forfeiture provision supported York's claim that they were using the statute to take property rather than return it to its rightful owner.[18] So did the facts:

> York has put forth considerable, credible evidence of his ownership of the vehicle, regardless of the missing VIN. [The defendants] have not controverted that evidence. Although from York's affidavit testimony it appears that the evidence he presented to the justice court showed that McNutt Co., rather than York, was the true owner of the property, Sergeant Martinez's testimony does not indicate that he ever contacted or attempted to contact McNutt Co.; he simply concluded that since York could not produce the original VIN plates that the property was "deemed" stolen and that there was no way of ever tracing ownership. McNutt Co. was never served in the . . . proceeding or named as an interested party. This is significant because if McNutt Co. were the owner, as evidenced on the DPS registration receipts, and was allowing York to use the property, also as evidenced by the DPS registration receipts, then York would have a superior right to possess the trailer as against [the defendants], regardless of whether the trailer was deemed stolen or not. It seems logical that if DPS were acting in furtherance of the true purpose of [Chapter 47], to return property to its rightful owner, that Sergeant Martinez would at least have included McNutt Co. in his investigation. The evidence that he contacted York instead, coupled with York's allegations (and [defendants'] admissions that [they] are treating [Chapter 47]

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[16] *Id*. at 750.

[17] *Id*.

[18] *Id*. at 750-751.

> as a forfeiture statute), is enough to at least raise a fact issue sufficient to survive appellees' jurisdictional challenge to York's alleged takings claim.[19]

The court also concluded that because the justice court judgment authorized the County to use or dispose of the trailer in its discretion, a fact issue remained whether the trailer had been taken for a public purpose.[20] The dissent argued only that York's taking claim was precluded by the justice court's determination that he did not own the trailer.[21]

York, the State, and the County each petitioned for review. We granted all three petitions.[22] We turn first to York's declaratory judgment claim, then to his takings claim.[23]

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[19] *Id*. at 751-752 (footnotes and citations omitted).

[20] *Id*. at 753.

[21] *Id*. at 754 (Cayce, C.J., dissenting).

[22] 54 Tex. Sup. Ct. J. 1548 (Aug. 19, 2011).

[23] The State and County do not argue that only the bankruptcy trustee has standing to assert York's claims. When a Chapter 13 plan is confirmed, as York's was in 2005, all property of the bankruptcy estate vests in the debtor except as otherwise provided by the plan. 11 U.S.C. § 1327(b)(2012). Unlike a Chapter 7 proceeding in which a debtor's assets are liquidated to pay debts, a Chapter 13 plan allows a debtor to keep his assets and use earnings to pay debts over time, usually three to five years. *Compare id.* § 721 *with id.* § 1322. Because of this feature of Chapter 13, federal circuit courts generally hold that the debtor has standing to sue on causes benefitting the estate. *See Smith v. Rockett*, 522 F.3d 1080, 1081–1082 (10th Cir. 2008); *Crosby v. Monroe Cnty.*, 394 F.3d 1328, 1331 n.2 (11th Cir. 2004); *Cable v. Ivy Tech State Coll.*, 200 F.3d 467, 472–474 (7th Cir. 1999); *Olick v. Parker & Parsley Petroleum Co.*, 145 F.3d 513, 515-516 (2d Cir. 1998); *Maritime Elec. Co. v. United Jersey Bank*, 959 F.2d 1194, 1209 n.2 (3d Cir. 1992). State courts appear to be in accord. *See Ex parte Moore*, 793 So. 2d 762, 765 (Ala. 2000); *Kelsey v. Waste Mgmt. of Alameda Cnty.*, 90 Cal. Rptr. 2d 510, 514 (Cal. Ct. App. 1999); *Dance v. La. State Univ. Med. Ctr.*, 749 So. 2d 870, 873 (La. Ct. App. 1999). *See also* 8 COLLIER ON BANKRUPTCY ¶ 1303.04 (16th ed. 2011) ("[T]he right to bring a lawsuit . . . is implicit in section 1306(b), which allows the debtor to retain possession of all property of the estate . . . .").

II

All agree that to have the justice court judgment set aside, York must show that a judgment issued in violation of an automatic stay provided by the Bankruptcy Code is void, that such a judgment is subject to collateral attack, even if the existence of the stay must be established by extrinsic evidence, and that the justice court judgment at issue in this action violated the automatic stay arising from York's bankruptcy proceedings. We conclude that York is correct on the first two matters but that fact questions remain on the third.

A

We have considered the effect of actions taken in violation of the automatic stay in only two cases. In *Continental Casing Corp. v. Samedan Oil Corp.*, an oil well operator, Samedan, ordered casing from Misco Supply Co., which subcontracted the order to Continental.[24] Continental delivered the casing to Samedan and billed Misco, but Misco declared bankruptcy.[25] So Continental sued Samedan, claiming a lien for the amount due for the casing.[26] Samedan responded that it had offset the amount it owed Misco for the casing against other amounts Misco owed it, and therefore owed Continental nothing.[27] Continental countered that the offset was prohibited by the automatic stay. The court of appeals held that Samedan's offset, if in violation of the automatic stay, was not

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[24] 751 S.W.2d 499, 500 (Tex. 1988) (per curiam).

[25] *Id*.

[26] *Id*.

[27] *Id*.

void but only voidable, and only if challenged by the bankruptcy trustee.[28] We disagreed, stating that "[a]n action taken in violation of the automatic stay is void, not merely voidable."[29] Four years later, in *Howell v. Thompson*, we held, citing only *Continental Casing*, that an appeals court's issuance of an opinion and judgment in violation of the automatic stay "was void".[30]

In *Continental Casing*, we relied on the United States Supreme Court's decision in *Kalb v. Feuerstein*.[31] There, a Wisconsin state court had ordered foreclosure on the property of farmers who were debtors in bankruptcy.[32] The Frazier-Lemke Farm Bankruptcy Act provided that foreclosure proceedings

> shall not be instituted, or if instituted at any time prior to the filing of a petition under this [Act], shall not be maintained, in any court or otherwise, against the farmer or his property, at any time after the filing of the petition under this section, and prior to the confirmation or other disposition of the composition or extension proposal by the [bankruptcy] court . . . .
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> * * *
>
> The prohibitions . . . shall apply to all judicial or official proceedings in any court or under the direction of any official, and shall apply to all creditors, public or private, and to all of the debtor's property, wherever located.[33]

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[28] *Id*. at 501.

[29] *Id*.

[30] 839 S.W.2d 92, 92 (Tex. 1992) (order).

[31] 308 U.S. 433 (1940).

[32] *Id*. at 435-436.

[33] *Id*. at 440-441.

When the debtors sued in state court to collaterally attack the foreclosure judgment, the court dismissed their complaints, and the Supreme Court of Wisconsin affirmed.[34]

The United States Supreme Court held that the foreclosure judgment "was beyond [the state court's] power, void, and subject to collateral attack."[35] Noting that while "[i]t is generally true that a judgment by a court of competent jurisdiction bears a presumption of regularity and is not thereafter subject to collateral attack",[36] the Supreme Court stated: "Congress, because its power over the subject of bankruptcy is plenary, may by specific bankruptcy legislation create an exception to that principle and render judicial acts taken with respect to the person or property of a debtor whom the bankruptcy law protects nullities and vulnerable collaterally."[37] Congress, the Supreme Court concluded, had done in the Bankruptcy Act what it was empowered to do, thereby depriving the Wisconsin court "of all jurisdiction or power to proceed with the foreclosure, the confirmation of the sale, the execution of the sheriff's deed, the writ of assistance, and the ejection of appellants from their property".[38]

The State and County argue that *Kalb* is no longer controlling precedent because the law has changed and the bankruptcy court is now authorized not only to modify or terminate the automatic

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[34] *Id*. at 436-437.

[35] *Id*. at 438.

[36] *Id*.

[37] *Id*. at 438-439.

[38] *Id*. at 443.

stay but also to annul it,[39] retroactively vitiating its prohibition,[40] something the bankruptcy court could not do at the time *Kalb* was decided. By annulling the stay, their argument continues, the bankruptcy court can now in effect ratify an act done in violation of the stay, and under Texas law, an act that can be ratified cannot be void.[41] But in annulling a stay to give a judgment validity it lacked when rendered, the court need not necessarily ratify the judgment in the sense of approving it on the merits. In one case, for example, a bankruptcy court annulled the stay merely to validate a notice of appeal so that an appeal could be prosecuted, without regard to its merits.[42]

Moreover, treating an action in violation of the automatic stay as void is more consistent with its purpose of providing debtors a "breathing spell".[43] One court has explained:

> Either the debtor must affirmatively challenge creditor violations of the stay, or the violations are void without the need for direct challenge. If violations of the stay are merely voidable, debtors must spend a considerable amount of time and money policing and litigating creditor actions. If violations are void, however, debtors are afforded better protection and can focus their attention on reorganization.

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[39] 11 U.S.C. § 362(d) ("On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay [in specified circumstances].")

[40] *Sikes v. Global Marine, Inc.*, 881 F.2d 176, 178 (5th Cir. 1989); *Soares v. Brockton Credit Union*, 107 F.3d 969, 976-977 (1st Cir. 1997); *Mataya v. Kissinger (In re Kissinger)*, 72 F.3d 107, 109 (9th Cir. 1995); *In re Siciliano*, 13 F.3d 748, 751 (3d Cir. 1994).

[41] *Brazel v. Murray*, 481 S.W.2d 801, 803 (Tex. 1972) ("A void act is one entirely null within itself, not binding on either party, and which is not susceptible of ratification or confirmation. Its nullity cannot be waived." (internal quotation marks omitted)).

[42] *In re Hoffinger Indus., Inc.*, 329 F.3d 948 (8th Cir. 2003).

[43] *St. Paul Fire & Marine Ins. Co. v. Labuzan*, 579 F.3d 533, 540 (5th Cir. 2009) ("The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors." (quoting S. Rep. No. 95-989, at 49 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6010)).

> Given the important and fundamental purpose of the automatic stay and the broad debtor protections of the Bankruptcy Code, we find that Congress intended violations of the automatic stay to be void rather than voidable.[44]

Another has echoed:

> Treating an action taken in contravention of the automatic stay as void places the burden of validating the action after the fact squarely on the shoulders of the offending creditor. In contrast, treating an action taken in contravention of the automatic stay as voidable places the burden of challenging the action on the offended debtor. We think that the former paradigm, rather than the latter, best harmonizes with the nature of the automatic stay and the important purposes that it serves.[45]

We agree, as do most of the federal circuit courts that have considered the issue,[46] and would add only that the automatic stay protects not only the debtor but other creditors of the estate as well.

The Fifth Circuit is not in the majority, as reflected in its decision in *Sikes v. Global Marine, Inc.,*[47] with which we have previously noted our disagreement.[48] There, plaintiffs filed a personal injury action a few weeks before limitations was to run, but before they could serve the defendant, they learned it was in bankruptcy.[49] The bankruptcy court modified the automatic stay to allow the action to proceed, but the defendant argued that the original filing was void and that plaintiffs could

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[44] *In re Schwartz*, 954 F.2d 569, 571 (9th Cir. 1992).

[45] *Soares*, 107 F.3d at 976.

[46] *Id.*; *In re Schwartz*, 954 F.2d 569, 571 (9th Cir. 1992); *In re Calder*, 907 F.2d 953, 956 (10th Cir. 1990) (per curiam); *In re 48th St. Steakhouse, Inc.*, 835 F.2d 427, 431 (2d Cir. 1987); *In re Albany Partners, Ltd.*, 749 F.2d 670, 675 (11th Cir. 1984). *But see Sikes*, 881 F.2d at 178; *Bronson v. United States*, 46 F.3d 1573, 1578 (Fed. Cir. 1995); *Easley v. Pettibone Mich. Corp.*, 990 F.2d 905, 911 (6th Cir. 1993).

[47] 881 F.2d 176 (5th Cir. 1989); *accord In re Coho Resources, Inc.*, 345 F.3d 338, 344 (5th Cir. 2003).

[48] *Roccaforte v. Jefferson Cnty.*, 341 S.W.3d 919, 923 n.7 (Tex. 2011) (citing *Kalb* and noting conflict between *Continental Casing* and *Sikes*).

[49] *Sikes*, 881 F.2d at 177.

only refile the action, which was by then barred by limitations.[50] The district court agreed, but the court of appeals reversed.[51] Because the bankruptcy court could annul the stay, and because the Bankruptcy Code provided that some actions in violation of the stay were not automatically invalid, the court concluded that the plaintiffs' filing was only voidable, not void, and was rehabilitated by the modification of the stay.[52] The court distinguished *Kalb*, as the State and County do here, by noting that the power to annul the stay did not exist when the Supreme Court decided that case.[53]

We respectfully disagree that the distinction is valid. *Kalb* squarely held that Congress acted to deny courts jurisdiction to render judgment in violation of the automatic stay. The automatic stay in bankruptcy is for this reason different, for example, from a stay of proceedings pending appeal which merely stops a court with jurisdiction from proceeding.[54] We do not think that by authorizing the bankruptcy court to annul the stay, Congress broadened all courts' jurisdiction to violate it. No one doubts that the bankruptcy court can retroactively grant relief from the stay. The issue is whether a judgment that violates the stay is nevertheless valid unless the debtor seeks enforcement of a stay that is supposed to be automatic, or invalid unless the creditor obtains relief from the stay. We agree with most courts that the latter view is correct.

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[50] *Id*. at 177-179.

[51] *Id*. at 178.

[52] *Id*. at 178-179.

[53] *Id*. at 179 n.2.

[54] *Roccaforte*, 341 S.W.3d at 923-924.

We agree with the result in *Sikes*. By modifying the stay, the bankruptcy court validated the plaintiffs' original filing. But until the modification, we think the filing was void. In our view, the bankruptcy court's authority to grant relief did not change the character of the action the stay prohibited. Accordingly, we adhere to the rule we stated in *Continental Casings*.

B

A judgment void on its face is subject to collateral attack, but in *Crawford v. McDonald*, we held that for reasons of public policy, a judgment rendered by a court without jurisdiction cannot be collaterally attacked with extrinsic evidence:

> Logically, it can make no difference as to the validity of the judgment whether the lack of jurisdiction of the person or the subject-matter appears from the face of the record or is made to appear by evidence aliunde; for if, for instance, no service was had upon the defendant, he not appearing in the case, the court, having no jurisdiction whatever over his person, is absolutely without power to bind him by an adjudication that he had been in fact duly served; and, logically, this want of power is the same whether the lack of jurisdiction appears on the face of the record or not. There is, however, another rule of law, equally well settled upon principles of public policy, which precludes inquiry by evidence aliunde the record in a collateral attack upon a judgment of a domestic court of general jurisdiction, regular on its face, into any fact which the court rendering such judgment must have passed upon in proceeding to its rendition. Therefore it is well settled that, where a personal judgment has been rendered against a defendant by a domestic court of general jurisdiction, and under the same his property has been seized and sold, he will not, in a contest over the title to the property, be allowed to show by evidence dehors the record that the judgment was rendered without any service whatever upon him. Logically, the judgment is, in fact, void, but on grounds of public policy the courts, in order to protect the property rights, apply the rule aforesaid, which precludes inquiry into facts dehors the record for the purpose of showing the invalidity of the judgment; and therefore, for all practical purposes, in such collateral attack, the judgment is held valid.[55]

But as we explained only a month later in *Templeton v. Ferguson*, there are exceptions:

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[55] 33 S.W. 325, 328 (Tex. 1895).

> [T]here are classes of cases over which a court has not, under the very law of its creation, any possible power; e.g. an administration upon the estate of a living person, administration upon the estate of a deceased soldier when prohibited by statute, an administration in bankruptcy upon the estate of a person deceased before the institution of the proceedings, a suit for divorce in a foreign country in which neither of the parties is domiciled, or a suit to recover against a nonresident, upon service by publication, a purely personal judgment. In such cases the entire proceedings are coram non judice. The law raises no presumptions in their support, and the facts bringing any particular case within one of such classes may be established by evidence dehors the record, either in a direct or collateral attack, for the purpose of destroying the apparent binding force of such proceedings.[56]

Crawford and *Templeton* both rejected collateral attacks of judgments for want of jurisdiction. In *Crawford*, the challenge was to a probate court judgment confirming a sale of property that had occurred outside the county seat, which the law did not permit. In *Templeton*, the challenge was to a judgment in the probate of the estate of a decedent who had not resided in the county at the time of his death. But in *Easterline v. Bean*, citing *Crawford* and *Templeton*, we allowed the collateral attack of a probate court judgment rendered, in guardianship proceedings, after the ward's death to confirm the sale of his property.[57] We noted that statutes terminating a court's jurisdiction over such proceedings at the ward's death "firmly established . . . the public policy of this state."[58]

Whether distinctions in these cases are or should be material is, we acknowledge, arguable, as is the no-extrinsic-evidence rule itself. The *Restatement (Second) of Judgments* explains:

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[56] 33 S.W. 329, 332 (Tex. 1895).

[57] 49 S.W.2d 427, 429-431 (Tex. 1932).

[58] *Id*. at 429-430.

> The modern rule is that a judgment may be impeached by evidence that contradicts the record in the action. Concern for protecting judgments from contrived attacks is considered adequately served by requiring that an attack based on extrinsic evidence be brought in an appropriate forum and that it be sustained by more than ordinarily persuasive evidence.[59]

But we have not been asked to reconsider the rule here, nor need we attempt to define exceptions with greater certainty. This case fits comfortably under *Templeton*'s exclusion from the rule of "cases over which a court has not, under the very law of its creation, any possible power"[60] because the law of the justice court's creation includes the United States Constitution, which gives the "Power . . . To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States".[61] As the Supreme Court explained in *Kalb*, that power extends to limiting state-court jurisdiction:

> Congress manifested its intention that the issue of jurisdiction in the [state] court need not be contested or even raised by the distressed farmer-debtor. The protection of the farmers was left to the farmers themselves or to the Commissioners who might be laymen, and considerations as to whether the issue of jurisdiction was actually contested in the County Court, or whether it could have been contested, are not applicable where the plenary power of Congress over bankruptcy has been exercised as in this Act.[62]

The State argues that *Kalb* does not preempt Texas' no-extrinsic-evidence rule because it requires only that there be *some* forum in which the debtor in bankruptcy can collaterally attack a state-court judgment rendered in violation of the automatic stay, and that forum is the bankruptcy

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[59] RESTATEMENT (SECOND) OF JUDGMENTS § 77 cmt a (1982).

[60] *Templeton*, 33 S.W. at 332.

[61] U.S. CONST. art. I, § 8, cl. 4.

[62] *Kalb v. Feuerstein*, 308 U.S. 433, 444 (1940) (footnotes omitted).

court. The State is vague on what happens after the debtor's bankruptcy has been closed.[63] But we need not decide whether federal law preempts. As a matter of Texas law, a state court has no power to render a judgment in violation of the automatic stay under fundamental, constitutional law, and thus the no-extrinsic-evidence rule limiting a collateral attack does not apply.[64]

C

The State and County argue that even if the justice court judgment is void and can be collaterally attacked, York has not established that the Chapter 47 proceeding violated the automatic stay.

1

The automatic stay applies to, among other things, "any act to obtain possession of property of the estate or of property from the estate".[65] The County argues, as the dissent did in the court of appeals, that the Chapter 47 proceeding does not fall within this provision because York does not own the trailer. The State pointedly does not make this argument.

First, the County contends, the justice court determined that York is not the owner, and its determination is conclusive. But Chapter 47 authorizes only a determination of possession, not ownership. Article 47.01a, under which the State filed, provides in pertinent part:

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[63] York's counsel stated at oral argument that he had been discharged from bankruptcy for more than a year.

[64] We assume, as the parties do, that a state court's determination that a state-court judgment did or did not violate the automatic stay would not bind the bankruptcy court. If that is true, it is possible that the bankruptcy court might, by annulment of the automatic stay, validate a judgment already set aside by a state court, though that seems unlikely as long as the parties in state court could seek relief from the bankruptcy court before the state court's decision.

[65] 11 U.S.C. § 362(a)(3) (2012).

> (a) If a criminal action relating to allegedly stolen property is not pending, a . . . judge . . . 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. Jurisdiction under this section is based solely on jurisdiction as a criminal magistrate under this code and not jurisdiction as a civil court. The court shall . . . order the property delivered to whoever has the superior right to possession . . . .
>
> (b) 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 shall order the peace officer to:
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> (1) deliver the property to a government agency for official purposes;
>
> (2) deliver the property to a person authorized . . . to receive and dispose of the property; or
>
> (3) destroy the property.
>
> (c) At a hearing under Subsection (a) of this article, any interested person may present evidence showing that the property was not acquired by theft or another offense or that *the person is entitled to possess the property*. At the hearing, hearsay evidence is admissible.[66]

The court may base its determination of the right to possession on evidence of ownership,[67] but a determination of ownership is a civil matter over which the court is expressly denied jurisdiction.[68] The rightful owner may not even have notice of a Chapter 47 proceeding if law enforcement officials have not managed to locate him. Chapter 47's only purpose is to provide a procedure for

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[66] TEX. CODE CRIM. PROC. art. 47.01a (emphasis added).

[67] *Id*. arts. 47.02, 47.04, & 47.07.

[68] *Id*. art. 47.01a(a).

determining whether someone claiming allegedly stolen property has a superior right of possession to law enforcement officials.

Second, the County argues, even if Chapter 47 does not authorize a determination of ownership, York's only claim to possession of the trailer was based on his assertion of ownership, and the justice court's rejection of his claim necessarily rejected the only basis offered for it. Be that as it may — there was no record of the proceeding — the justice court was not authorized to determine ownership and did not do so.

Moreover, even if the justice court had been authorized to determine that York did not own the trailer — and thus that it was not part of his bankruptcy estate and that the automatic stay did not apply — that determination would not preclude York's collateral attack. A court cannot insulate its judgments from collateral attack for lack of jurisdiction simply by holding that it has jurisdiction.

Finally, the County argues that even now, York has failed to prove he owns the trailer. He has produced registration receipts, repair bills, and photographs of the 1981 model trailer in use in his small-town business. His name was painted on it. His explanations about how he acquired the trailer from a seller in Snyder more than ten years before it was seized, and how the trailer's VIN plate was lost during repainting, have been independently corroborated. He has produced a copy of the title held as security by the bank for a loan the bank made to him. DPS's investigation in 2006 revealed that no trailer like York's had ever been reported being stolen in Texas. And in the five years since Chapter 47 proceedings were initiated, no one but York has ever claimed the trailer. Whatever doubts York's evidence in the justice court may have failed to dispel — the only evidence of what transpired is from the participants — none remains. The State's and County's refusal to

acknowledge the validity of York's claim obviously troubled the court of appeals and troubles us. The County's statutory authority to treat the trailer as stolen for want of a VIN ends with proof of ownership, and its insistence, after five years of litigation, that York has not proven that he owns the trailer is indefensible.

Even if the County's argument had substance, it simply misreads the Bankruptcy Code. The automatic stay applies to an action to obtain possession of property both *of* and *from* a debtor's estate.[69] York scheduled the trailer as an asset in his bankruptcy proceeding years before DPS seized it. He had possession, title (held by the bank as security), and a claim of right. Without question, the Chapter 47 proceeding was an act to obtain possession of property *from*, if not *of*, York's bankruptcy estate and therefore a violation of the automatic stay unless it falls within an exception provided by the Bankruptcy Code.

2

The State and County argue that the Chapter 47 proceeding falls within the "police power" exception to the automatic stay, which excludes "the commencement or continuation of an action or proceeding by a governmental unit . . . to enforce [its] police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce [its] police or regulatory power".[70] Courts have used two tests — the "pecuniary purpose" test and the "public policy" test — to determine the application of the "police power" exception.

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[69] 11 U.S.C. § 362(a)(3) (2012).

[70] *Id.* § 362(b)(4) (2012). *See Graber v. Fuqua*, 279 S.W.3d 608, 624 n.3 (Tex. 2009).

> The pecuniary purpose test reviews whether the government acted primarily to protect its pecuniary interest in the debtor's property or the public safety and welfare. If it is the former, the stay applies. The public policy test examines whether the government's actions are motivated to effectuate public policy or private rights. Satisfaction of either test will suffice.[71]

Ordinarily, a Chapter 47 proceeding would clearly pass both tests. As the State asserts (though the County disagrees), the government's principal interest in the property involved lies in seeing it returned to its rightful owner. The government has no legitimate pecuniary interest of its own. But in this case, York has alleged that the State and County prosecuted the Chapter 47 proceeding, not for any legitimate purpose, but as a means of depriving him of his property.

Evidence in the record before us supports York's allegation. As already noted, his evidence of ownership of the trailer is overwhelming. Further, he points out that under Article 47.01a(b), the government may not be awarded property in a Chapter 47 proceeding unless there is probable cause to believe property was obtained illegally — there was in this case, because of the missing VIN — *and* that "the identity of the actual owner of the property cannot be determined".[72] Not only is there no evidence that the actual owner of the trailer could not be determined, all the evidence before us is to the contrary. The County argues that for a vehicle without a VIN, ownership can never be determined, but the argument is not supported by authority or logic. DPS's investigation left no reasonable suspicion that the trailer could be owned by anyone other than York or the McNutt Co. Indeed, confronted with York's evidence, the State and County might well have simply returned the trailer to him. But they ignored York's evidence and declined to contact McNutt.

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[71] *In re Chapman*, 264 B.R. 565, 569 (B.A.P. 9th Cir. 2001) (citation omitted).

[72] TEX. CODE CRIM. PROC. art. 47.01a(b).

"We expect our government to retrieve stolen property and return it to the rightful owner."[73] Were that expectation warranted here, the "police power" exception to the automatic stay for the Chapter 47 proceeding would be established. But York has raised fact issues that the State acted for reasons outside its police power which must be resolved by the trial court.[74]

III

We turn briefly to York's takings claim that the State and County misused the Chapter 47 proceeding to obtain his property and must therefore pay just compensation. But "[w]hen there exists provision . . . for the property's return[,] a constitutional claim is necessarily premature."[75]

The State was entitled to seize the trailer for lack of a VIN and to initiate a Chapter 47 proceeding to determine who had a superior right of possession. Even if the State intended to take York's property, as he contends, it could obtain through the proceeding at most possession subject to a claim of ownership, and that is all the justice court awarded. York could have appealed but did not do so. He could have appealed the denial of his bill of review but chose not to. He has prosecuted this action to set aside the justice court's judgment and may yet prevail. And he is not barred from suing the officials who continue to hold the trailer to establish his ownership. Any of these procedures, and certainly all of them together, afford York ample opportunity to recover the trailer and therefore preclude his takings claim.

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[73] *City of Dallas v. VSC, LLC*, 347 S.W.3d 231, 233 (Tex. 2011).

[74] The State argues that the justice court judgment does not bar York from initiating a civil proceeding, or even another Chapter 47 proceeding, to obtain possession of the trailer; the availability of such a new proceeding might obviate the need to set aside the justice court's judgment here.

[75] *VSC*, 347 S.W.3d at 236.

* * *

The court of appeals' judgment is reversed and the case is remanded to the trial court for further proceedings consistent with this opinion.

Nathan L. Hecht
Justice

OPINION DELIVERED: June 29, 2012

IN THE SUPREME COURT OF TEXAS

NO. 10-0141

VERNON F. MINTON, PETITIONER,

v.

JERRY W. GUNN, INDIVIDUALLY, WILLIAMS SQUIRE & WREN, L.L.P., JAMES E. WREN, INDIVIDUALLY, SLUSSER & FROST, L.L.P., WILLIAM C. SLUSSER, INDIVIDUALLY, SLUSSER WILSON & PARTRIDGE, L.L.P., AND MICHAEL E. WILSON, INDIVIDUALLY, RESPONDENTS

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

Argued March 1, 2011

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

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

JUSTICE HECHT did not participate in the decision.

This case arises out of patent infringement litigation. We consider whether federal courts possess exclusive subject-matter jurisdiction over state-based legal malpractice claims that require the application of federal patent law. The federal patent issue presented here is necessary, disputed, and substantial within the context of the overlying state legal malpractice lawsuit. Additionally, the patent issue may be determined without creating a jurisdictional imbalance between state and federal

courts. We conclude that exclusive federal jurisdiction exists in this case. Accordingly, without reaching the merits of the legal malpractice claim, we reverse the court of appeals' judgment and dismiss this case.

I. BACKGROUND

A. TEXCEN and the '643 Patent

Petitioner, Vernon Minton, is a former securities broker. In early 1990, Minton formed Texas International Stock Exchange, Inc. (TISE). A couple of years later, Minton began developing the Texas Computer Exchange Network (TEXCEN), a software program intended to operate over a telecommunications network. Minton developed the TEXCEN software to allow financial investors to "open[] brokerage accounts and execut[e] trades" at their own convenience "with all the investment technology the experts enjoy." After successfully establishing TEXCEN's commercial viability to R.M. Stark & Co. (Stark), a New York corporation and member of the National Association of Securities Dealers, Inc. (NASD), Minton asked Stark to employ TEXCEN in its business. In a January 1995 letter, Minton touted TEXCEN's utility to Stark's business, stating that "[a]fter five years of development, TEXCEN is scheduled to be on-line during March or April of this year." Stark agreed to lease TEXCEN from TISE, Minton's company. The lease permitted Stark to use TEXCEN "for the purpose of opening brokerage accounts and executing trades for individuals." In exchange, Stark agreed to pay TISE a monthly payment of the lesser of $2,000.00 or 30% of the gross revenues that Stark derived from using TEXCEN. The lease warranted that "TEXCEN will perform in a workmanlike manner." During the lease negotiations, Minton knew that Stark could not use TEXCEN or provide its customers with TEXCEN's benefits until NASD

had reviewed and approved of the software. Despite this knowledge, Minton did not disclose to Stark that he intended to lease TEXCEN to Stark for experimental purposes.

More than one year after signing the TEXCEN lease, Minton filed a provisional application for a patent covering an interactive securities trading system that contained features very similar to TEXCEN. Minton's patent attorney drafted the patent application with the aid of TEXCEN's software assistance manual, which Minton had provided him. The United States Patent and Trademark Office granted Minton a patent (the '643 Patent) on January 11, 2000.

B. Underlying Patent Infringement Litigation

Subsequently, Minton filed a patent infringement action against NASD and The NASDAQ Stock Market, Inc. in the United States District Court for the Eastern District of Texas. *Minton v. Nat'l Ass'n of Sec. Dealers, Inc.*, 226 F. Supp. 2d 845, 852 (E.D. Tex. 2002). Minton's infringement suit alleged that the NASDAQ software system used in conjunction with NASD's services infringed the '643 patent. *Id.* at 854. At the time they filed the patent infringement suit on Minton's behalf, his attorneys had no knowledge of the TEXCEN lease. NASD and NASDAQ moved for summary judgment, alleging the '643 patent's invalidity under the "on-sale bar" provided in § 102(b) of the U.S. Patent Act. *Id.* at 852; *see* 35 U.S.C. § 102(b). Under the on-sale bar, a patent is invalid when the invention claimed by the patent is sold "more than one year prior to the date of the application for patent in the United States." 35 U.S.C. § 102(b). As an initial defense to the application of the on-sale bar, Minton pled that TEXCEN was a different type of software system than that claimed by the '643 patent. *Minton*, 226 F. Supp. 2d at 855. The federal district court found Minton's

argument unpersuasive and, accordingly, granted NASD and NASDAQ's motion for summary judgment and declared the '643 patent invalid. *Id.* at 852, 882–84.

Following the district court's decision, Minton asked his attorneys to consider a new defense to the on-sale bar—the experimental use exception. Under the experimental use exception, a patent will not be invalidated by the on-sale bar if the purpose for which the patented invention was sold was primarily experimental rather than commercial. *See Electromotive Div. of Gen. Motors Corp. v. Transp. Sys. Div. of Gen. Elec. Co.*, 417 F.3d 1203, 1210 (Fed. Cir. 2005). Minton obtained new counsel to brief the experimental use exception to the on-sale bar, and a motion for reconsideration arguing the experimental use exception was filed on Minton's behalf. When the federal district court denied Minton's motion for reconsideration, Minton appealed to the United States Court of Appeals for the Federal Circuit. *See Minton v. Nat'l Ass'n of Sec. Dealers, Inc.*, 336 F.3d 1373 (Fed. Cir. 2003). On appeal, the Federal Circuit affirmed the federal district court's denial of reconsideration because the experimental use exception was not timely asserted during trial. *Id.* at 1379–81.

C. Resulting State-Based Legal Malpractice Lawsuit

Minton filed a legal malpractice suit in state court against Respondents, the attorneys who had originally prosecuted his patent infringement litigation in the federal district court: Jerry W. Gunn, individually; Williams Squire & Wren, L.L.P.; James E. Wren, individually; Slusser & Frost, L.L.P.; William C. Slusser, individually; Slusser Wilson & Partridge, L.L.P.; and Michael E. Wilson, individually (collectively "Gunn"). Minton alleged that Gunn's negligent failure to timely plead and brief the experimental use exception to the on-sale bar cost him the opportunity of

winning his federal patent infringement litigation. Alternatively, Minton claimed that Gunn's negligence resulted in the pretrial dismissal of his patent infringement suit, costing him a potential settlement with NASD and NASDAQ of his claim for more than $100,000,000.00 in damages. Gunn, in turn, challenged the causation element of Minton's malpractice claim by filing joint no-evidence and traditional motions for summary judgment. Gunn's joint motions asserted that he was not obligated to raise the experimental use exception to the on-sale bar because, under the facts in existence at the time of the federal patent infringement litigation, the exception was neither a legally nor factually viable defense. Therefore, Gunn asserted that Minton could not establish as a matter of law that, but for his failure to plead the experimental use exception, Minton would have won his patent infringement lawsuit.

Based on the absence of any evidence that the primary purpose of the TEXCEN lease was experimental, the trial court granted Gunn's no-evidence motions for summary judgment and motions to dismiss and rendered a take-nothing judgment in his favor.[1] Minton appealed the judgment to the Second Court of Appeals in Fort Worth. *Minton v. Gunn*, 301 S.W.3d 702 (Tex. App.—Fort Worth 2009, pet. granted).

[1] Gunn filed two joint motions for summary judgment, with the second filing in response to Minton's first amended original petition. Both of Gunn's joint motions included no-evidence and traditional motions for summary judgment. Initially, the trial court granted Gunn's first no-evidence motion for summary judgment and partially granted Gunn's first traditional motion for summary judgment, but waited for additional briefing to dispose of the new claims alleged in Minton's amended petition. Minton's amended petition included a new damages theory, alleging that Minton would have settled the patent litigation or that Minton would have prevailed at trial and recovered damages of at least $100,000,000.00 if the federal district court had not dismissed his claim under the on-sale bar. In response to Gunn's second joint motion, Minton merely incorporated by reference his briefing and evidence filed in response to Gunn's first joint motion and offered no additional evidence or argument. After reviewing the additional briefing and summary-judgment evidence, the trial court granted Gunn's second joint motion for summary judgment.

Shortly after Minton filed his state court appeal, the United States Court of Appeals for the Federal Circuit decided *Air Measurement Technologies, Inc. v. Akin Gump Strauss Hauer & Feld, L.L.P.*, 504 F.3d 1262 (Fed. Cir. 2007). *Air Measurement* held that when "establishing patent infringement is a necessary element of a [state] malpractice claim stemming from alleged mishandling of . . . earlier patent litigation, the issue is substantial and contested, and federal resolution of the issue was intended by Congress," and thus, federal courts possess exclusive "arising under" jurisdiction of the malpractice claim. *Id.* at 1273. Relying on *Air Measurement*, Minton argued that his malpractice suit arose under exclusive federal patent law jurisdiction and asked the court of appeals to dismiss his appeal for lack of subject-matter jurisdiction. Declining to follow the Federal Circuit's precedent, the court of appeals held that it had subject-matter jurisdiction over Minton's appeal and denied his motion to dismiss. *Minton*, 301 S.W.3d at 709. The court of appeals then affirmed the trial court's judgment, which granted Gunn's joint motions for summary judgment. *Id.* at 715. Minton filed a petition for review, which we granted. 54 TEX. SUP. CT. J. 538 (Feb. 8, 2011).

II. ANALYSIS

A. Subject-Matter Jurisdiction

Before we can reach the merits of Minton's claim, we must first determine whether we possess subject-matter jurisdiction to consider this appeal. *See Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1, 9 (Tex. 2008) (considering jurisdiction before proceeding to determine the merits of the case). The question of "[w]hether a court has subject matter jurisdiction is a question of law that we review de novo." *City of Dallas v. Carbajal*, 324 S.W.3d 537, 538 (Tex.

2010) (per curiam). In support of his view that this case arises under exclusive federal patent law jurisdiction, Minton relies chiefly on two Federal Circuit opinions. *Air Measurement*, 504 F.3d 1262; *Immunocept, LLC v. Fulbright & Jaworski, LLP*, 504 F.3d 1281 (Fed. Cir. 2007). Minton asserts that the court of appeals erred in rejecting these cases and in applying non-patent law cases to reach its holding. In reply, Gunn argues that this Court is not bound by the decisions of the Federal Circuit and that the two Federal Circuit opinions that Minton would have us follow fail to apply the federalism analysis required by the United States Supreme Court in cases involving the division of jurisdiction between state and federal courts. *See Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005). Although we disagree with Minton's claim that non-patent law cases are inapplicable to the issues presented here, we do agree that the experimental use exception to the on-sale bar plays a substantial role within the context of Minton's state-based legal malpractice claim. *Cf. Alexander v. Turtur & Assocs.*, 146 S.W.3d 113, 117 (Tex. 2004) ("To prevail on a legal malpractice claim, a plaintiff must show that . . . [his attorney's negligence] proximately caused the plaintiff's injuries . . . ." (internal quotations omitted)); *Schaeffer v. O'Brien*, 39 S.W.3d 719, 720 (Tex. App.—Eastland 2001, pet. denied) (legal malpractice plaintiffs must prove a "case within a case"). We are also of the opinion that federal courts may entertain the application of this patent law concept within a state-based legal malpractice suit without disturbing the balance Congress has struck between state and federal judicial responsibilities. *See Grable*, 545 U.S. at 313–14. Accordingly, we are persuaded that exclusive federal patent law jurisdiction has been triggered and that we lack subject-matter jurisdiction to consider Minton's appeal.

Congress has provided federal courts jurisdiction over civil actions generally "arising under" federal law and also over actions specifically "arising under" any federal law relating to patents. *See* 28 U.S.C. §§ 1331 (providing general federal question jurisdiction), 1338(a) (providing patent law jurisdiction). One form of "arising under" federal-question jurisdiction stems from "state-law claims that implicate significant federal issues." *Grable*, 545 U.S. at 312. In *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800 (1988), the Supreme Court construed § 1338(a)'s "arising under" language to extend federal jurisdiction to any case "in which a well-pleaded complaint establishes either that federal patent law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal patent law, in that patent law is a necessary element of one of the well-pleaded claims." 486 U.S. at 808–09. Whether a patent issue presented in a state-based action is substantial enough to trigger federal jurisdiction under § 1338(a) "must be determined from what necessarily appears in the plaintiff's [well-pleaded complaint] . . . unaided by anything alleged in anticipation or avoidance of defenses which it is thought the defendant may interpose." *Id.* at 809 (internal quotations omitted).

Several opinions issued by the United States Supreme Court demonstrate federal courts' traditional reluctance to allow state plaintiffs to open "the 'arising under' door" by simply pleading a federal issue. *E.g.*, *Grable*, 545 U.S. at 313; *Gully v. First Nat'l Bank in Meridian*, 299 U.S. 109, 117–18 (1936) (declining to define cases arising under federal law broadly and adopting instead "a selective process which picks the substantial causes out of the web and lays the other ones aside"); *Shulthis v. McDougal*, 225 U.S. 561, 569 (1912) ("A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those

laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of such a law, upon the determination of which the result depends."). Based on its reluctance to open wide the federal courthouse doors, the Supreme Court has added several other requirements, in addition to substantiality, which must be satisfied before a federal patent issue presented in a state action may trigger exclusive federal patent jurisdiction.

In *Grable*, the Supreme Court refined the *Christianson* test and clarified the role that federalism concerns should play in the analysis of whether a state-based lawsuit with embedded federal issues arises under federal jurisdiction: "[T]he question is, does a state-law claim necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." *Grable*, 545 U.S. at 314. "In other words, federal question jurisdiction exists where (1) resolving a federal issue is necessary to resolution of the state-law claim; (2) the federal issue is actually disputed; (3) the federal issue is substantial; and (4) federal jurisdiction will not disturb the balance of federal and state judicial responsibilities." *Singh v. Duane Morris LLP*, 538 F.3d 334, 338 (5th Cir. 2008) (interpreting *Grable*). Although *Grable* is a non-patent law case, we may apply this test here to determine whether Minton's state-based legal malpractice claim arises under exclusive federal patent law jurisdiction. *See Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 829–30 (2002); *Christianson*, 486 U.S. at 808–09.

While we are not bound by the holdings of the Federal Circuit, its opinions in *Air Measurement* and *Immunocept* are directly on point with the issues and facts presented by Minton's

legal malpractice action. *Cf. Penrod Drilling Corp. v. Williams*, 868 S.W.2d 294, 296 (Tex. 1993) (stating that only the opinions of the United States Supreme Court are binding on this Court). *Air Measurement* dealt with a state-based legal malpractice claim stemming from an underlying patent dispute. 504 F.3d at 1265. In the underlying patent litigation, Air Measurement filed several patent infringement suits and ultimately settled all of the cases. *Id.* at 1266. Based on information discovered with subsequent counsel, Air Measurement claimed it was forced to settle for an amount far below the market value of the patents due to errors committed by their original patent attorney during the patent application process. *Id.* Air Measurement alleged that the patent attorney failed to timely file the patent application within the one year on-sale bar, failed to disclose prior patents and other facts while prosecuting the patent applications, and committed other errors that led to the invalidity of Air Measurement's patents in the underlying litigation. *Id.* In the resulting state-based legal malpractice lawsuit, the Federal Circuit held that it possessed exclusive jurisdiction over the malpractice suit. *Id.* at 1269. The Federal Circuit explained that "[b]ecause proof of patent infringement is necessary to show [Air Measurement] would have prevailed in the prior litigation, patent infringement is a 'necessary element' of [Air Measurement's] malpractice claim and therefore apparently presents a substantial question of patent law conferring [exclusive federal patent law] jurisdiction." *Id.* The *Immunocept* case involved a similar issue. 504 F.3d at 1282. There, the assignee of a patent brought a state-based legal malpractice action against the patent attorney originally hired to apply for and prosecute the patent at issue. *Id.* at 1283-84. The basis of the resulting malpractice suit was the patent attorney's claim-drafting error, which allegedly resulted in a lower level of protection for the patented technology. *Id.* at 1284–85. Again, the Federal

Circuit determined that it had exclusive jurisdiction over the state-based legal malpractice suit "[b]ecause patent claim scope defines the scope of patent protection . . . [and] is the first step of a patent infringement analysis," and is therefore "a substantial question of patent law." *Id.* at 1285.

To support his assertion that we should follow the Federal Circuit's holdings in *Air Measurement* and *Immunocept*, Minton criticizes the court of appeals' reliance on non-patent law cases and argues that we should look only to patent law cases because Congress has given federal courts exclusive jurisdiction over patent law. *See Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 682 (2006) (involving a state lawsuit for reimbursement based on a provision of the Federal Employees Health Benefits Act); *Grable*, 545 U.S. at 310 (involving a state quiet title action based on a federal tax statute); *Singh*, 538 F.3d at 338 (involving a state-based legal malpractice claim stemming from an underlying trademark dispute). We find this distinction to be unpersuasive because the Federal Circuit applied these very cases to reach its holdings in *Air Measurement* and *Immunocept*. *See Immunocept*, 504 F.3d at 1285–86; *Air Measurement*, 504 F.3d at 1271–73. Moreover, in various contexts, the Supreme Court has applied the same rules and tests to patent law and non-patent law cases alike. *See, e.g.*, *Holmes Grp.*, 535 U.S. at 829–30; *Christianson*, 486 U.S. at 808–09. Thus, we may look to both patent and non-patent law cases to determine whether exclusive federal jurisdiction exists. After applying the law to the facts and issues presented here, we determine each of the four *Grable* elements have been satisfied and that the court of appeals erred in concluding that exclusive federal patent law jurisdiction was not triggered by the federal issue embedded in Minton's legal malpractice lawsuit.

The first prong of the *Grable* test requires that the applicability of the experimental use exception to the on-sale bar be a necessary component in the determination of Minton's state-based legal malpractice claim. *See Grable*, 545 U.S. at 314. In *Grable*, the Supreme Court held that the interpretation of a federal tax statute was a necessary element of the petitioner's state-based quiet title action because the success of his claim turned on that issue alone. *Id.* at 314–15. Until the Supreme Court construed the language and determined the meaning of the federal statute, it could not determine whether the petitioner had successfully proven his state-law claim. *Id.* The Supreme Court has further explained that a federal element cannot be deemed necessary to a state-law claim if on the face of the well-pleaded complaint there are alternative theories upon which the claimant may recover. *Christianson*, 486 U.S. at 810. Here, Minton's trial court petition asserted only one theory in support of his legal malpractice claim—his attorneys' negligent failure to timely plead and brief the experimental use exception to the on-sale bar. Because Minton relies on a single negligence claim, there are no alternative theories on which he may establish his attorneys' legal malpractice. Moreover, a determination of whether Minton would have won his underlying federal patent infringement action necessarily requires a consideration of the legal and factual viability of the experimental use defense. *See Grable*, 545 U.S. at 314–15; *Alexander*, 146 S.W.3d at 117; *see also Air Measurement*, 504 F.3d at 1270 (noting that in the case-within-a-case requirement for legal malpractice claims, the plaintiff had the burden of proving patent infringement, and whether the plaintiff would have prevailed against the on-sale bar defense raised in the underlying patent litigation is "not the sort of jurisdiction-defeating defense[] contemplated by [the Supreme Court in] *Christianson*" because it is "part of the malpractice causation element rather than the defense[]

raised by [the defendant] in the" malpractice claim). If the experimental use defense would not apply under the facts of his case, for instance, Minton's attorneys' negligence could not have proximately caused the federal district court to invalidate the claims of the '643 patent. *See Grable*, 545 U.S. at 314–15. Therefore, the applicability of the experimental use exception is a necessary element of Minton's state legal malpractice suit, and the first *Grable* prong is satisfied.

The second prong of the *Grable* test requires that the experimental use exception to the on-sale bar be disputed in Minton's state-based legal malpractice lawsuit. *See id.* at 314. For obvious reasons, the legal and factual viability of the experimental use exception is clearly in dispute. Minton's attorneys will be liable for legal malpractice if the experimental use exception would have been a viable defense to the on-sale bar and a defense that a reasonably prudent patent attorney would have raised. *See Alexander*, 146 S.W.3d at 117. Accordingly, to defeat the applicability of the experimental use exception, Gunn alleges Minton leased TEXCEN for a primarily commercial purpose. Minton, on the other hand, avers that the exception would have applied to save the '643 patent from invalidation because the TEXCEN system was not fully operational and, therefore, required extensive experimentation at the time he leased the software to Stark. This dispute regarding the applicability of the experimental use exception satisfies the second element of the *Grable* test.

The third prong of the *Grable* test demands that the applicability of the experimental use exception be a substantial issue within Minton's state-based legal malpractice claim. *See* 545 U.S. at 314. Although we recognize that this question is close, we disagree with the court of appeals' holding that the experimental use exception is not a substantial element here. In determining

whether a federal patent issue is a substantial element within the context of a state-based legal malpractice claim, we are informed by the Supreme Court's holding in *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677 (2006). In *Empire*, an insurance carrier sued the estate of one of its deceased insureds in federal district court when it learned that the insured's estate had settled a state-based personal injury suit on his behalf. *Id.* at 683. The carrier's federal suit sought reimbursement for the full amount of benefits it had paid to the insured after he sustained injuries in an accident. *Id.* The carrier asserted that its reimbursement claims arose under federal jurisdiction because a preemption provision in the insured's insurance contract stated that federal law shall supersede any state law relating to benefits. *See id.* at 699. The Supreme Court held that the operation of the preemption clause of the federal insurance contract was not a substantial issue because "the bottom-line practical issue [in the state-based reimbursement claim] is the share of [the] settlement properly payable to [the carrier]." *Id.* at 700–01. Unlike *Grable*, where the construction and interpretation of a federal tax statute was the crux of the state-based lawsuit, even if the preemption provision in *Empire* allowed federal law to trump state law regarding reimbursement for benefits, the carrier could not win until it proved that it was entitled to reimbursement from the state-based personal injury recovery. *Compare Grable*, 545 U.S. at 315, *with Empire*, 547 U.S. at 700–01. We conclude that the experimental use exception presented here is more similar to the substantial federal issue presented in *Grable* than the insubstantial issue presented in *Empire*.

Following *Grable*, other courts have deemed federal patent issues substantial when the determination of the patent issue establishes the success or failure of an overlying state-law claim.

See, e.g., *USPPS, Ltd. v. Avery Dennison Corp.*, 647 F.3d 274, 280–82 (5th Cir. 2011) (holding that the state-law claims of fraud and breach of fiduciary duty in connection with a patent application presented a substantial federal patent issue because the causation element required the plaintiff to prove the underlying patentability of its invention); *Warrior Sports, Inc. v. Dickinson Wright, P.L.L.C.*, 631 F.3d 1367, 1372 (Fed. Cir. 2011) (holding that in order for the plaintiff to prove its case-within-a-case in the legal malpractice suit, the state-based malpractice action presented a substantial federal patent issue because it required a resolution on the merits of the patent infringement claims, which were not addressed by the federal district court in the underlying patent infringement litigation); *Davis v. Brouse McDowell, L.P.A.*, 596 F.3d 1355, 1361–62 (Fed. Cir. 2010), *cert. denied*, 131 S.Ct. 118 (2010) (holding that a state-based legal malpractice action presented a substantial federal patent issue where no patent had actually issued because of the attorney's alleged failure to timely file the patent application); *Immunocept*, 504 F.3d at 1285 (holding that the construction of patent claims, which define the amount of protection a patent receives against infringement, was a substantial federal issue within the context of a state legal malpractice suit based on a patent attorney's claim-drafting error); *U.S. Valves, Inc. v. Dray*, 212 F.3d 1368, 1372 (Fed. Cir. 2000) (stating that a federal patent issue was substantial to a state breach-of-contract claim where a patent licensee had to construe the claims of the licensed patent to show that the licensor had sold products protected by the patent in contravention of a licensing agreement); *Additive Controls & Measurement Sys., Inc. v. Flowdata, Inc.*, 986 F.2d 476, 477–78 (Fed. Cir. 1993) (holding that a determination of patent infringement was a substantial federal issue within the context of a state-based business disparagement claim in which the plaintiff could not

succeed until it showed that the defendant lied about the plaintiff having infringed its patent); *Landmark Screens, LLC v. Morgan, Lewis & Bockius, LLP*, 107 Cal. Rptr. 3d 373, 381 (Cal. Ct. App. 2010), *cert. denied*, 131 S.Ct. 1472 (2011) (finding exclusive federal question jurisdiction where the plaintiff's legal malpractice claim, stemming from the attorney's negligence in prosecuting the patent, required proof of a substantial issue of federal patent law). Similarly, to succeed on his state-based legal malpractice claim, Minton must establish that Gunn was required to raise the experimental use exception because it was a legally and factually viable defense to the on-sale bar and that Gunn's failure to do so proximately caused Minton to lose his federal patent infringement litigation. *See Alexander*, 146 S.W.3d at 117. Therefore, because the success of Minton's malpractice claim is reliant upon the viability of the experimental use exception as a defense to the on-sale bar, we hold that it is a substantial federal issue satisfying the third prong of the *Grable* inquiry.

Finally, the fourth *Grable* element requires that the determination of the viability of the experimental use exception be a question that a federal court may decide without upsetting the balance between federal and state judicial responsibilities. *Grable*, 545 U.S. at 314. This final factor is perhaps the most important. *See id.* ("[T]he presence of a disputed federal issue and the ostensible importance of a federal forum are never necessarily dispositive; there must always be an assessment of any disruptive portent in exercising federal jurisdiction."). Although we recognize that legal malpractice claims traditionally fall under the domain of state courts, we conclude that federal courts may decide this malpractice case without upsetting the jurisdictional balance between federal and state courts. *Compare USPPS*, 647 F.3d at 282 (finding federal-question jurisdiction

in a state-based tort claim where the underlying proceedings involved substantial questions of *patent* law), *with Singh*, 538 F.3d at 338 (recognizing the importance of federalism considerations and holding a state-based legal malpractice resulting from an underlying *trademark* dispute did not meet the standard for federal jurisdiction).[2] In *Grable*, the Supreme Court held that allowing a federal court to have jurisdiction over the construction of the federal tax statute did not upset the congressionally approved balance of judicial responsibility because the federal government had a strong interest in having the tax statute applied consistently in the future by federal officials who are frequently charged with the duty of collecting delinquent taxes. *Grable*, 545 U.S. at 312–14. In conducting the federalism analysis required under *Grable*, the Federal Circuit has recognized that federal courts also have a strong interest in having federal patent law applied uniformly. *See Immunocept*, 504 F.3d at 1285–86 (recognizing Congress's "intent to remove non-uniformity in the patent law, as evidenced by its enactment of the Federal Courts Improvement Act of 1982" (citing Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25)); *Air Measurement*, 504

[2] The dissent and Gunn's emphasis on the Fifth Circuit's holding in *Singh* is misplaced. Although *Singh* also involves a determination of whether exclusive federal jurisdiction over a state-based legal malpractice claim exists, that case is inapplicable to the question considered here. The federal issue in *Singh* arose under trademark law. *Id.* at 336. We have recognized that the distinction between patent and non-patent law cases is irrelevant to our consideration of whether a case arises under federal jurisdiction, however, the Fifth Circuit in *Singh* expressly declined to extend its jurisdictional holding to the area of federal patent law. *Id.* at 340 ("[W]e decline to follow or extend a recent opinion of the Federal Circuit, which found 'arising under' jurisdiction for a malpractice claim stemming from representation in a federal patent suit." (referencing *Air Measurement*, 504 F.3d at 1269)). While limiting its *Singh* holding to the embedded federal trademark dispute, the Fifth Circuit noted the following: "It is possible that the federal interest in patent cases is sufficiently more substantial, such that it might justify federal jurisdiction. But we need not decide [the patent law issue], because it is not before us." *Id.* More recently in *USPPS*, the Fifth Circuit addressed the distinction between underlying trademark and patent disputes embedded in state-based claims. 647 F.3d at 282. In *USPPS*, the Fifth Circuit recognized the federalism concerns expressed in *Singh*, but distinguished *Singh*'s holding, which concerned a legal malpractice claim arising from an underlying trademark dispute, and adopted the Federal Circuit's *Air Measurement* holding of federal question jurisdiction for a state-law tort claim arising from an underlying patent litigation dispute. *Id.*

F.3d at 1272 ("There is a strong federal interest in the adjudication of patent infringement claims in federal court because patents are issued by a federal agency."). Not only does the federal government have an interest in the uniform application of patent law, but so do litigants involved in patent law disputes. *See Immunocept*, 504 F.3d at 1285 ("Litigants will benefit from federal judges who are used to handling these complicated [patent law] rules."); *Air Measurement*, 504 F.3d at 1272 (stating that patent litigants will benefit from the "experience, solicitude, and hope of uniformity that a federal forum offers on federal issues" (quoting *Grable*, 545 U.S. at 315) (internal quotation marks omitted)).

Gunn attempts to persuade us that the facts of this case cannot survive the *Grable* federalism inquiry because they are more similar to those considered by the Supreme Court in *Empire*. *See Empire*, 547 U.S. at 677. As explained above, *Empire* involved a state cause of action for reimbursement based on a preemption provision contained within a federal health care act. *See id.* at 693, 699. There, the Supreme Court determined that the federal health care statute was not a substantial element of the carrier's state reimbursement suit because the more important factor was the extent to which the carrier could attain reimbursement for the medical bills it covered. *Id.* at 701. When applying *Grable*'s federalism inquiry to the non-statutory issue of reimbursement, the Supreme Court stated that "it is hardly apparent why a proper federal-state balance would place such a nonstatutory issue under the complete governance of federal law, to be declared in a federal forum." *See id.* at 701 (internal citations and quotations omitted).

At first glance, the fact that the experimental use exception to the on-sale bar is a product of case law, rather than statute, appears to warrant a determination that the experimental use exception,

like the federal issue in *Empire*, does not survive the *Grable* federalism inquiry. *See, e.g.*, *City of Elizabeth v. Pavement Co.*, 97 U.S. 126, 134–35 (1877) (establishing the experimental use exception to the on-sale bar). However, courts applying this exception have noted that because the experimental use exception only operates within the context of the statutory on-sale bar, "the focus remains throughout the inquiry on application of the statutory bar itself." *EZ Dock v. Schafer Sys., Inc.*, 276 F.3d 1347, 1351–52 (Fed. Cir. 2002); *see* 35 U.S.C. § 102(b). Accordingly, because we cannot determine the success of Minton's legal malpractice claim without focusing on the application of the on-sale bar, which is based directly in a federal statute, we are not convinced by Gunn's attempt to liken this case to *Empire*. The on-sale bar serves to invalidate patents issued by the federal government. 35 U.S.C. § 102(b). We agree with the Federal Circuit that when the validity of a patent is questioned, even if within the context of a state-based legal malpractice claim, the federal government and patent litigants have an interest in the uniform application of patent law by courts well-versed in that subject matter. *See, e.g.*, *Immunocept*, 504 F.3d at 1285–86; *Air Measurement*, 504 F.3d at 1272. Accordingly, Minton's malpractice claim satisfies the fourth prong of the *Grable* test.

Because this case satisfies all four elements of the *Grable* test, we hold that federal courts possess exclusive jurisdiction to determine Minton's state-based legal malpractice claim. Gunn and the dissent have predicted that this holding will cause all legal malpractice suits arising out of patent litigation to fall under the exclusive patent law jurisdiction of the federal courts. We do not foresee this result. Our opinion should only be construed as conferring exclusive federal patent jurisdiction based upon the specific facts of this case. In the future, just as Minton has done, any state litigant

asserting a legal malpractice action to recover for damages resulting from his patent attorney's negligence in patent prosecution or litigation must also satisfy all four elements of the *Grable* test to place his claim under exclusive federal jurisdiction. In the context of state-based legal malpractice claims, plaintiffs will not always be able to meet such a burden. *See, e.g.*, *Holmes Grp., Inc.*, 535 U.S. at 831 (holding a patent-law counterclaim cannot serve as the basis for "arising under" jurisdiction); *Thompson v. Microsoft Corp.*, 471 F.3d 1288, 1291–92 (Fed. Cir. 2006) (finding the state-law claim of unjust enrichment did not arise under § 1338 jurisdiction because the plaintiff could prevail on the claim by showing the defendant's unauthorized use of proprietary information without proving inventorship under U.S. patent laws); *Roof Tech. Servs., Inc. v. Hill*, 679 F. Supp. 2d 749, 754 (N.D. Tex. 2010) (explaining that a state legal malpractice action involving an attorney's "failure to meet deadlines and communicate with [his] client" and in which "[p]atent issues are merely floating on the periphery," did not trigger exclusive federal patent jurisdiction); *Genelink Biosciences, Inc. v. Colby*, 722 F. Supp. 2d 592, 601 (D. N.J. 2010) (holding that where a state malpractice claim was based on missed deadlines, and not on the validity of the actual patent itself, there was no patent issue triggering exclusive federal patent law jurisdiction); *E-Pass Techs., Inc. v. Moses & Singer, LLP*, 117 Cal. Rptr. 3d 516, 521 (Cal. Ct. App. 2010) (finding no federal-question jurisdiction where the ultimate question in the legal malpractice claim was not the attorney's negligence in the prosecution of the patent, but rather "that the defendant attorneys knew or should have known that [the plaintiff] did not have sufficient evidence to support the claims" they asserted on its behalf in the underlying litigation.).

III. CONCLUSION

Because we determine that the application of the experimental use exception to the on-sale bar is a necessary, disputed, and substantial element of Minton's state-based legal malpractice claim, and because the federal courts are capable of addressing this issue without disrupting the jurisdictional balance existing between state and federal courts, we hold that Minton's claim has triggered exclusive federal patent jurisdiction. Accordingly, we do not reach the merits of Minton's claims, and we reverse the court of appeals' judgment and dismiss the case.

_____

Paul W. Green
Justice

OPINION DELIVERED: December 16, 2011

IN THE SUPREME COURT OF TEXAS

NO. 10-0141

VERNON F. MINTON , PETITIONER,

v.

JERRY W. GUNN, INDIVIDUALLY, WILLIAMS SQUIRE & WREN, L.L.P., JAMES E. WREN, INDIVIDUALLY, SLUSSER & FROST, L.L.P., WILLIAM C. SLUSSER, INDIVIDUALLY, SLUSSER WILSON & PARTRIDGE, L.L.P., AND MICHAEL E. WILSON, INDIVIDUALLY, RESPONDENTS

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

Argued March 1, 2011

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

Our system of justice has a "deep-rooted historic tradition that everyone should have his own day in court," *Martin v. Wilks*, 490 U.S. 755, 762 (1989) (quotation marks omitted), but there is no right to a second day in a different court. By adopting the approach of the Federal Circuit instead of the United States Supreme Court, the Court allows a defeated litigant to undeservedly hit the "reset" button on his failed legal malpractice case. The defendants, having won on the merits in state court, must now repeat a no doubt costly and time-consuming defense all over again in federal court, a result not required by the mainstream of federal question jurisprudence.

In concluding that there is exclusive federal jurisdiction over this case, the Court principally relies on a pair of Federal Circuit cases, with additional support from a Fifth Circuit case. *See USPPS, Ltd. v. Avery Dennison Corp.*, 647 F.3d 274 (5th Cir. 2011); *Immunocept, LLC v. Fulbright & Jaworski, LLP*, 504 F.3d 1281 (Fed. Cir. 2007); *Air Measurement Techs., Inc. v. Akin Gump Strauss Hauer & Feld, L.L.P.*, 504 F.3d 1262 (Fed. Cir. 2007). The two Federal Circuit opinions were written by the same judge, for the same three-judge panel, and issued on the same day. The Fifth Circuit's position in *USPPS* appears to have been primarily driven by those two opinions. Collectively, these opinions represent a novel method of determining federal question jurisdiction, and one which this Court should not adopt.

Contrary to the Federal Circuit's reasoning in *Air Measurement* and *Immunocept*, federal question jurisprudence requires a more nuanced approach than the version found in these two cases, and implicitly adopted today by this Court. The United States Supreme Court mandates that courts conduct a four-part inquiry before finding federal question jurisdiction in embedded federal issue cases. *See Grable & Sons Metal Prods. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005). More specifically, a persuasive Fifth Circuit precedent, conducting that very inquiry, indicates that a legal malpractice case that touches upon federal intellectual property law should nonetheless remain under the jurisdiction of state courts. *See Singh v. Duane Morris LLP*, 538 F.3d 334, 340 (5th Cir. 2008). Yet, in *Air Measurement* and *Immunocept*, the Federal Circuit failed to conduct more than a cursory attempt at applying the *Grable* factors.

Only opinions of the United States Supreme Court are binding on this Court. *See Penrod Drilling Corp. v. Williams*, 868 S.W.2d 294, 296 (Tex. 1993). Therefore, we are not required to

follow the Federal Circuit's view of federal patent jurisdiction. We are, however, bound to follow the Supreme Court's pronouncements, *id.*, and they fully support the conclusions drawn by the Fifth Circuit in *Singh* and the court of appeals' judgment in the instant case. The Supreme Court's federal question precedents require that we reject Minton's assertion of exclusive federal jurisdiction over this case, and, with the exception of *Singh*, the circuit cases on point are contrary to the Supreme Court's opinions and unpersuasive on this point of law. Because federal question jurisprudence does not require the result reached by the Court today, I respectfully dissent.

I. Analysis

Unlike the courts of this state, federal courts are courts of limited jurisdiction, and thus "due regard for the constitutional allocation of powers between the state and federal systems requires a federal court scrupulously to confine itself to the jurisdiction conferred on it by Congress and permitted by the Constitution." *In re Carter*, 618 F.2d 1093, 1098 (5th Cir. 1980). There are two main types of federal jurisdiction: diversity jurisdiction, and federal question jurisdiction, often also referred to as "arising under" jurisdiction because of the governing constitutional and statutory language. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 266 (5th ed. 2007). Federal question jurisdiction is in turn subdivided into (1) cases in which federal law provides a cause of action, and (2) state-law claims that implicate a federal issue. *Grable*, 545 U.S. at 312. It is this latter subtype, often referred to as "embedded" federal-issue cases, CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3562 at 187 (3d ed. 2008), that is at issue here.

One area of federal question jurisdiction, encompassing both subtypes described above, is that covering federal intellectual property law, as established by section 1338(a) of the United States

Code.[1] *See* 28 U.S.C. § 1338(a). Specifically, section 1338(a) gives federal courts jurisdiction over cases "arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks." *Id.* That jurisdiction is exclusive for patent, plant variety protection, and copyright cases. *Id.* Speaking to patent cases particularly, the Supreme Court has explained that section 1338(a) applies:

> [O]nly to those cases in which a well-pleaded complaint establishes either that federal patent law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal patent law, in that patent law is a necessary element of one of the well-pleaded claims.

Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 809 (1988) (citations omitted).

The above quote is the point of departure for the Court today, and also for the Federal Circuit cases the Court relies on. However, the full inquiry when determining federal question jurisdiction is not so simple: the well-pleaded complaint must "necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." *Grable*, 545 U.S. at 314. In other words, it is *not* enough that the federal issue constitute an element of the plaintiff's well-pleaded complaint. *See id.* at 313 ("[E]ven when the state action discloses a contested and substantial federal question, the exercise of federal jurisdiction is subject to a possible veto."); *Singh*, 538 F.3d at 338 ("The fact that a substantial federal question is necessary to the resolution of a state-law claim is not sufficient to permit federal jurisdiction . . . ."). Rather, the Supreme Court has laid

[1] Although much of the Supreme Court's federal question jurisprudence is in the context of the more general federal question statute, 28 U.S.C. § 1331, sections 1331 and 1338 both have the phrase "arising under" as their operative language, and the Supreme Court applies section 1331 precedent to section 1338 cases. *See Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 808–09 (1988); *Air Measurement*, 504 F.3d at 1271.

out a four-element test for determining whether federal question jurisdiction is proper over a state-law claim with an embedded federal issue (such as this case): "federal question jurisdiction exists where (1) resolving a federal issue is necessary to resolution of the state-law claim; (2) the federal issue is actually disputed; (3) the federal issue is substantial; and (4) federal jurisdiction will not disturb the balance of federal and state judicial responsibilities." *Singh*, 538 F.3d at 338 (interpreting *Grable*, 545 U.S. at 314). Explicating the final element, the Supreme Court explains that "the federal issue will ultimately qualify for a federal forum only if federal jurisdiction is consistent with congressional judgment about the sound division of labor between state and federal courts." *Grable*, 545 U.S. at 314. The Supreme Court further requires: "[T]here must always be an assessment of any disruptive portent in exercising federal jurisdiction." *Id.* As the Supreme Court explained, "[t]he doctrine captures the commonsense notion that a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law, and thus justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues." *Id*. at 312.

Grable is a landmark case in this area of jurisprudence, and it should be the touchstone for any court's analysis of whether embedded question jurisdiction is proper. *See* CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3562 at 197–99 (3d ed. 2008) ("In 2005, the Supreme Court issued its finest effort in this line of cases . . . . In Grable, the Court for the first time discussed comprehensively the relevant factors for assessing [embedded question jurisdiction]. . . .

Grable brings considerable clarity to what had been quite muddled."). I therefore turn to the analysis required of this Court by *Grable*.[2]

In this case, only the first of the *Grable* elements is potentially met; the other three are not. The federal issue here is neither disputed nor substantial, and the exercise of exclusive federal jurisdiction over cases such as this would disrupt the proper balance between the state and federal judiciaries intended by Congress. I address each element in turn.

A. Federal Issue Is Not Disputed

First, the federal issue is not in dispute. The Court and the Federal Circuit have read this element of the *Grable* test as simply requiring some live controversy, effectively making it a mootness requirement. But a review of the roots of the element reveal its true meaning: for the federal issue to be "disputed" under *Grable*, there must be a controversy as to the "'validity, construction, or effect'" of the federal issue. *Grable*, 545 U.S. at 315 n.3 (quoting *Shulthis v. McDougal*, 225 U.S. 561, 570 (1912)). The Supreme Court noted "the limiting effect of the requirement that the federal issue in a state-law claim must actually be *in dispute* to justify federal-question jurisdiction," and cited *Shulthis* as an example where "this Court found that there was no federal-question jurisdiction to hear a plaintiff's [state law] claim in part because the federal statutes on which [the claim] depended were not subject to 'any controversy respecting their validity, construction, or effect.'" *Id.* (quoting *Shulthis*, 225 U.S. at 570) (emphasis added).

[2] The Court makes a good faith effort of its own to apply *Grable*, but the outcome of that effort is incorrect because it is conducted through the lens of *Air Measurement* and *Immunocept*.

Here, there is no such controversy. The experimental use exception is well-established in meaning and scope. *See Elizabeth v. Pavement Co.*, 97 U.S. 126, 134–35 (1877) (establishing the exception in 1877); *Electromotive Div. of Gen. Motors Corp. v. Transp. Sys. Div. of Gen. Elec. Co.*, 417 F.3d 1203, 1210–18 (Fed. Cir. 2005) (applying it in its modern form). The parties do not dispute its meaning; they simply dispute whether it was available as a defense in the original patent infringement suit. And that dispute turns on whether the TEXCEN lease concluded between Minton and R.M. Stark & Co. was experimental or commercial in nature—a question to be resolved by reference to the lease and the conduct of the parties, rather than a disputed construction of federal law.

B. Federal Issue Is Not Substantial

The federal issue is also not substantial. The Supreme Court has explained that federal question jurisdiction based on federal law being a "necessary element" of the complaint is limited to a "special and small category" of cases, *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 699 (2006) (citations omitted), and that "it takes more than a federal element 'to open the "arising under" door,'" *id.* at 701 (quoting *Grable*, 545 U.S. at 313). The Court emphasized that *Grable*, in which interpretation of a federal statutory notice provision was at issue, presented an almost purely legal issue, one whose resolution would both be dispositive in that case, and "controlling in numerous other cases." *Id.* at 700 (citing *Grable*, 545 U.S. at 313). It was also significant that *Grable* "centered on the action of a federal agency (IRS) and its compatibility with a federal statute," thus making the issue "'substantial.'" *Id.* (citing *Grable*, 545 U.S. at 313). The Supreme Court has also drawn a line between federal statutory construction issues and other issues

such as federal common law. In *Empire*, the United States asserted that the federal issue of whether an insurer's recovery of amounts paid to an insured as a result of an accident should take into account the insured's attorney's fees in obtaining the initial recovery. *Id*. at 701. While the Supreme Court conceded that may be an issue, it refused to find federal jurisdiction because "it is hardly apparent why a proper 'federal-state balance' would place such a nonstatutory issue under the complete governance of federal law, to be declared in a federal forum." *Id*. (citation omitted). The Supreme Court also re-affirmed that state courts are "competent to apply federal law, to the extent it is relevant," in deciding actions under their jurisdiction. *See id*.

Here, the federal issue is not substantial for three reasons the Supreme Court has outlined: (1) the determination is one of fact—not law; (2) it will not result in precedent that controls numerous other cases; and (3) it involves federal common law, not a federal statute. First, the federal issue is whether the experimental use exception was legally and factually available to Minton's attorneys in the underlying patent infringement case. The answer to this question is purely factual and turns on the nature of the TEXCEN lease between Minton and R.M. Stark & Co.: was that particular lease for experimental purposes (thus making the exception available) or for commercial ends (rendering it unavailable)? Because the federal issue is one of fact, it is not substantial. *See Empire*, 547 U.S. at 700–01 (noting that *Grable* claim was subject to federal jurisdiction because it was a "nearly pure issue of law" but that claim at issue in *Empire* was not subject to federal jurisdiction because it was "fact-bound and situation-specific"). Second, the experimental use exception is well defined. It need only be applied to the facts of this case. A determination of whether the experimental use exception applies to the lease will not result in an

important precedent. *Id*. at 700 (citing *Grable*, 545 U.S. at 313) (noting that *Grable* claim was subject to federal jurisdiction because it "would be controlling in numerous other cases" but that claim at issue in *Empire* was not subject to federal jurisdiction because the bottom-line practical issue was the share of settlement property from a state court proceeding). Third, the experimental use exception is a creature of federal common law, not of any statute. *See id*. (noting that *Grable* claim was subject to federal jurisdiction because it involved a federal statute and IRS action but that claim at issue in *Empire* was not subject to federal jurisdiction because it involved a federal common law determination in a state law claim). Because the federal issue here is one of fact (not law), will not control numerous other cases, and involves only federal common law and not a federal statute, the federal issue here is not substantial.

C. The Court's Holding Upsets the Division Between Federal and State Courts

Finally, the Court's holding today upsets the division between federal and state courts envisioned by Congress. Legal malpractice, along with the regulation of the practice of law generally, has traditionally been a matter for the states. *See Singh*, 538 F.3d at 339 ("Legal malpractice has traditionally been the domain of state law, and federal law rarely interferes with the power of state authorities to regulate the practice of law."). It was not the purpose of Congress to encroach on this state sphere when it enacted section 1338; rather, the plain language of the statute simply indicates an intent to assure federal jurisdiction over, and uniform interpretation of, federal intellectual property law. It is only under the gloss applied to that language by later decisions of the Federal Circuit that we could imagine that a legal malpractice action "arises under" patent law.

Common sense tells us that this is a matter for state courts. And our sense on this matter is confirmed by the oft-quoted wisdom of Justice Cardozo:

> What is needed is something of that common-sense accommodation of judgment to kaleidoscopic situations which characterizes the law in its treatment of causation. . . . If we follow the ascent far enough, countless claims of right can be discovered to have their source or their operative limits in the provisions of a federal statute or in the Constitution itself with its circumambient restrictions upon legislative power. To set bounds to the pursuit, the courts have formulated the distinction between controversies that are basic, and those that are collateral, between disputes that are necessary and those that are merely possible.

Gully v. First Nat. Bank in Meridian, 299 U.S. 109, 117–18 (1936), *quoted with approval in Grable*, 545 U.S. at 313.

In Justice Cardozo's terms, the federal issue here is collateral, not basic. This is a legal malpractice case, litigated after final judgment in the original, federal case. Resolution of the malpractice claim in question does not impact any live patent law claims. *Cf. Singh*, 538 F.3d at 341 (noting that a legal malpractice action "will in no way disturb or interfere with the judgments of the federal courts" regarding the underlying federal intellectual property lawsuit). Moreover, it is unlikely that the legal malpractice opinions of Texas courts will in any way disrupt the uniformity of patent law that Congress sought by enacting section 1338; on the merits of actual patent lawsuits, federal courts will no doubt look first to federal patent precedents, not Texas legal malpractice cases.

Unfortunately, the Federal Circuit has not remained faithful to the Supreme Court's federalism inquiry in the context of malpractice decisions arising from patent cases. Instead, under the Federal Circuit's approach, the federalism element is simply an invocation of the need for uniformity in patent law. In *Air Measurement*, the federalism discussion was limited to the benefits

of a federal forum, the need for uniformity in patent law, and the fact that patents are issued by a federal agency. *See Air Measurement*, 504 F.3d at 1272. There was no consideration of what effect asserting exclusive federal jurisdiction would have over the balance between the state and federal judiciaries intended by Congress. *See id.*; *see also USPPS* 647 F.3d at 281 n.4 ("*Air Measurement Technologies* is silent as to the *Grable* question of federalism . . . ."). Rather, the court simply noted "[i]n § 1338, Congress considered the federal-state division of labor and struck a balance in favor of this court's entertaining patent infringement." *Air Measurement*, 504 F.3d at 1272. Of course, there is no doubt that Congress wants the Federal Circuit to "entertain[] patent infringement," but that is not the issue under *Grable*'s federalism analysis: what is required is a consideration of the impact on our federal system.

In *Immunocept*, application of the *Grable* factors, and particularly the federalism analysis, was equally cursory. The Federal Circuit concluded that the federalism element was met simply because litigants benefit from the expertise of federal judges, and Congress intended to "remove non-uniformity in the patent law." *Immunocept*, 504 F.3d at 1285–86. Again, there was no consideration of the impact on the balance between state and federal courts, as required by the Supreme Court in precedents such as *Grable* and *Empire*.[3]

This is particularly disheartening given the potential consequences on the division between state and federal courts beyond the purview of patent disputes. The impact of the Court's decision

[3] In *Davis v. Brouse McDowell, L.P.A.*, 596 F.3d 1355 (Fed. Cir. 2010), a legal malpractice case derived from a patent application, the Federal Circuit went even further and neither cited *Grable* nor mentioned its factors at all. *See generally id.* This approach was repeated in *Warrior Sports*, another patent-law legal malpractice case, which likewise made no mention of *Grable* or federalism. *See generally Warrior Sports, Inc. v. Dickinson Wright, P.L.L.C.*, 631 F.3d 1367 (Fed. Cir. 2011).

on other potential types of embedded question cases is relevant in conducting the federalism inquiry required in this case. *See Grable*, 545 U.S. at 317 ("'[I]n exploring the outer reaches of § 1331, determinations about federal jurisdiction require sensitive judgments about congressional intent, judicial power, and the federal system.'") (quoting *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 810 (1986)). In *Merrell Dow*, the Supreme Court found the federal balance was upset in a case, as here, where there was no federal cause of action. *See Grable*, 545 U.S. at 318–19. The Court noted that asserting federal jurisdiction over the state law claim at issue "would have attracted a horde of original filings and removal cases raising other state claims with embedded federal issues." *Id.* at 318. "For if the federal labeling standard without a federal cause of action could get a state claim into federal court, so could any other federal standard without a federal cause of action. And that would have meant a tremendous number of cases." *Id.*

This point is telling, because the Supreme Court's fears have already been realized in *USPPS*. There, the Fifth Circuit adopted the reasoning applied by the Federal Circuit in *Air Measurement* and *Immunocept* to reach the same outcome in a fraud and breach of fiduciary duty case involving patent law. *See USPPS*, 647 F.3d at 284.[4] Put another way, the reach of the Federal

[4] Although the Fifth Circuit previously expressed skepticism about the Federal Circuit's approach, and declined to apply it to a legal-malpractice case involving trademarks and section 1338, *see Singh*, 538 F.3d at 340, it recently adopted the *Air Measurement*/*Immunocept* reasoning, *see USPPS*, 647 F.3d at 278–81. Although *USPPS* mentioned the treatment of *Grable* (described above) found in *Air Measurement* and *Immunocept*, and promised to be "sensitive" to federalism issues, *see id.* at 278 n.1, *USPPS* contains no federalism analysis of its own. *See generally id.* Rather, the *USPPS* opinion simply quoted *Immunocept* on the federal interest in patent law uniformity, and then applied as binding precedent the Fifth Circuit's own opinion in *Scherbatskoy v. Halliburton Co.*, 125 F.3d 288, 291 (5th Cir. 1997). *See USPPS*, 647 F.3d at 282. *Scherbatskoy* in turn conducted no federalism analysis, *see* 125 F.3d at 291; but that is unsurprising because it was decided some eight years *prior* to *Grable*. Given *Grable*'s landmark status, it is thus curious that *USPPS* relies so heavily on *Sherbatskoy* on this point. Other than stating "[i]n so holding, we conform . . . to *Singh*'s requirement of balancing the federal and state interests involved," *USPPS* made no other analysis of the *Grable* factors, thus carrying forward the Federal Circuit's misguided approach. 647 F.3d at 282.

Circuit's section 1338 reasoning is uncabined, and can potentially sweep any state law case that touches on substantive patent law (or, for that matter, the other areas of law covered by section 1338, such as copyright and trademarks) irrevocably into federal court.

In contrast to *Air Measurement* and *Immunocept*, *Singh* correctly applied the Supreme Court's federal question jurisprudence governing embedded question cases to a section 1338 trademark legal malpractice case, with a proper analysis of the federalism element. *Singh* discussed at length the *Grable* factors of substantialness and federalism. *See Singh*, 538 F.3d at 337–41. As for the first, the court noted that trademark law has an entirely different purpose from state malpractice law, and further that the trademark issue in question was predominantly one of fact, not law, rendering the trademark issue insubstantial under *Grable*. *Id.* at 339. *Singh* then conducted a careful and substantive federalism analysis, one that considered the impact on the division of labor between state and federal courts. *See id.* at 339–40. The court observed that legal malpractice traditionally is a state law matter, and that "federal law rarely interferes with the power of state authorities to regulate the practice of law." *Id.* at 339. The court further observed that exerting federal jurisdiction would "constitute a substantial usurpation of state authority in an area in which states have traditionally been dominant." *Id.* The court also expressed concern, echoing the Supreme Court's fears in *Grable* and *Merrell Dow*, that adopting such reasoning in one type of federal question case could lead to its application in other types of embedded question cases.[5] *See*

[5] The *Singh* court is certainly not the only court to have examined the *Grable* factors and concluded that there is no exclusive federal jurisdiction over claims such as this. *See, e.g.*, *New Tek Mfg., Inc. v. Beehner*, 702 N.W.2d 336 (Neb. 2005) (finding no federal jurisdiction over malpractice claim and holding "[w]hen patent issues are merely implicated incidentally in a cause of action, however, federal courts do not have jurisdiction of the case pursuant to § 1338"); *E-Pass Tech., Inc. v. Moses & Singer, LLP*, 189 Cal. App. 4th 1140, 1152 (Cal. Ct. App. 2010), review denied (Feb. 23, 2011) (finding no federal jurisdiction over malpractice claim and holding that "to the

id. at 340 ("Because all Texas malpractice plaintiffs must prove that they would have prevailed in their prior suits, federal jurisdiction could extend to every instance in which a lawyer commits alleged malpractice during the litigation of a federal claim."). As mentioned previously, this concern has ironically been borne out in *USPPS*, a subsequent Fifth Circuit case that applied the Federal Circuit's reasoning in patent law malpractice cases to a fraud and breach of fiduciary duty case. *See USPPS*, 647 F.3d at 278–81.

In sum, the cases relied on by the Court are not persuasive authority because they either ignore the standard required by United States Supreme Court precedent or apply it in a conclusory manner. The Court therefore errs when it concludes, based on the importance of uniformity in patent law emphasized in *Air Measurement* and *Immunocept*, that the balance between state and federal courts is not upset by allowing jurisdiction here.

II. Conclusion

The Federal Circuit has pursued a particular mandate—to achieve uniformity in patent law. *Panduit Corp.*, 744 F.2d at 1574 ("This court . . . has a mandate to achieve uniformity in patent matters."). The Federal Circuit appears to be animated by this goal when finding section 1338

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extent that the subject matter of patent law is relevant to the determination of the professional negligence claim, it does not present a question of patent law that is substantial") (citations omitted); *Roof Technical Servs., Inc. v. Hill*, 679 F. Supp. 2d 749, 753–54 (N.D. Tex. 2010) (finding no federal jurisdiction over malpractice claim and holding "even if the court must decide patent law issues, those decisions will not create or destroy any patent rights such that uniformity in the way patents are issued or enforced will be threatened"); *Genelink Biosciences, Inc. v. Colby*, 722 F. Supp. 2d 592 (D. N.J. 2010) (finding no federal jurisdiction over malpractice claim involving patent law); *Danner, Inc. v. Foley & Lardner, LLP*, No. 09-1220-JE, 2010 WL 2608292, at *5 (D. Or. Mar. 15, 2010) (finding no federal jurisdiction over malpractice claim and holding that because "plaintiff's malpractice claim . . . is supported by theories that do not depend on patent law or the resolution of patent issues, its claim does not 'arise' under patent laws"); *Anderson v. Johnson*, No. 08-CV-6202, 2009 WL 2244622, at *3 (N.D. Ill. July 27, 2009) (finding no federal jurisdiction over malpractice claim and holding that a "federal court's adjudication of [a] state malpractice claim [involving copyright law] would disturb the balance of federal and state judicial responsibilities").

jurisdiction over state legal malpractice claims. *See Immunocept*, 504 F.3d at 1285; *Air Measurement*, 504 F.3d at 1272. The Federal Circuit's focus on this mandate is understandable, but uniformity in patent law is not the be-all and end-all of jurisprudence. It must give way to the contours of federal question jurisdiction provided by the Supreme Court. *See Grable*, 545 U.S. at 312–15. In turn, this Court has its own mandate, of at least equal importance to that of the Federal Circuit. We owe a duty to the people of this state to exercise the judicial power, *see* TEX. CONST. art. V, §§ 1, 3, and that duty includes vital matters such as ensuring consistency and certainty in the civil law of the state, *see* TEX. GOV'T CODE § 22.001, and regulating the practice of law, *id.* § 81.011(c). Accordingly, we should not risk the confusion and inconsistency that will result from having two sets of binding precedent in Texas legal malpractice law—one stemming from this Court and the other courts of this state, and another, entirely outside of our control after today's opinion, developing under the direction of the Federal Circuit, largely uninformed by the deep roots of Texas jurisprudence and the requirements of the Texas Constitution.

This Court should not be quick to follow Federal Circuit case law that fails to follow the test set forth by the Supreme Court. Because this case fails to meet three of the four elements required by the Supreme Court for federal-element "arising under" jurisdiction, the court of appeals was correct when it held that exclusive federal patent jurisdiction does not lie here. I therefore respectfully dissent.

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Eva M. Guzman
Justice

OPINION DELIVERED: December 16, 2011

IN THE SUPREME COURT OF TEXAS

NO. 10-0155

IN RE SERVICE CORPORATION INTERNATIONAL AND SCI TEXAS FUNERAL SERVICES, INC. D/B/A MAGIC VALLEY MEMORIAL GARDENS

ON PETITION FOR WRIT OF MANDAMUS

PER CURIAM

This mandamus proceeding arises from an arbitration agreement governed by the Federal Arbitration Act (FAA). The parties entered into a contract for interment rights and services. The contract obligated the parties to arbitrate this dispute over the care and maintenance of the cemetery. The arbitration agreement provides that an arbitrator would either be selected by mutual agreement of the parties or appointed by the American Arbitration Association (AAA). The parties failed to agree to an arbitrator and the trial court appointed an arbitrator without allowing a reasonable opportunity to procure an appointment by AAA. We conclude that the trial court abused its discretion and conditionally grant the petition for writ of mandamus.

Relators Service Corporation International and SCI Texas Funeral Services, Inc. (jointly SCI) entered into a written contract with Gabriel and Yolanda Serna for two burial plots in the Magic Valley Memorial Gardens after the death of their son. The contract contained an arbitration clause to be utilized for dispute resolution. Under the arbitration clause, the parties would choose

an arbitrator by mutual agreement. If the parties were unable to agree on an arbitrator, the AAA would select the arbitrator upon application of one or both of the parties.

The Sernas filed a suit against SCI on March 19, 2009, alleging, among other things, that SCI had misrepresented the cemetery as a licensed endowment-care facility and failed to properly maintain the cemetery. In its original answer, SCI asserted that the dispute was bound for arbitration. The parties were unable to agree on an arbitrator for several months. When the parties eventually reached an agreement on an arbitrator on October 14, 2009, he was disqualified because he represented employees of SCI in an unrelated case. On October 27, the Sernas asked the trial court to appoint an arbitrator, arguing that SCI had waived its right to seek an appointment by the AAA. On November 10, the trial court appointed former district judge Abel C. Limas to arbitrate the case after concluding that the parties were unable to agree on an arbitrator and SCI had waived the right to seek an AAA appointment. SCI filed a motion for rehearing arguing that the contractual provision required that the AAA appoint the arbitrator, and that the Sernas were responsible for initiating proceedings with the AAA. The trial court denied the motion for rehearing on December 15. SCI unsuccessfully sought a writ of mandamus from the court of appeals. In this Court, SCI requests that we direct the trial court to vacate its order naming Limas as arbitrator.

Mandamus relief is appropriate when the trial court has abused its discretion and there is no adequate remedy by appeal. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135–36 (Tex. 2004) (citations omitted). When a trial court errs in determining the law or in applying the law to the facts, it has abused its discretion. *Id.* at 135 (citations omitted). No adequate remedy by appeal exists when a trial court erroneously appoints an arbitrator pursuant to section 5 of the Federal Arbitration

Act because the FAA does not provide for review of the trial court's actions in state court.[1] *See* 9 U.S.C. § 5*; In re La. Pac. Corp.*, 972 S.W.2d 63, 65 (Tex. 1998) (per curiam). Because the terms of the contract require the parties to apply to the AAA to appoint an arbitrator upon their failure to agree to an arbitrator, we conditionally issue a writ of mandamus.

The parties agree that this case is governed by the FAA, 9 U.S.C. §§ 1–16. Section 5 of the FAA provides:

> If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and *any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators* or umpire, or in filling a vacancy, *then upon the application of either party to the controversy the court shall designate and appoint an arbitrator* or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein . . . .

9 U.S.C. § 5 (emphasis added). The primary purpose of the FAA is to require enforcement of arbitration agreements "according to their terms." *Volt Info. Scis. v. Bd. of Trs.*, 489 U.S. 468, 479 (1989). Before the trial court can intervene and appoint an arbitrator, section 5 requires that parties follow the previously agreed method of arbitrator selection. *CMH Homes v. Perez*, 340 S.W.3d 444, 449 (Tex. 2011). Because the FAA requires the trial court to follow the arbitrator selection method detailed in the contract, we first determine the method of appointment required by the contract.

[1] This case was filed prior to the 2009 addition of section 51.016 to the Texas Civil Practice and Remedies Code expanding state court interlocutory review of certain FAA arbitration matters. *See CMH Homes v. Perez*, 340 S.W.3d 444 (Tex. 2011) (discussing the appellate remedies available to parties in arbitration proceedings following the 2009 amendment).

The contract signed by SCI and the Sernas outlined the following method of appointing an arbitrator:

> [T]he arbitrator shall be selected by mutual agreement of the parties. If the parties fail to or are unable to agree on the selection of an appropriate arbitrator, the AAA shall select the arbitrator pursuant to its rules and procedures upon the application of one or both parties.

The agreement provides only two ways that the parties may select an arbitrator: (1) mutual agreement, or (2) if the parties cannot agree, the AAA selects an arbitrator. When the parties failed to agree on an arbitrator, the contract required petitioning the AAA to appoint an arbitrator. Because the contract plainly requires the AAA to appoint an arbitrator when mutual agreement fails, the trial court abused its discretion by appointing an arbitrator unless an exception under section 5 applies.

The parties contracted to this method of appointing an arbitrator. The trial court is permitted to appoint an arbitrator under section 5 of the FAA only if one or both of the parties "fail[s] to avail" itself of the agreed-upon arbitrator selection method, or there is a "lapse" in the selection of an arbitrator. 9 U.S.C. § 5. The section 5 substitution process triggered by the "fail to avail" and "lapse" language of the FAA should be invoked by the trial court when there is some "mechanical breakdown in the arbitrator selection process" or "one of the parties refuses to comply, thereby delaying arbitration indefinitely." *In re La. Pac. Corp.*, 972 S.W.2d at 64–65 (Tex. 1998) (citing *In re Salomon Inc.*, 68 F.3d 554, 560 (2d Cir. 1995) (interpreting "lapse" and "fail to avail" in section 5 of the FAA)). The Sernas argue that SCI has forfeited its right to involve the AAA in the arbitrator selection process because of a lapse due to the time that had passed, the failure of SCI to

apply to the AAA, and a mechanical breakdown in the method of selecting an arbitrator. We do not agree.

The Sernas contend that a time lapse in applying to the AAA triggered the trial court's authority to appoint an arbitrator under section 5 of the FAA. It is important to remember that the FAA disfavors waiver and similar forfeitures of arbitration rights, and there is a strong presumption against them. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983) (observing that, under the FAA, any doubts concerning "an allegation of waiver, delay or a like defense to arbitrability" should be "resolved in favor of arbitration"); *Prudential Secs. Inc. v. Marshall*, 909 S.W.2d 896, 898 (Tex. 1995) (noting the presumption, under both federal and state law, against waiver of a contractual right to arbitration). We have observed that "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." *In re La. Pac. Corp.*, 972 S.W.2d at 65. However, section 5 tempers the principle that parties are free to make – and enforce – their arbitration agreements as they see fit, with the countervailing grant of authority to a district court to intercede and "spur the arbitral process forward" when the parties reach a stalemate in naming an arbitrator. *Pac. Reins. Mgmt. Corp. v. Ohio Reins. Corp*., 814 F.2d 1324, 1329 (9th Cir. 1987).

In *Pacific Reinsurance*, a district judge appointed an umpire, notwithstanding the parties' arbitration agreement, under circumstances in which the litigants had "tried and failed" to name an umpire. *Id.* at 1329. Finally, after "five months of impasse," the trial court appointed an umpire on motion of one of the parties. *Id.* The Court affirmed the appointment on failure-to-avail and lapse grounds, holding that section 5 may properly be invoked when the parties' "impasse" had lasted for

five months. *Id.* The Court explained that while parties should be afforded every reasonable opportunity "to comply with their agreement," section 5 may be invoked by a trial court to appoint an arbitrator where the arbitration process "stagnate[s] into endless bickering over the selection process." *Id*.

This is not such a case. The contract provides consensual methods for appointment of an arbitrator, and the court must allow the parties sufficient time to utilize the contractual method before intervening to appoint an arbitrator. An unreasonable delay in such an appointment, sufficient to constitute a lapse or failure to avail, should be measured from the point when mutual agreement failed. *See id.; cf. In re Universal Underwriters of Tex. Ins. Co.*, 345 S.W.3d 404, 409 (Tex. 2011) (holding, in the context of the right to an appraisal under an insurance contract, that an unreasonable delay sufficient to invoke waiver must be measured from the point of impasse – the point at which the parties become aware of the futility of further negotiations). Seven months elapsed from SCI's motion to compel arbitration in April 2009 to the time the trial court appointed an arbitrator in November. The Sernas argue the seven-month period establishes a deadlock or impasse between the parties justifying the trial court's intervention. On the contrary, that seven-month period includes the time the parties worked to reach a mutual agreement and did agree on an arbitrator, only to have him recused on conflict-of-interest grounds. The arbitration clause contemplated efforts to reach such an agreement. The applicable delay is the time after an impasse or deadlock is reached. *See Pac. Reins.*, 814 F.2d at 1329.

An impasse, if any, occurred after the agreed arbitrator was disqualified. Acting on the Sernas' motion, filed less than two weeks after the agreed arbitrator was disqualified, the trial court

appointed an arbitrator, notwithstanding the contract. This appointment occurred just one month after the parties had been in apparent agreement on an arbitrator. Thus, the disagreement of the parties as to the selection of the arbitrator was at most one month old. We are unable to locate any instance in which a federal court held that a delay in appointing an arbitrator as short as one month constituted a lapse under section 5. In the instances in which courts have found a lapse, the periods between the impasse and the appointment of an arbitrator are significantly longer than one month. *See e.g.*, *Pac. Reins. Mgt. Corp.*, 814 F.2d at 1328 (concluding that a five-month "impasse" between the parties resulted in both a "lapse" and "fail[ure] to utilize" the agreed-to umpire-selection method); *Trustmark Ins. Co. v. Clarendon Nat'l Ins. Co.*, No. 09 C 6169, 2010 U.S. Dist. LEXIS 8078, at *14 (N.D. Ill. Feb. 1, 2010) (holding that a four-month delay, measured from the time the defendants sent a list of potential umpires to the plaintiffs with no response to the time the defendants asked the trial court to appoint an umpire, constituted a lapse). As a matter of law, a one-month interval following an impasse, by itself, cannot reasonably be construed as a lapse in appointing an arbitrator. The parties had reached an agreement previously; both their contract and section 5 entitled them to a reasonable opportunity to do so again.

Arguing a failure-to-avail point, the Sernas assert that it was clear that neither party intended to apply to the AAA and, further, SCI's position was that it did not have the obligation to petition the AAA for appointment of an arbitrator. Again relying on the seven-month period from the filing of SCI's motion to compel through the time the trial court appointed an arbitrator, the Sernas contend that a stalemate had been reached. Reiterating, the period of time during which the parties are in discussions or negotiations toward mutual selection of an arbitrator does not count as delay

after an impasse. *See generally In re Universal Underwriters of Tex. Ins. Co.*, 345 S.W.3d at 408–09. As a matter of law, we conclude that under section 5 a one-month halt in negotiations between the parties does not in itself constitute a failure to avail by SCI of its contractual right to have the AAA select the arbitrator, irrespective of whether one or both parties had the contractual burden to pursue AAA appointment.

The Sernas also argue that an ambiguity in the contract resulted in a mechanical breakdown in the selection of an arbitrator. The contract states that "in the absence of [applicable state laws governing arbitration], the arbitration proceedings shall be conducted in accordance with the applicable rules of the [AAA]; provided, however, that the foregoing reference to the AAA rules shall not be deemed to require any filing with that organization . . . ." The Sernas argue that these provisions are contradictory and ambiguous and should be construed against the contract drafter, SCI. When interpreting a contract, our primary concern is to ascertain and give effect to the intent of the parties as expressed in the contract. *Seagull Energy E & P, Inc. v. Eland Energy, Inc*., 207 S.W.3d 342, 345 (Tex. 2006) (citations omitted). "To discern this intent, we '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. No single provision taken alone will be given controlling effect; rather, all the provisions must be considered with reference to the whole instrument.'" *Id.* (citations omitted).

The provisions that the Sernas argue are ambiguous simply define the rules applicable to arbitration proceedings and do not conflict with other portions of the arbitration agreement. Because the contract allows for the appointment of an arbitrator without the involvement of the AAA, the

contract provides that, although the parties may use AAA rules to govern their dispute, no filing with the AAA is required when the parties mutually agree. However, if the parties cannot agree, then either party may apply to have an arbitrator appointed through the AAA's procedures. We conclude that the contract is not ambiguous on this point. If the parties cannot agree on an arbitrator, the contract requires that they use AAA to appoint the arbitrator.

Accordingly, without hearing oral argument, we conditionally grant mandamus relief to SCI and direct the trial court to vacate its prior order appointing an arbitrator and allow the parties a reasonable opportunity to select an arbitrator pursuant to their agreement. TEX. R. APP. P. 59.1, 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**:** December 16, 2011

IN THE SUPREME COURT OF TEXAS

NO. 10-0158

IN RE SERVICE CORPORATION INTERNATIONAL AND SCI TEXAS FUNERAL SERVICES, INC., JOINTLY D/B/A MONT META MEMORIAL GARDENS

ON PETITION FOR WRIT OF MANDAMUS

PER CURIAM

Norma Sandoval and her sister, Nora Martinez, jointly filed suit against Service Corporation International (SCI) alleging fraud, deceptive trade practices, and other tort claims arising from their respective interment rights and services contracts for family burial plots at Mont Meta Memorial Park.[1] The parties agree the dispute was required to be arbitrated pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1-16. The contracts that Sandoval and Martinez signed both included arbitration clauses, albeit with different contractual methods for appointing the arbitrators. Martinez's contract allowed the court to appoint an arbitrator, while Sandoval's contract required the American Arbitration Association (AAA) to appoint the arbitrator if the parties could not reach

[1] SCI's briefing before this Court alternately provides its d/b/a name as "Mont Meta Memorial Gardens" and "Mont Meta Memorial Park." The certified mandamus record consistently refers to SCI's d/b/a name as "Mont Meta Memorial Park."

a mutual agreement.[2] Due to the differing contract terms, the trial judge severed the cases and then appointed arbitrator David Calvillo for Martinez's case. Sandoval asked the court to appoint an arbitrator in her case as well. Over the objection of SCI, the trial court also appointed David Calvillo to arbitrate Sandoval's case. SCI unsuccessfully sought a writ of mandamus from the court of appeals. In this Court, SCI requests that we issue a writ of mandamus directing the trial court to vacate its order naming David Calvillo as arbitrator.

The disputed issue is whether SCI allowed a lapse or mechanical breakdown in the contractual process for selection of an arbitrator, thereby validating the trial court's intervention to appoint the arbitrator. After suit was filed, SCI moved to compel arbitration. Sandoval acknowledges that at the October 5, 2009 hearing on the motion, SCI insisted on its right to seek AAA appointment of an arbitrator after the parties could not agree. Sandoval argues that SCI refused to initiate AAA procedures for appointment of an arbitrator because it claimed that Sandoval had the duty to do so. According to SCI, because the parties contracted to be governed by AAA rules, the burden of approaching the AAA rests on Sandoval, as she is the party seeking relief. Over SCI's objections, the trial court appointed Calvillo as the arbitrator from the bench on December 3, 2009. The trial court signed an order to that effect on January 11, 2010.

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[2] As in *In re Service Corp. International & SCI Tex. Funeral Services, Inc. d/b/a Magic Valley Memorial Gardens*, __ S.W.3d __ (Tex. 2011), the arbitration agreement in Sandoval's contract is governed by the Federal Arbitration Act. *See* 9 U.S.C. §§ 1–16. The relevant portion of the arbitration provision in Sandoval's contract provides:

> The arbitrator shall be selected by mutual agreement of the parties. If the parties fail to or are unable to agree on the selection of an appropriate arbitrator, the AAA shall select the arbitrator pursuant to its rules and procedures upon the application of one or both parties.

SCI asserts that the trial court's appointment of an arbitrator interfered with the contractual rights of the parties and was not authorized by the Federal Arbitration Act. Without reaching the parties' arguments as to which party or parties have the burden of approaching the AAA to appoint an arbitrator, we agree with SCI that the trial court's appointment was an abuse of discretion from which there is no adequate remedy by appeal. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135–36 (Tex. 2004). In a related case also decided today, *In re Service Corp. International & SCI Tex. Funeral Services, Inc. d/b/a Magic Valley Memorial Gardens*, we analyzed an identical arbitration provision. __ S.W.3d __ (Tex. 2011). Following the rationale in *Magic Valley Memorial Gardens*, we conclude the trial court abused its discretion by appointing an arbitrator instead of following the agreed-upon method of selection outlined in the contract. As a matter of law, the two-month delay in the selection of an arbitrator in this case, by itself, does not establish a lapse or failure of the parties to avail themselves of the contractual selection method. *See* 9 U.S.C. § 5; *Magic Valley Memorial Gardens*, __ S.W.3d __ (Tex. 2011). Accordingly, without hearing oral argument, we conditionally grant SCI's petition for writ of mandamus and direct the trial court to vacate its prior order appointing David Calvillo as arbitrator. TEX. R. APP. P. 59.1, 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: December 16, 2011

IN THE SUPREME COURT OF TEXAS

NO. 10-0223

CENTOCOR, INC., PETITIONER,

v.

PATRICIA AND THOMAS HAMILTON,
RESPONDENTS AND CROSS-PETITIONERS,

v.

MICHAEL G. BULLEN, M.D.,
CROSS-RESPONDENT

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

Argued December 8, 2011

JUSTICE GREEN delivered the opinion of the Court.

Under the learned intermediary doctrine, the manufacturer of a pharmaceutical product satisfies its duty to warn the end user of its product's potential risks by providing an adequate warning to a "learned intermediary," who then assumes the duty to pass on the necessary warnings to the end user. *See, e.g.*, *Gravis v. Parke-Davis & Co.*, 502 S.W.2d 863, 870 (Tex. Civ. App.—Corpus Christi 1973, writ ref'd n.r.e.). In this case, we consider the applicability of the

learned intermediary doctrine to a patient's claims against a prescription drug manufacturer, whose product allegedly caused a serious injury. We hold that the doctrine generally applies within the context of a physician-patient relationship and allows a prescription drug manufacturer to fulfill its duty to warn end users of its product's potential risks by providing an adequate warning to the prescribing physician. We further hold that the court of appeals erred by creating an exception to the learned intermediary doctrine for direct-to-consumer (DTC) advertising. Although the patient alleged various common law causes of action, all of the patient's claims turn on the prescription drug manufacturer's failure to warn. Therefore, the learned intermediary doctrine applies to all of the patient's claims, and the patient was required to show that an inadequate warning to the prescribing physicians caused the patient's injuries. Because the patient presented no evidence that the allegedly inadequate warning was a producing cause of her physicians' decisions to prescribe the prescription drug, her claims fail as a matter of law. Accordingly, we reverse the court of appeals' judgment in part and render judgment that the plaintiffs take nothing.

I. Background

In March 2003, Patricia and Thomas Hamilton sued Centocor, Inc., a prescription drug manufacturer and subsidiary of Johnson & Johnson, claiming that Centocor provided "inadequate and inappropriate warnings and instruction for use" of its prescription drug Remicade, which made Remicade "defective and unreasonably dangerous," and seeking damages for injuries that Patricia allegedly incurred from using the drug.[1] In August 2006, the Hamiltons amended their claims and

[1] Despite suing Centocor in March 2003, Patricia continued receiving Remicade treatments for approximately six months after filing suit.

added Patricia's prescribing and treating physicians as defendants. They claimed that Centocor was liable for, among other things, (1) "manufacturing, promoting, distributing and/or selling Remicade®," which was "defective and unreasonably dangerous" because of "inadequate and inappropriate warnings and instructions for use"; (2) negligence; (3) gross negligence; (4) fraud; and (5) malice. The Hamiltons claimed that Remicade caused Patricia to suffer a serious drug-induced side effect called lupus-like syndrome. The Hamiltons also alleged that Patricia's medical providers failed to adequately warn Patricia of the risks associated with Remicade and failed to obtain her informed consent to the treatment.

In the course of her prescribed treatments, Patricia's treating physician, Michael Bullen, M.D., showed her an informational video that he received from Centocor. The Hamiltons alleged that Centocor's video over-emphasized the benefits of Remicade and intentionally omitted warnings about the potential side effect of lupus-like syndrome. They argued that the video bypassed the physician-patient relationship and required Centocor to warn Patricia directly of Remicade's potential risks and side effects, thereby making Centocor liable for Patricia's injuries. The jury found in favor of the Hamiltons, and the trial court entered judgment for approximately $4.6 million. The court of appeals reversed the award of future pain and mental anguish damages but affirmed the remainder of the trial court's judgment, adopted a DTC advertising exception to the learned intermediary doctrine, and held that the record contained sufficient expert evidence to prove that Centocor's actions caused Patricia's injuries.

A. Patricia's Medical History Prior to 2001

Patricia Hamilton has a complicated medical history. For more than two decades, she has suffered from Crohn's disease, recurring joint pain, arthritis, and several other ailments. Crohn's disease is a chronic, lifelong inflammatory condition that can affect any part of the digestive system. There is no cure for the disease; however, patients have several treatment options, which seek to control intestinal inflammation. Over the years, Patricia underwent various procedures to treat the disease and mitigate its effects. By 2001, Patricia had part of her small intestine, colon, and rectum removed, and she lived with a colostomy. During a resection surgery—a procedure to reconnect her bowels after removing damaged tissues—Patricia contracted hepatitis C from a blood transfusion. She was also diagnosed with sarcoidosis.[2]

B. Dr. Hauptman Treats Patricia's Crohn's Disease

In September 2001, Patricia experienced a "flare" in her Crohn's disease and sought treatment from Ronald Hauptman, M.D., a gastroenterologist who was practicing in Corpus Christi. To confirm that Patricia's symptoms were caused by her Crohn's disease, Dr. Hauptman tracked Patricia's reported abdominal pains for several weeks and ordered a series of tests, including a CAT scan and an upper GI.[3] By December 2001, Dr. Hauptman confirmed that Patricia was experiencing a moderate flare in her Crohn's disease.

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[2] Sarcoidosis is a disease in which inflammation occurs in the lymph nodes, lungs, liver, eyes, skin, or other tissues.

[3] At trial, Dr. Hauptman explained that a CAT scan or computed axial tomography is a specialized x-ray that takes images of the inside of the human body, while an upper GI series or gastrointestinal tract radiography is another method of viewing the digestive system with x-ray pictures. Dr. Hauptman explained that an upper GI tracks the movement of barium that has been ingested by the patient as it progresses through the patient's digestive tract.

Dr. Hautpman testified that it was important to treat the Crohn's flare quickly to mitigate the risk that Patricia would lose more of her bowels. Based on Patricia's existing medical regimen and her reported allergic reactions to one type of anti-inflammatory medication used to treat Crohn's disease, Dr. Hauptman testified that Patricia's only two options to treat the Crohn's flare were through steroids or Remicade infusions. According to Dr. Hauptman, he consulted with Patricia about the available treatments and explained the risks and benefits of each approach. Based in part on Patricia's desire to avoid steroid treatments, which had previously caused severe adverse effects, Dr. Hauptman prescribed three treatments of Remicade, a relatively new drug that had been developed since Patricia's surgery in 1997, administered at six-week intervals of 400 milligrams each.

C. Remicade

Remicade is a prescription drug, manufactured by Centocor, that is approved by the Food and Drug Administration (FDA) for the treatment of Crohn's disease and rheumatoid arthritis.[4] An immunomodulator medication, Remicade is designed to suppress the immune system's inflammatory response to the affected bowel. Patients receive Remicade treatments through intravenous infusions—the medication is injected through an IV catheter in the patient's arm.

1. The FDA Approval Process

Barbara Matthews, M.D., an FDA administrator from 1994 to 2000, testified as an expert on the FDA approval process. Dr. Matthews was the clinical reviewer of Centocor's application for

[4] Remicade is Centocor's brand name for the drug infliximab.

FDA approval of Remicade and testified about her knowledge of the drug and her review of the safety and clinical data supporting Centocor's application. According to Dr. Matthews, once the FDA approves a drug for prescription use, the drug manufacturer drafts a package insert, which contains the clinical information, warnings, and other information known about the drug. The FDA then reviews the proposed package insert, makes revisions, and ultimately approves the insert for distribution with the drug. According to Dr. Matthews, the purpose of a package insert

> is to describe both the safety and efficacy that were reported to [the] FDA and . . . provide[] information to the physician regarding the types of events, the serious[] nature of some of the events, the incidents of the events and, yes, the physician uses [this information to assess the] risk to the patient when they prescribe the medication.
>
> . . . .
>
> The degree of risk to the individual patient really depends on the physician's knowledge of the patient and then also the information that's in the label but the label really doesn't link directly that patient to the degree of risk.

Additionally, once a drug has received FDA approval, the manufacturer must submit periodic safety update reports to the FDA. These post-approval reports contain cumulative summaries of the drug's safety information, including updated clinical studies and any other medical findings published about the drug. Depending on the number, nature, and severity of events reported for a given adverse reaction, the FDA may recommend that the manufacturer (1) continue to monitor the events, (2) change the warning label, or (3) conduct additional studies. Because the FDA requires continuing studies of the safety and efficacy of the prescription drug, it is common for the package insert to undergo revisions as new information becomes available.

2. The 2001 Remicade Package Insert

At the time of Patricia's initial Remicade prescription in December 2001, Centocor provided Patricia's doctors with a package insert that warned Remicade's use could lead to certain adverse reactions. The package insert included the following warning information regarding lupus-like syndrome:

> **PRECAUTIONS:**
>
> **Autoimmunity**
> Treatment with REMICADE may result in the formation of autoantibodies and, rarely, in the development of a lupus-like syndrome. If a patient develops symptoms suggestive of a lupus-like syndrome following treatment with REMICADE, treatment should be discontinued (see *ADVERSE REACTIONS*, *Autoantibodies/Lupus-like Syndrome*).
>
> . . . .
>
> **ADVERSE REACTIONS:**
>
> A total of 771 patients were treated with REMICADE in clinical studies. In both rheumatoid arthritis and Crohn's disease studies, approximately 6% of patients discontinued REMICADE because of adverse experiences. The most common reasons for discontinuation of treatment were dyspnea, urticaria and headache. Adverse events have been reported in a higher proportion of patients receiving the 10 mg/kg dose than the 3 mg/kg dose.
>
> . . . .
>
> **Autoantibodies/Lupus-like Syndrome**
> In the ATTRACT rheumatoid arthritis study through week 54, 49% of REMICADE-treated patients developed anti-nuclear antibodies (ANA) between screening and last evaluation, compared to 21% of placebo-treated patients. Anti-dsDNA antibodies developed in approximately 10% of REMICADE-treated patients, compared to none of the placebo-treated patients. No association was seen between REMICADE dose/schedule and development of ANA or anti-dsDNA.
>
> . . . .

> In clinical studies, three patients developed clinical symptoms consistent with a lupus-like syndrome, two with rheumatoid arthritis and one with Crohn's disease. All three patients improved following discontinuation of therapy and appropriate medical treatment. No cases of lupus-like reactions have been observed in up to three years of long-term follow-up (see *PRECAUTIONS*, *Autoimmunity*).

The package insert also included a table noting that serious adverse reactions—including systemic lupus erythematosus syndrome—occurred at frequencies of less than 2% "by body system in all patients treated with REMICADE."

D. Lupus-Like Syndrome

According to Mary Olsen, M.D., an expert witness hired by Centocor but called by the Hamiltons, lupus-like syndrome, also called drug-induced lupus, has similar characteristics to the autoimmune disorder systemic lupus erythematosus (SLE), except that lupus-like syndrome is caused by a drug. All of the testifying experts generally agreed that symptoms of both lupus-like syndrome and SLE include joint pain and swelling, weight gain, fatigue, unusual weakness, leukopenia, lymphopenia, rash, oral ulcers, fever, and pericarditis. Patients with Crohn's disease or rheumatoid arthritis, another autoimmune disorder, could also present similar symptoms to lupus-like syndrome, making it sometimes difficult to diagnose SLE or drug-induced lupus.

Physicians can conduct lab tests to check for the presence of anti-nuclear antibodies (ANA), double-stranded DNA antibodies (anti-dsDNA), and antihistone antibodies, which are specific indicators that may help a physician diagnose the presence of an autoimmune condition. Although no antibody is definitive of lupus-like syndrome, positive tests for ANA or anti-dsDNA may indicate the patient has lupus-like syndrome. Physicians also use electrophoresis and immunoelectrophoresis as other immunology blood tests to help diagnose lupus. According to Atilla Ertan, M.D., an expert

witness for Centocor, the anti-dsDNA test is the most important indicator for diagnosing drug-induced lupus. Additionally, Dr. Olsen testified that antihistone antibodies are classically seen in patients with drug-induced lupus and "as a rule, an antihistone antibody often is a flag [that indicates] a drug-induced problem." Because Remicade may produce ANA or anti-dsDNA in patients, however, Dr. Olsen explained that it is often difficult to diagnose lupus-like syndrome. A doctor must look to both the laboratory tests and the clinical presentation of symptoms. If a patient has drug-induced lupus rather than SLE, removing the patient from the drug should improve the patient's lupus-like symptoms.

E. Dr. Bullen and the Remicade Infusions

Dr. Hauptman prescribed three infusions of Remicade over a six-week period from December 2001 to January 2002 and referred Patricia to Dr. Bullen for treatment. Dr. Bullen is an infectious disease specialist and, at that time, operated an infusion clinic in Corpus Christi where Patricia received the Remicade infusions. As the non-prescribing, treating physician, neither Dr. Bullen nor his staff discussed with Patricia the risks inherent in Remicade, but they informed her of the potential risks directly associated with the infusion process. At trial, Dr. Bullen did not recall confirming that Dr. Hauptman had informed Patricia of Remicade's risks. Dr. Bullen stated that he was aware that Remicade could cause lupus-like syndrome, but admitted that he probably did not give Patricia any warnings or instructions concerning the risk of developing lupus-like syndrome.

Polly Swinney, a registered nurse at Bullen's infusion clinic, took Patricia's patient history, advised Patricia on the potential infusion-related side effects,[5] and monitored Patricia during her Remicade treatments at the infusion center. Before Patricia received her first infusion, Dr. Bullen's clinic performed a tuberculin skin test, per Dr. Hauptman's orders, because of the serious risks related to treating tuberculosis-infected patients with Remicade.[6] After confirming that Patricia did not have tuberculosis, Patricia received her first Remicade infusion at Dr. Bullen's infusion clinic on December 19, 2001.

F. Centocor's Informational Video

After Swinney connected Patricia's IV and started the first Remicade infusion, she showed Patricia an informational video about Remicade and the treatment process, which Centocor had provided to Dr. Bullen. Centocor had submitted the video to the FDA, but the FDA neither approved nor disapproved it.

Dr. Bullen, Dr. Matthews, and Swinney generally agreed that the main purpose of the video was to educate patients and make them more comfortable with the infusion process. The video, titled "Patient Guide to Remicade® (infliximab) IV Administration," was viewed by the jury during trial. It depicts the effects of Remicade on several people and includes statements from a doctor, identified as Alan Safdi, M.D., who explains the Remicade infusion process and warns about some

[5] Swinney testified that she warned Patricia of potential side effects like headache, chills, fever, nausea, vomiting, dyspnea, vertigo, upper respiratory infections, hypertension, and hypotension.

[6] Because Remicade can lower the body's ability to fight infections, the 2001 package insert contained a "black box" warning of the potentially fatal risks associated with treating tuberculosis-infected patients with Remicade and instructed doctors to conduct tuberculosis tests prior to treating patients with Remicade.

of the drug's side effects. The video shows several patients receiving Remicade infusions, provides answers to common questions about the treatment process, and shows the patients continuing their daily routines after the treatment while the bottom of the screen states: "RESULTS MAY VARY." Although Dr. Safdi states that "there are very little side effects that people need to watch for" and adverse reactions are "extremely rare," he also instructs patients to contact their medical providers if they have any discomfort and states that there have been some reports of serious, life-threatening side effects.

In addition to Dr. Safdi's verbal warnings, the video provides several written warnings and disclaimers at the end of the production. It instructs patients to contact their healthcare provider if they have any questions and provides a Remicade website address for further information. The video warns of various risks associated with the infusion process, advises that "[p]hysicians should discuss with their patients all potential side effects that may occur during these infusions," and cautions that the "video should not be used as a substitute for talking with your doctor." For the treatment of fistulizing Crohn's disease,[7] the video warning states that "[t]he safety and efficacy of therapy continued beyond three doses have not been studied." After listing a series of potential side effects, the warning instructs patients to "see the accompanying Full Prescribing Information." It is undisputed that the video did not mention lupus-like syndrome as a potential side effect of Remicade.

[7] A fistula is a connection of two body cavities or a connection of a body cavity to the skin, e.g., a connection of the rectum to the skin. It is common for Crohn's disease patients to develop fistulas.

Swinney testified that the infusion clinic received the videotapes from Centocor in cellophane-wrapped boxes that usually contained the video, informational brochures about Remicade, and package inserts that provided more extensive details about the drug. She claimed that after showing Patricia the video, she placed it back in the box with the written materials on top and gave it to Patricia. At trial, Patricia denied receiving any written information about Remicade, but stated that she never looked in the box that Swinney gave her or reviewed any additional written information about Remicade. During one of Patricia's infusions, Swinney gave Patricia a second Centocor video to give to Patricia's sister, who had rheumatoid arthritis. The second video contained the same visual content but was enclosed in different packaging material. The box containing the second video had a plastic sleeve on the inside cover that contained the Remicade package insert and an informational brochure.[8]

Patricia reported an excellent response to her Remicade treatments at Dr. Bullen's infusion clinic, and the treatments helped relieve the symptoms of her Crohn's disease. After her first two Remicade infusions, Dr. Hauptman performed a colonoscopy on Patricia, which revealed that Patricia no longer had abnormalities in her small intestine. Following her third Remicade infusion, Dr. Hauptman believed that Patricia's Crohn's disease was in remission. Dr. Hauptman then planned to continue monitoring Patricia's condition before determining whether Patricia needed a Remicade maintenance dose every eight weeks. Throughout her follow-up appointments with Dr. Hauptman, Patricia reported that she was having no problems with her bowels, leading Dr. Hauptman to

[8] The second video Patricia received was also admitted into evidence at trial. Inside this video's packaging box are three copies of the 2001 package insert.

conclude that the Remicade treatments were successful and that Patricia's Crohn's disease remained in remission. It is undisputed that, since taking Remicade, Patricia's Crohn's disease has been asymptomatic.

G. Dr. Pop-Moody Treats Patricia's Arthritis

In the weeks following her initial treatments with Remicade, Patricia experienced severe arthritis-like pains in her joints. Patricia's family physician referred her to a local rheumatologist, Adriana Pop-Moody, M.D. During her initial visit with Dr. Pop-Moody, Patricia explained her recent treatments with Remicade and told Dr. Pop-Moody that it had dramatically improved her Crohn's condition and that her arthritis pains had markedly improved after her first three doses of Remicade. In April 2002, Dr. Pop-Moody prescribed treatments including additional Remicade infusions at regular intervals to treat Patricia's joint pains. Between April 2002 and September 2003, Patricia received fourteen additional Remicade infusions at the Corpus Christi Medical Center.

Patricia continued to experience severe joint pain. Each treatment provided temporary relief, but the relief periods dwindled. In an attempt to improve Patricia's condition, Dr. Pop-Moody decreased the time between infusions and increased the dosage of Remicade. Dr. Pop-Moody and Patricia remained convinced that Remicade was providing Patricia temporary relief from her joint pains. In her practice, Dr. Pop-Moody routinely diagnosed and treated patients with lupus. Even though Patricia tested positive for SLE in June 2002—a condition similar to drug-induced lupus and a potential side effect of Remicade—because of Patricia's complicated condition, Dr. Pop-Moody did not diagnose Patricia with drug-induced lupus at that time. In April 2003, Dr. Pop-Moody reviewed treatment options with Patricia and discussed that she might need to stop the Remicade

infusions. Dr. Pop-Moody informed Patricia that she may have lupus-like syndrome, but Patricia's medical records indicate that, despite this risk, Patricia desired to continue taking Remicade.

H. The Houston Doctors

Because of Patricia's increasing joint pain and Dr. Pop-Moody's inability to determine the cause of Patricia's continuing ailments, Dr. Pop-Moody referred Patricia to rheumatologists at the University of Texas Health Science Center in Houston, where she saw Maureen D. Mayes, M.D., Noranna B. Warner, M.D., and Leslie Wilson, M.D. (collectively, the Houston Doctors). In response to Dr. Pop-Moody's request, the Houston Doctors examined Patricia's symptoms and Dr. Mayes and Dr. Wilson made the following assessment in September 2003:

> 1. Symmetric polyarthritis involving the hands, elbows, shoulders, knees, and feet that could be consistent with lupus (potentially drug-induced by Remicade), although the literature is limited in supportive evidence of this entity. There have been several studies showing that the presence of double stranded DNA antibodies in patients who receive Remicade is not uncommon; however, there have been limited cases of lupus-like syndrome seen with this medication. The patient, at this time, does appear to have a syndrome that could be classified as systemic lupus erythematosus. The clinical picture is less consistent with ~~sarcoidosis or~~[9] arthritis associated with sarcoidosis. The clinical presentation could be consistent with enteropathic arthritis. This could be arthritis associated with hepatitis C virus.
>
> 2. Leukopenia—possibly secondary to lupus-like syndrome or a side effect of Imuran.[10]

[9] The word "sarcoidosis" is marked through with an ink pen on the official trial exhibit. It is unclear who made this change to the document.

[10] Imuran is another immunosuppressant drug that Patricia received for her ailments. Additionally, a third assessment is handwritten on the document, stating: "3. Significant Osteopenia on DEXA—now on chronic prednisone." It is also unclear from the record who made this change to the document.

The Houston Doctors stopped Patricia's Remicade treatments and, instead, prescribed steroids for her joint pains. At her October 2003 follow-up appointment, Patricia reported that she felt much better than she did at her previous visit. Dr. Warner sent Dr. Pop-Moody a status report, which documented Patricia's improvement and stated in pertinent part:

> The patient presented to our clinic for evaluation of possible lupus-like syndrome which may have been induced by Remicade therapy. Upon evaluation by her rheumatologist in Corpus Christi, the patient was found to have a positive ANA and positive double-stranded DNA antibodies. Other significant history included the episode of pericarditis in January of 2003 and the presence of leukopenia (absolute lymphopenia). Upon initial presentation to our clinic a few weeks ago, the patient's physical exam showed significant tenderness on internal and external rotation of both of her shoulders. There was also some swelling of the fingers, particularly in the PIP joints bilaterally. There was decreased hand grip secondary to pain.
>
> Today, the patient states that she is much improved since her previous visit. . . .
>
> . . . .
>
> ASSESSMENT: Symmetric polyarthritis involving hands, shoulders, knees, feet, which is consistent with a lupus-like syndrome (potentially drug-induced by Remicade). The patient has improved on an increased dose of Imuran 150 mg daily, increased from 100 mg daily. The patient also had increased her prednisone dose from 10 mg daily to 15 mg daily.

Within a few months of ceasing the Remicade infusions, Patricia's lupus-like symptoms subsided. Patricia's arthritic symptoms also improved dramatically after she ceased taking Remicade.

II. Procedural Background

A. Trial Court Proceedings

The case proceeded to a multi-week jury trial. At trial, Patricia and her doctors gave conflicting testimony about their conversations concerning the risks and potential adverse effects associated with Remicade. Specifically, Dr. Hauptman and Dr. Pop-Moody testified that they fully

informed Patricia about the risks of developing lupus-like syndrome while Patricia averred that she received no such warning from either doctor when they initially prescribed Remicade treatments. Although Patricia admitted that she was informed by her physicians of certain risks associated with Remicade, including the rare risk of cancer, she testified that her doctors made no mention of the risk of developing lupus-like syndrome. She further stated that the risk of lupus-like syndrome was something that she would have wanted to know, that it "would have impacted [her] decision," and that "[t]he question of lupus would have made [her] stop and ask more questions before [she] made a decision [to take Remicade]." Regardless of the conflicting testimony, it is undisputed that all of Patricia's doctors were aware of the risk of lupus-like syndrome when they chose to prescribe and treat Patricia with Remicade. And according to all of the doctors who testified on the subject, lupus-like syndrome can be difficult to diagnose.

At the charge conference, the Hamiltons abandoned their original failure-to-warn claim and proposed separate jury questions on claims against Centocor for (1) fraud, (2) negligent misbranding, (3) negligent marketing, (4) negligent undertaking, (5) misrepresentation to Patricia's prescribing physicians concerning the risk of lupus-like syndrome, and (6) misrepresentation to Patricia's prescribing physicians concerning the risk of hepatitis C and liver damage. Centocor raised several objections to the Hamiltons' proposed charge, including that it was error for the trial court to submit separately the claims for negligent misbranding, negligent marketing, negligent undertaking, misrepresentation regarding lupus-like syndrome, misrepresentation regarding hepatitis C and liver conditions, and fraud. Centocor argued that each of the Hamiltons' claims were premised on a single failure-to-warn cause of action, the separate questions were duplicative, and the trial court should

only submit one failure-to-warn claim to the jury. The trial court judge overruled each of Centocor's objections and submitted all of the Hamiltons' questions to the jury. Centocor also repeatedly raised the learned intermediary doctrine, contesting its duty to warn Patricia directly. It argued that the record lacked expert testimony to (1) support the Hamiltons' claims that Centocor's warnings to Patricia and her prescribing doctors were inadequate, and (2) prove that the allegedly inadequate product warning was the producing cause of Patricia's injuries. Additionally, Centocor argued that there was no evidence Centocor breached the standard of care.

Before the trial court submitted the charge to the jury, the court granted a directed verdict in favor of Dr. Bullen and his infusion clinic, finding that Dr. Bullen and his staff had no duty to warn Patricia of the risks associated with Remicade because Dr. Bullen was not the prescribing physician.

The jury found Centocor liable for fraud, misrepresentation to Patricia's doctors, negligent misbranding, negligent marketing to Patricia's doctors, and negligent undertaking. The jury awarded Patricia $1.2 million for past pain and mental anguish, $1 million for future pain and mental anguish, $1.1 million for past physical impairment, and $65,908 for past medical expenses. It also awarded Thomas $50,000 for loss of consortium and household services. The jury apportioned liability for the Hamiltons' damages, finding Centocor 85% liable, Dr. Pop-Moody 10% liable, and Dr. Hauptman 5% liable. The jury determined that the Hamiltons established fraud by clear and convincing evidence and awarded Patricia $15 million and Thomas $1 million in exemplary damages based on the fraud claim.

Before the trial court entered judgment on the jury's verdict, Dr. Hauptman and Dr. Pop-Moody settled with the Hamiltons, and the Hamiltons nonsuited those defendants.[11] The trial court denied Centocor's motion for judgment notwithstanding the verdict. On February 13, 2007, the trial court apportioned responsibility, applied settlement credits, applied the exemplary damages caps, and entered judgment against Centocor, awarding a total of $4,687,461.70 to Patricia and $120,833.71 to Thomas in actual damages, punitive damages, and interest. The trial court entered judgment on the Hamiltons' fraud claim only but stated that, in the alternative, the Hamiltons should recover actual damages under the various other theories presented to the jury.

B. Court of Appeals

Centocor timely appealed, arguing first that the learned intermediary doctrine precluded the Hamiltons' recovery because, as a matter of law, Centocor's warnings to Patricia's prescribing physicians were adequate and Centocor had no duty to warn Patricia directly.[12] 310 S.W.3d 476, 499 (Tex. App.—Corpus Christi 2010). The court of appeals disagreed, however, and affirmed the trial

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[11] Dr. Pop-Moody settled for $50,000, and Dr. Hauptman settled for a confidential amount.

[12] In total, Centocor raised twelve issues before the appellate court: (1) under the learned intermediary doctrine, Centocor had no duty to warn Patricia directly and it provided adequate warnings to Patricia's prescribing physicians who had preexisting knowledge of the relevant risks associated with Remicade; (2) the Hamiltons failed to present legally or factually sufficient evidence of causation; (3) Centocor provided adequate warnings, and no expert testified that the warning was inadequate or made Remicade unreasonably dangerous; (4) the Hamiltons failed to present legally or factually sufficient evidence of fraud by omission; (5) the Hamiltons incorrectly asserted claims for implied misrepresentation under Section 402B of the *Restatement (Second) of Torts*, which provides only for claims of express misrepresentation; (6) even if Section 402B of the *Restatement* entitles the Hamiltons to recover for implied misrepresentations, those claims must fail for lack of legally sufficient evidence; (7) the Hamiltons failed to provide expert testimony about the standard of care or evidence that Centocor breached the standard of care; (8) Texas does not recognize a cause of action for negligent misbranding; (9) as a matter of law, distribution of a videotape does not constitute a negligent undertaking; (10) the evidence on future damages was legally and factually insufficient; (11) if Patricia's claims fail, then Thomas's derivative claims must fail; and (12) the judgment should be remitted because the trial court misapplied the punitive damages cap. *See* 310 S.W.3d at 480–81, 521–22.

court's judgment on the Hamiltons' fraud claim but reversed the damages award for future pain and mental anguish. *Id.* at 522.

The court of appeals first examined Centocor's duty under the learned intermediary doctrine, which generally limits a prescription drug manufacturer's duty to warn of its product's risks and potential side effects to prescribing physicians, who then serve as "learned intermediaries" and assume the duty to pass the warnings on to patients. *See id.* at 499–508. Relying on reasoning from the New Jersey Supreme Court's opinion in *Perez v. Wyeth Laboratories*, 734 A.2d 1245, 1246–47 (N.J. 1999), the court of appeals adopted "an exception to the learned intermediary doctrine when a drug manufacturer directly advertises to its consumers in a fraudulent manner." 310 S.W.3d at 480–81. Guided by the *Perez* court's decision, the court of appeals held "that when a pharmaceutical company directly markets to a patient, it must do so without fraudulently misrepresenting the risks associated with its product." *Id.* at 508. The court therefore dismissed Centocor's arguments based on the learned intermediary doctrine and, in a footnote, stated: "[W]e hold today that Centocor cannot rely on its *adequate* warnings to Patricia's physicians when it directly misrepresented its product's dangerous propensities to Patricia." *Id.* at 508 & n.18 (emphasis added).

The court of appeals next considered Centocor's argument that the Hamiltons failed to present legally and factually sufficient evidence of causation and held that the Hamiltons met their burden of proof on causation.[13] *Id.* at 508–12. The court then overruled Centocor's claims that the

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[13] The court of appeals properly noted:

> Centocor did not raise [its claims that the Hamiltons failed to present epidemiological studies or other legally sufficient evidence of general or specific causation] in its motions for directed verdict, objections to the jury charge, or motions for judgment notwithstanding the verdict. Rather, Centocor first raised these challenges to the causation evidence in its motion for new trial. Thus, even if we

trial court erred because (1) no expert testified that the Remicade warnings were inadequate, (2) the side effect of lupus-like syndrome did not make Remicade unreasonably dangerous, and (3) the Hamiltons presented no evidence that a different warning by Centocor would have prevented Patricia's injuries. *Id.* at 512–16. The court of appeals overruled or dismissed as moot Centocor's remaining issues, reversed the trial court's damages award for future pain and mental anguish,[14] and affirmed the trial court's judgment on the Hamiltons' fraud claim. *See id.* at 516–22.

C. Centocor's Petition for Review

Centocor timely petitioned this Court for review, and raises four issues on appeal: (1) the court of appeals erred by creating an advertising exception to the learned intermediary doctrine, and the doctrine applies, thereby limiting Centocor's duty to warn to Patricia's prescribing physicians only and barring the Hamiltons' claims; (2) the Hamiltons failed to present any expert testimony that the warning in Centocor's informational video was inadequate, and the appellate court erred by considering Dr. Matthews's testimony about the FDA approval process and the FDA regulations as sufficient evidence to show that the video's allegedly inadequate warning made Remicade

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> agree with Centocor that there is no legally sufficient evidence of causation on this ground, we may only grant Centocor a new trial.

Id. at 509 (citing *Werner v. Colwell*, 909 S.W.2d 866, 870 n.1 (Tex. 1995)); *see also* TEX. R. APP. P. 43.3; *Horrocks v. Tex. Dep't of Transp.*, 852 S.W.2d 498, 499 (Tex. 1993). Centocor did, however, properly raise and preserve its causation argument regarding its contention that the Hamiltons failed to present any evidence that a different warning would have prevented Patricia's doctors from prescribing the medication or prevented Patricia from taking Remicade.

[14] At trial, the Hamiltons spent considerable time discussing Remicade's potential to damage Patricia's liver or worsen her preexisting hepatitis C. Although the jury found in favor of the Hamiltons on this point, the court of appeals reversed the award of future damages and noted that the Hamiltons "did not present any evidence . . . that [Patricia] actually suffered any injury to her liver as a result of Remicade, that she would likely need a liver transplant, or that she would, in reasonable probability, suffer any injury in the future as a result of Remicade." *Id.* at 520. Neither party disputes the court of appeals' findings on Patricia's damages for the purported risk of liver injury or hepatitis C. Accordingly, the sole issue before us in this appeal is whether the Hamiltons can prevail on their claims for the alleged injury of lupus-like syndrome.

unreasonably dangerous; (3) the Hamiltons failed to show any evidence of causation because they presented no expert testimony of causation or epidemiological studies, but instead relied on the package insert and expert witnesses' unsupported references to clinical trials; and (4) the appellate court erred in affirming the Hamiltons' fraud claim because there was no evidence of any *mens rea* on the part of Centocor, which was isolated from the patient by the intermediary doctors, and that Patricia could not have relied on any alleged misrepresentation because she continued to take Remicade even after suing Centocor. In response to Centocor's first issue, the Hamiltons raise a conditional cross-issue, alleging that if we hold that the learned intermediary doctrine applies, we should reinstate the Hamiltons' claims against Dr. Bullen, the non-prescribing, treating physician, because Centocor deliberately used Dr. Bullen to provide direct marketing materials outside of the context of the prescribing physician's doctor-patient relationship. We granted both petitions. 54 Tex. Sup. Ct. J. 1578 (Aug. 26, 2011).[15] We address the parties' arguments in turn.

III. Learned Intermediary Doctrine

Generally, a manufacturer is required to provide an adequate warning to the end users of its product if it knows or should know of any potential harm that may result from the use of its product. *See, e.g.*, *Bristol-Myers Co. v. Gonzales*, 561 S.W.2d 801, 804 (Tex. 1978). In certain contexts,

[15] The following amici curiae submitted briefs in support of Centocor: International Association of Defense Counsel; Pacific Legal Foundation; Pharmaceutical Research and Manufacturers of America; Product Liability Advisory Council, Inc. Also, the Texas Medical Association, Texas Medical Liability Trust, and Texas Alliance for Patient Access (collectively, TMA) jointly submitted an amicus curiae brief in support of the trial court's and court of appeals' judgments, arguing that we should (1) hold that Dr. Bullen, the non-prescribing physician, had no duty to warn, and (2) reject the learned intermediary doctrine and hold that the prescription-drug manufacturer is responsible for warning those whom it should reasonably expect to be endangered by the use of its product. In response to the TMA's arguments, the Washington Legal Foundation submitted an amicus curiae brief, advocating in favor of Centocor and urging the Court to adopt the learned intermediary doctrine in the prescription-drug context.

however, the manufacturer's or supplier's duty to warn end users of the dangerous propensities of its product is limited to providing an adequate warning to an intermediary, who then assumes the duty to pass the necessary warnings on to the end users. *See, e.g.*, *Alm v. Aluminum Co. of Am.*, 717 S.W.2d 588, 590–92 (Tex. 1986); Richard C. Ausness, *Learned Intermediaries and Sophisticated Users: Encouraging the Use of Intermediaries to Transmit Product Safety Information*, 46 SYRACUSE L. REV. 1185, 1195–96 (1996). It is firmly established in Texas that whether a duty exists is ordinarily a legal matter for the court to decide. *See, e.g.*, *Humble Sand & Gravel, Inc. v. Gomez*, 146 S.W.3d 170, 181 (Tex. 2004). Within the context of prescription drug manufacturers, the underlying premise for the learned intermediary doctrine is that prescription drugs are complex and vary in effect, depending on the unique circumstances of an individual user, and for this reason, patients can obtain them only through a prescribing physician. *See Reyes v. Wyeth Labs.*, 498 F.2d 1264, 1276 (5th Cir. 1974), *cert. denied*, 419 U.S. 1096 (1974).

Centocor argues that the learned intermediary doctrine applies and therefore it had no duty to warn Patricia directly of the risks and potential side effects associated with Remicade. It asserts that it provided warnings of specific side effects and risks associated with Remicade to Patricia's doctors through the FDA-approved package insert, which Patricia did not challenge as inadequate. Centocor further argues that the appellate court erred by adopting a DTC advertising exception. Centocor claims that DTC advertising does not threaten the physician-patient relationship, but helps educate consumers about available medications—sometimes causing patients to seek treatment for ailments they otherwise would not have treated or sometimes even discovered. Additionally, Centocor points out that the FDA and other courts have recognized that over-warning can confuse

the public and, ultimately, can harm treatment efforts by scaring patients from taking the necessary risks associated with some prescription drugs.

In response, the Hamiltons argue that Centocor cannot benefit from the learned intermediary doctrine because it provided an inadequate and misleading warning to the "learned intermediary"—Patricia's prescribing and treating physicians. The Hamiltons contend that Centocor misrepresented the risks and side effects associated with Remicade to Patricia and her doctors by conveying instances of lupus-like syndrome observed only in clinical studies instead of all reported cases, thereby preventing Centocor from relying on the defense of the learned intermediary doctrine. Alternatively, if the learned intermediary doctrine applies, the Hamiltons urge us to adopt the DTC advertising exception and affirm the court of appeals' judgment because when a drug manufacturer directly markets its product to patients, that manufacturer should have a duty, at minimum, to present non-misleading information about the drug and must be liable for its fraudulent or intentionally misleading marketing.

A. The Learned Intermediary Doctrine in Texas Jurisprudence

The learned intermediary doctrine has been part of Texas jurisprudence for many years. *See, e.g.*, *Gravis v. Parke-Davis & Co.*, 502 S.W.2d 863, 870 (Tex. Civ. App.—Corpus Christi 1973, writ ref'd n.r.e.). In *Gravis*, the court of appeals held that it was unreasonable for the law to impose a duty on prescription drug manufacturers to "specifically warn each and every patient that receives drugs prescribed by the physician or other authorized persons" and outlined the underlying rationale for the doctrine:

> The entire system of drug distribution in America is set up so as to place the responsibility of distribution and use upon professional people. The laws and regulations prevent prescription type drugs from being purchased by individuals without the advice, guidance and consent of licensed physicians and pharmacists. These professionals are in the best position to evaluate the warnings put out by the drug industry. Our holding in no way relieves the drug company in their duty to warn or to provide a product free of defects.

Id. Since the Thirteenth Court of Appeals' opinion in *Gravis*—the same court from which we consider the instant case—many Texas courts of appeals have applied the learned intermediary doctrine in prescription drug products-liability cases. *See, e.g.*, *Wyeth-Ayerst Labs. Co. v. Medrano*, 28 S.W.3d 87, 91 (Tex. App.—Texarkana 2000, no pet.) ("In prescription drug cases, the courts have found that it is reasonable for the manufacturer to rely on the health care provider to pass on its warnings. This is reasonable because the learned intermediary understands the propensities and dangers involved in the use of a given drug, and as the prescriber, he stands between this drug and the ultimate consumer.").[16]

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[16] *See also Morgan v. Wal-Mart Stores, Inc.*, 30 S.W.3d 455, 467 (Tex. App.—Austin 2000, pet. denied) (applying the learned intermediary doctrine to shield pharmacists from an independent duty to warn of dangers associated with prescription drugs); *Guzman v. Synthes (USA)*, 20 S.W.3d 717, 720 n.2 (Tex. App.—San Antonio 1999, pet. denied) ("[W]here, as here, the product is meant only for administration by a physician, the physician is integrally involved in deciding what type of medical device to use on the patient, and the physician is in a better position than the patient to understand the dangers and propensities of the possible devices, the supplier satisfies its duty by warning and instructing the treating physician."); *Bean v. Baxter Healthcare Corp.*, 965 S.W.2d 656, 662 (Tex. App.—Houston [14th Dist.] 1998, no pet.) ("The learned intermediary doctrine arises when a product manufacturer has little or no contact with the ultimate user. The third party intermediary decides whether to purchase and prescribe the medicine, taking into account the risk and benefit to the patient, as well as the characteristics of the particular drug."); *Rolen v. Burroughs Wellcome Co.*, 856 S.W.2d 607, 609 (Tex. App.—Waco 1993, writ denied) ("Under the doctrine, the manufacturer has a duty to adequately warn the physician; the physician then chooses the type and quantity of drug to be prescribed to an individual patient. The physician must use his comprehensive training and experience in conjunction with his knowledge of the individual patient in determining the suitability of a medication. The physician assumes the duty to warn the patient of dangers associated with a particular prescribed drug."); *Stewart v. Janssen Pharmaceutica, Inc.*, 780 S.W.2d 910, 911 (Tex. App.—El Paso 1989, writ denied) (noting that the pharmaceutical company "had a duty to warn the physician of the dangers of [the drug], and once the physician is warned, the choice of which drugs to use and the duty to explain the risks become that of the physician"); *Khan v. Velsicol Chem. Corp.*, 711 S.W.2d 310, 313 (Tex. App.—Dallas 1986, writ ref'd n.r.e.) (applying the doctrine and noting that the doctrine had "consistently been limited in its application in Texas and elsewhere to the prescription drug, physician-patient relationship"); *Cooper v. Bowser*, 610 S.W.2d 825,

We first discussed the doctrine in *Alm v. Aluminum Co. of America*, a case involving an aluminum bottle cap manufacturer's duty to warn end users of hazards associated with its product. 717 S.W.2d at 590–92. Alm sued the manufacturer of soda bottle caps, claiming that an aluminum bottle cap popped off a soda bottle and struck him in the eye. *Id.* at 590. Alm claimed that Alcoa, the manufacturer of the machine that fastened the caps to the soda bottles, had a duty to warn him of the risk that a cap could pop off. *Id.* Although Alcoa manufactured the bottle-fastening machine, the machine was owned and operated by an independent bottler. *Id.* at 589–90. Alcoa did not control the bottling process or sell the bottled soda, nor did it have any practical way of reaching consumers with any warning. *Id.* at 592. Because of Alcoa's limited connection to the end user of the consumer product, we recognized the need for an intermediary:

> [A] manufacturer or supplier may, in certain situations, depend on an intermediary to communicate a warning to the ultimate user of a product. However, the mere presence of an intermediary does not excuse the manufacturer from warning those whom it should reasonably expect to be endangered by the use of its product. The issue in every case is whether the original manufacturer has a reasonable assurance that its warning will reach those endangered by the use of its product.

Id. at 591. We then analogized Alm's position to that of a bulk supplier "who sells a product to another manufacturer or distributor who in turn packages and sells the product to the public." *Id.* at 592. Because the bulk-supplier rationale applied to Alcoa's duty to warn in that case, we explained:

> Alcoa should be able to satisfy its duty to warn consumers by proving that its intermediary was adequately trained and warned, familiar with the propensities of the

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830–31 (Tex. Civ. App.—Tyler 1980, no writ) (adopting *Gravis* and noting that "a drug manufacturer must warn the physician of the dangers of its product, and once the physician is warned, the choice of which drugs to use and the duty to explain the risks become that of the physician").

> product, and capable of passing on a warning. But, if Alcoa failed to adequately warn and train [the intermediary] or if [the intermediary] was incapable of passing on the received warning, Alcoa would not have discharged its duty to the ultimate consumer.

Id. While Alcoa did not have a duty to warn Alm directly, it still had a duty to warn the bottler, and we concluded that the record contained some evidence to support the jury's finding that Alcoa's warning to the bottler was inadequate. *Id.* at 593–95.

Although *Alm* did not apply the learned intermediary doctrine within the context of a pharmaceutical manufacturer's duty to warn consumers of dangers associated with prescription drugs, we noted that other courts had done so:

> [W]hen a drug manufacturer properly warns a prescribing physician of the dangerous propensities of its product, the manufacturer is excused from warning each patient who receives the drug. The doctor stands as a learned intermediary between the manufacturer and the ultimate consumer. Generally, only the doctor could understand the propensities and dangers involved in the use of a given drug. In this situation, it is reasonable for the manufacturer to rely on the intermediary to pass on its warnings. However, even in these circumstances, when the warning to the intermediary is inadequate or misleading, the manufacturer remains liable for injuries sustained by the ultimate user.

Id. at 591–92 (citations omitted).

More recently, we addressed the learned intermediary doctrine's relevance in *Humble Sand & Gravel, Inc. v. Gomez*, 146 S.W.3d 170, 185–96 (Tex. 2004). In that case, we considered whether a supplier of flint used for an abrasive blasting agent had a duty to warn its customers' employees of foreseeable dangers associated with the product, given the customer-employers' knowledge of those dangers. *Id.* at 172–73. We discussed relevant provisions from the Second and Third *Restatements of Torts* and noted that, in situations that did not meet the generally accepted

exceptions to a manufacturer's duty to warn, the court must consider six balancing factors adopted from the *Restatement* to determine the scope of a supplier's duty to warn the ultimate user of its product:

> (1) the dangerous condition of the product; (2) the purpose for which the product is used; (3) the form of any warnings given; (4) the reliability of the third party as a conduit of necessary information about the product; (5) the magnitude of the risk involved; and (6) the burdens imposed on the supplier by requiring that he directly warn all users.

Id. at 190 (quoting *Goodbar v. Whitehead Bros.*, 591 F. Supp. 552, 557 (W.D.Va. 1984), *aff'd sub nom. Beale v. Hardy*, 769 F.2d 213 (4th Cir. 1985)); *see also Restatement (Third) of Torts: Products Liability* § 2 cmt. i (1998); *Restatement (Second) of Torts* § 388 cmt. n (1965). We noted that each of these factors "must be weighed against each other, the measure being reasonableness in the circumstances." *Humble Sand*, 146 S.W.3d at 190. Because the record lacked "any evidence that, in general, warnings by flint suppliers could effectively reach their customers' employees actually engaged in abrasive blasting," we were unable to determine whether the suppliers had a duty to warn the customers' employees directly and, accordingly, remanded the case for a new trial. *Id.* at 173.

As in *Alm*, we again recognized in *Humble Sand* that other courts have applied the learned intermediary doctrine within the prescription drug context and explained: "The rationale for this 'learned intermediary' rule is not that a direct warning from manufacturers to patients is infeasible, in the practical, physical sense of that word, but that it is better for the patient for the warning to come from his or her physician." *Id.* at 190–91; *see also Restatement (Third) of Torts: Products Liability* § 6 cmt. b ("The rationale supporting this 'learned intermediary' rule is that only health-care professionals are in a position to understand the significance of the risks involved and to assess the

relative advantages and disadvantages of a given form of prescription-based therapy. The duty then devolves on the health-care provider to supply to the patient such information as is deemed appropriate under the circumstances so that the patient can make an informed choice as to therapy.").

Until now, we have not considered a case that squarely presents the applicability of the learned intermediary doctrine within the context of prescription drug products-liability cases. For reasons stated in *Humble Sand*, *Alm*, and *Gravis*, we hold that a prescription drug manufacturer fulfills its duty to warn end users of its product's risks by providing adequate warnings to the intermediaries who prescribe the drug and, once fulfilled, it has no further duty to warn the end users directly. *See Humble Sand*, 146 S.W.3d at 190–91; *Alm*, 717 S.W.2d at 591–92; *Gravis*, 502 S.W.2d at 870. But as we have previously indicated, when the warning to the prescribing physician is inadequate or misleading, the prescription drug manufacturer remains liable for the injuries sustained by the patient. *See Alm*, 717 S.W.2d at 592.

Our decision to apply the learned intermediary doctrine in the context of prescription drugs, prescribed through a physician-patient relationship, not only comports with our prior references to the doctrine and many years of Texas case law, but it places us alongside the vast majority of other jurisdictions that have considered the issue.[17] Our sister states have overwhelmingly adopted the

[17] The highest courts of at least thirty-five states have adopted some form of the learned intermediary doctrine within the prescription drug products-liability context or cited favorably to its application within this context. *See, e.g.*, *Springhill Hosps., Inc. v. Larrimore*, 5 So. 3d 513, 517–18 (Ala. 2008); *Shanks v. Upjohn Co.*, 835 P.2d 1189, 1200 & n.17 (Alaska 1992); *West v. Searle & Co.*, 806 S.W.2d 608, 613–14 (Ark. 1991); *Brown v. Superior Court*, 751 P.2d 470, 477 n.9 (Cal. 1988); *Vitanza v. Upjohn Co.*, 778 A.2d 829, 836–39 (Conn. 2001); *Lacy v. G.D. Searle & Co.*, 567 A.2d 398, 399–401 (Del. 1989); *Mampe v. Ayerst Labs.*, 548 A.2d 798, 801–02, 802 n.6 (D.C. 1988); *Felix v. Hoffmann-LaRoche, Inc.*, 540 So. 2d 102, 104 (Fla. 1989); *McCombs v. Synthes (U.S.A.)*, 587 S.E.2d 594, 595–96 (Ga. 2003); *Craft v. Peebles*, 893 P.2d 138, 155–56 (Haw. 1995); *Sliman v. Aluminum Co. of Am.*, 731 P.2d 1267, 1270–71 (Idaho 1986); *Hansen v. Baxter Healthcare Corp.*, 764 N.E.2d 35, 42 (Ill. 2002); *Humes v. Clinton*, 792 P.2d 1032, 1039–41 (Kan. 1990); *Hyman & Armstrong, P.S.C. v. Gunderson*, 279 S.W.3d 93, 109–10, 112 (Ky. 2008), *cert.*

learned intermediary doctrine in this context and, to date, only one state has rejected the doctrine altogether. *See State ex rel. Johnson & Johnson Corp. v. Karl*, 647 S.E.2d 899, 913–14 (W. Va. 2007). The underlying rationale for the validity of the learned intermediary doctrine remains just as viable today as stated by Judge Wisdom in 1974:

> Prescription drugs are likely to be complex medicines, esoteric in formula and varied in effect. As a medical expert, the prescribing physician can take into account the propensities of the drug, as well as the susceptibilities of his patient. His is the task of weighing the benefits of any medication against its potential dangers. The choice he makes is an informed one, an individualized medical judgment bottomed on a knowledge of both patient and palliative. Pharmaceutical companies then, who must warn ultimate purchasers of dangers inherent in patent drugs sold over the counter, in selling prescription drugs are required to warn only the prescribing physician, who acts as a "learned intermediary" between manufacturer and consumer.

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dismissed, 130 S. Ct. 30 (2009); *Rite Aid Corp. v. Levy-Gray*, 894 A.2d 563, 577 (Md. 2006); *MacDonald v. Ortho Pharm. Corp.*, 475 N.E.2d 65, 68 (Mass. 1985), *cert. denied*, 474 U.S. 920 (1985); *Mulder v. Parke Davis & Co.*, 181 N.W.2d 882, 885 & n.1 (Minn. 1970); *Janssen Pharmaceutica, Inc. v. Bailey*, 878 So. 2d 31, 57 (Miss. 2004); *Krug v. Sterling Drug, Inc.*, 416 S.W.2d 143, 146–47 (Mo. 1967); *Stevens v. Novartis Pharm. Corp.*, 247 P.3d 244, 257 (Mont. 2010), *cert. denied*, 131 S. Ct. 2938 (2011); *Freeman v. Hoffman-La Roche, Inc.*, 618 N.W.2d 827, 841–42 (Neb. 2000); *Allison v. Merck & Co.*, 878 P.2d 948, 958 n.16 (Nev. 1994) (plurality opinion), 878 P.2d at 969 (Rose, C.J., dissenting) (also following the learned intermediary doctrine); *Perez*, 734 A.2d at 1257 (applying the doctrine but adopting a DTC advertising exception); *Spensieri v. Lasky*, 723 N.E.2d 544, 549 (N.Y. 1999); *Howland v. Purdue Pharma L.P.*, 821 N.E.2d 141, 146 (Ohio 2004); *Edwards v. Basel Pharm.*, 933 P.2d 298, 300–01 (Okla. 1997); *McEwen v. Ortho Pharm. Corp.*, 528 P.2d 522, 528–30 (Or. 1974); *Coyle v. Richardson-Merrell, Inc.*, 584 A.2d 1383, 1385–86 (Pa. 1991); *Madison v. Am. Home Prods. Corp.*, 595 S.E.2d 493, 496 (S.C. 2004); *Pittman v. Upjohn Co.*, 890 S.W.2d 425, 429 (Tenn. 1994); *Schaerrer v. Stewart's Plaza Pharmacy, Inc.*, 79 P.3d 922, 928–29 (Utah 2003); *Pfizer, Inc. v. Jones*, 272 S.E.2d 43, 44–45 (Va. 1980); *Terhune v. A. H. Robins Co.*, 577 P.2d 975, 978 (Wash. 1978); *Rohde v. Smiths Med.*, 165 P.3d 433, 436 n.5 (Wyo. 2007); *see also Smith v. E. R. Squibb & Sons, Inc.*, 273 N.W.2d 476, 479 (Mich. 1979) (citing favorably to the learned intermediary doctrine). *But see In re Certified Questions*, 358 N.W.2d 873, 877–78 (Mich. 1984) (referencing that court's prior statement in *Smith* and noting that other Michigan appellate courts follow the learned intermediary doctrine, but stating that its reference in *Smith* was dictum and it "did not establish or represent a rule of law" for the State of Michigan).

Additionally, we note that scores of other intermediate state courts and federal courts applying state law have also recognized the validity of the learned intermediary doctrine within the context of prescription drugs, the physician-patient relationship, and the drug manufacturer's duty to warn. *See, e.g.*, *In re Norplant Contraceptive Prods. Liab. Litig. (Norplant III)*, 215 F. Supp. 2d 795, 806–09 (E.D. Tex. 2002) (listing cases and noting that the learned intermediary doctrine either applied or was recognized without relevant exception in forty-eight states); Diane Schmauder Kane, Annotation, *Construction and Application of Learned-Intermediary Doctrine*, 57 A.L.R.5th 1 (1998) (listing cases).

Reyes, 498 F.2d at 1276. *Accord Bean*, 965 S.W.2d at 662 (adopting *Reyes*' rationale for the doctrine). *Cf. Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 850 (Tex. 2005) ("The nature and intensity of care and treatment, including professional supervision, monitoring, assessment, quantities and types of medication, and other medical treatment are judgments made by professionals trained and experienced in treating and caring for patients and the patient populations in their health care facilities."). Because patients can obtain prescription drugs only through their prescribing physician or another authorized intermediary and because the "learned intermediary" is best suited to weigh the patient's individual needs in conjunction with the risks and benefits of the prescription drug, we are in agreement with the overwhelming majority of other courts that have considered the learned intermediary doctrine and hold that, within the physician-patient relationship, the learned intermediary doctrine applies and generally limits the drug manufacturer's duty to warn to the prescribing physician.

B. Recognized Exceptions to the Learned Intermediary Doctrine

Having concluded that the learned intermediary doctrine generally applies in the prescription drug context, we next consider whether some exception to the doctrine is warranted here, so that, despite the doctrine, Centocor retained a duty to warn the patient directly. In the more than forty-five years since courts first adopted the learned intermediary doctrine in the prescription drug context, the healthcare industry has experienced substantial changes, especially surrounding the marketing of prescription drugs. *See Vitanza*, 778 A.2d at 846 (citing *Sterling Drug, Inc. v. Cornish*, 370 F.2d 82, 85 (8th Cir. 1966), as the first case to adopt the doctrine). In light of these changes, some courts and commentators, including the *Restatement*, have recognized limited exceptions to

the learned intermediary doctrine. *See, e.g.*, *Restatement (Third) of Torts: Products Liability* § 6 (1998); *see also, e.g.*, Timothy S. Hall, *Reimagining the Learned Intermediary Rule for the New Pharmaceutical Marketplace*, 35 SETON HALL L. REV. 193, 205–16 (2004) (discussing the recognized exceptions to the doctrine).[18]

The most recent exception to merit significant national attention is the DTC advertising or "mass marketing" exception. Despite the significant academic literature on the topic, only a few courts have recognized a DTC advertising exception to the learned intermediary doctrine when a

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[18] Other jurisdictions, including the Fifth Circuit in its application of Texas law, have recognized limited exceptions to the learned intermediary doctrine. Some courts have adopted an exception for mass inoculations. *See, e.g.*, *Reyes*, 498 F.2d at 1276–79, 1295 (applying Texas law and holding that the learned intermediary doctrine did not apply in the context of mass polio vaccine inoculations that were administered in the absence of a physician-patient relationship and that were "unavoidably unsafe," requiring "either a warning—meaningful and complete so as to be understood by the recipient—or an individualized medical judgment that this treatment or medication is necessary and desirable for this patient"). The Fifth Circuit, however, has limited the mass inoculation exception to situations where no physician-patient relationship exists. *See, e.g.*, *In re Norplant Contraceptive Prods. Litig. (Norplant II)*, 165 F.3d 374, 379 (5th Cir. 1999) (applying Texas law) ("[A]s long as a physician-patient relationship exists, the learned intermediary doctrine applies."); *Hurley v. Lederle Labs. Div. of Am. Cyanamid Co.*, 863 F.2d 1173, 1178 (5th Cir. 1988) (applying Texas law) (distinguishing its holding in *Reyes* where "the child's personal physician prescribed the shot, and the vaccine was administered under the supervision of the physician in his office by his nurse," because "there [was] no question . . . that a patient-physician relationship existed before and at the time the immunization was given"). A minority of other jurisdictions have recognized an exception for oral contraceptives. *See, e.g.*, *McDonald*, 475 N.E. 2d at 69–72. *But see In re Norplant Contraceptive Prods. Liab. Litig. (Norplant I)*, 955 F. Supp. 700, 707 (E.D. Tex. 1997), *aff'd*, 165 F.3d 374 (5th Cir. 1999) ("This court finds that there is no principled distinction to be drawn between prescription contraceptives and other prescription drugs insofar as application of the learned intermediary doctrine is concerned, as long as a physician is involved. The physician has the duty as the learned intermediary to make an individualized balancing of the risks and benefits of any prescription drug contemplated for a particular patient and to advise the patient of possible adverse reactions."); *see also Medrano*, 28 S.W.3d at 92 (rejecting the contraceptive and DTC advertising exceptions where the patient received the Norplant implant from an advanced practice nurse because "[i]rrespective of the origin of the [allegedly inadequate warning or misleading information], it still went through the learned intermediary to get to [the patient]," and, therefore, because "the information reached [the patient] because of the physician-patient relationship," the learned intermediary doctrine applied). Additionally, a few courts have also recognized other less common exceptions for (1) contraceptive devices, *see, e.g.*, *Hill v. Searle Labs.*, 884 F.2d 1064, 1070–71 (8th Cir. 1989); (2) overpromoted drugs, *see, e.g.*, *Proctor v. Davis*, 682 N.E.2d 1203, 1215 (Ill. App. Ct. 1997), *appeal denied*, 689 N.E.2d 1146 (Ill. 1997); and (3) drugs withdrawn from the market, *see, e.g.*, *Nichols v. McNeilab, Inc.*, 850 F. Supp. 562, 565 (E.D. Mich. 1993). Because the unique circumstances and specific types of prescription drugs at issue in those cases are not before us, we need not determine whether Texas law should recognize exceptions to the learned intermediary doctrine in other contexts.

drug manufacturer directly markets to the consumer. In 1997, the Oklahoma Supreme Court recognized a marketing exception to the learned intermediary doctrine when the FDA mandated that the manufacturers, through their product labels, must communicate warnings directly to patients. *Edwards v. Basel Pharm.*, 933 P.2d 298, 301 (Okla. 1997). While this decision did not abrogate the learned intermediary doctrine on the basis of DTC advertising, soon thereafter, the New Jersey Supreme Court adopted a sweeping DTC advertising exception to the learned intermediary doctrine in *Perez v. Wyeth Laboratories Inc.*, 734 A.2d 1245, 1246–47 (N.J. 1999). *Perez* involved a prescription contraceptive called Norplant—a "hybrid" medical device that consists of a drug capsule that is surgically implanted in the patient's arm. *Id.* at 1247. The plaintiffs alleged that Wyeth Laboratories had conducted a massive advertising campaign, "which it directed at women rather than at their doctors," and sought damages because the DTC warnings failed to mention serious side effects including pain and permanent scarring attendant to the removal of the drug capsule. *Id.* at 1248. The New Jersey Supreme Court examined the theoretical underpinnings for the learned intermediary doctrine within the context of the dramatic changes associated with DTC advertising and determined that "[c]onsumer-directed advertising of pharmaceuticals thus belies each of the premises on which the learned intermediary doctrine rests." *Id.* at 1256. As a result, the court held that the learned intermediary doctrine no longer provided complete protection to pharmaceutical manufacturers that provided adequate warnings to physicians on the risks and benefits of a drug when that company chose to market directly to consumers. *Id. But see id.* (noting that its decision differed from the Fifth Circuit's holding in *Norplant II*, 165 F.3d at 379–80, and that, under Texas law, the learned intermediary doctrine applied in the context of the Norplant contraceptive). The

Perez court did, however, recognize that a drug manufacturer's compliance with "FDA advertising, labeling, and warning requirements" created a "rebuttable presumption that the [manufacturer's] duty to consumers is met."[19] *Id.* at 1259.

In the more than twelve years since *Perez*, many courts have declined to follow the New Jersey Supreme Court's sweeping departure from the learned intermediary doctrine. *But cf. Murthy v. Abbott Labs.*, ___ F. Supp. 2d ___ 4:11-CV-105, 2012 WL 734149 (S.D. Tex. Mar. 6, 2012) (citing cases that rejected *Perez*, but relying on the appellate court's holding in *Centocor* to hold that Texas law recognizes a DTC advertising exception); *see also Beale v. Biomet, Inc.*, 492 F. Supp. 2d 1360, 1376 (S.D. Fla. 2007) ("Since *Perez* was decided, no court—including any Florida court—has recognized the DTC exception to the learned intermediary doctrine, and several courts have expressly rejected the DTC exception."). *Cf. Karl*, 647 S.E.2d at 913 (decided after *Beale* and adopting *Perez*'s reasoning but, instead of adopting a DTC exception to the doctrine, rejecting the learned intermediary doctrine entirely). Even the Fifth Circuit has expressed that it is "skeptical that a Texas court would adopt [an overpromotion] exception" to the learned intermediary doctrine, which is closely akin to the DTC advertising exception. *Ebel v. Eli Lilly & Co.*, 321 F. App'x 350, 355 n.2 (5th Cir. 2009); *see also Beale*, 492 F. Supp. 2d at 1377–78 (discussing the overpromotion exception).

[19] Effective September 1, 2003, the Texas Legislature adopted section 82.007 of the Texas Civil Practice and Remedies Code, which created a rebuttable presumption that compliance with FDA-approved guidelines shields the "health care provider, manufacturer, distributor, and prescriber" from liability for "allegations involving failure to provide adequate warnings or information." TEX. CIV. PRAC. & REM. CODE § 82.007. Because this statute became effective after this suit was filed, it is inapplicable to this case.

To date, West Virginia is the only state whose highest court has followed the New Jersey Supreme Court's holding in *Perez*. *See Karl*, 647 S.E.2d at 912–l3.[20] In *State ex rel. Johnson & Johnson Corp. v. Karl*, the West Virginia Supreme Court relied on the *Perez* court's reasoning to reject the learned intermediary doctrine entirely: "Given the plethora of exceptions to the learned intermediary doctrine, we ascertain no benefit in adopting a doctrine that would require the simultaneous adoption of numerous exceptions in order to be justly utilized." *Id.* at 910–11, 913. While *Karl* is the only instance where the highest court of another state has followed *Perez*, at least five other jurisdictions have expressly declined to adopt a DTC advertising exception to the learned intermediary doctrine.[21]

C. The DTC Advertising Exception Does Not Apply

At issue in this case is whether the court of appeals erred in adopting the DTC advertising exception to the learned intermediary doctrine. Not until the court of appeals' holding below had any Texas court adopted a DTC advertising exception to the learned intermediary doctrine.

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[20] Additionally, at least one federal district court has adopted the *Karl* court's reasoning and made an *Erie* determination that the New Mexico Supreme Court would not adopt the learned intermediary doctrine. *See Rimbert v. Eli Lilly & Co.*, 577 F. Supp. 2d 1174, 1214–15 (D.N.M. 2008) (applying *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938)).

[21] *See Beale*, 492 F. Supp. 2d at 1376–77 ("It is now eight years since *Perez* was decided, and no other state has followed suit. Given Florida's longstanding recognition of the learned intermediary doctrine, I conclude that it would be unlikely that the Florida Supreme Court would recognize the DTC exception."); *Porter v. Eli Lilly & Co.*, 2008 WL 544739, at *8–9 (N.D. Ga. Feb. 25, 2008) (unreported decision), *aff'd*, 291 F. App'x 963 (11th Cir. 2008); *Allgood v. GlaxoSmithKline PLC*, 2008 WL 483574, at *3–4 (E.D. La. Feb. 20, 2008) (unreported decision), *aff'd sub nom. Allgood v. SmithKline Beecham Corp.*, 314 F. App'x 701 (5th Cir. 2009); *In re Meridia Prods. Liab. Litig.*, 328 F. Supp. 2d 791, 812 n.19 (N.D. Ohio 2004), *aff'd sub nom. Meridia Prods. Liab. Litig. v. Abbott Labs.*, 447 F.3d 861 (6th Cir. 2006); *Cowley v. Abbott Labs., Inc.*, 476 F. Supp. 2d 1053, 1060 n.4 (W.D. Wis. 2007) (applying North Carolina law).

See Centocor, 310 S.W.3d at 508.[22] We agree that it is important to prohibit pharmaceutical manufacturers from disseminating grossly misleading advertising, and we note that Congress has enacted a comprehensive regulatory scheme, implemented by the FDA, which is meant to control the design, implementation, and marketing of prescription drugs, including both criminal and civil penalties for manufacturers that violate these regulations.[23] *See, e.g.*, 21 U.S.C. §§ 331, 333, 335b. We acknowledge that some situations may require exceptions to the learned intermediary doctrine, but without deciding whether Texas law should recognize a DTC advertising exception when a prescription drug manufacturer distributes intentionally misleading information directly to patients or prospective patients, we hold that, based on the facts of this case, no exception applies.[24]

Here, the alleged harm was not caused by Centocor's direct advertising to Patricia. At trial, the Hamiltons admitted that the first time they heard of Remicade was when Patricia's husband, Thomas, saw a textual banner displayed on the bottom ticker of the CNN news channel, which stated that the FDA had approved Remicade for the treatment of Crohn's disease. This innocuous news report is a far cry from the basis for the *Perez* court's adoption of a DTC advertising exception where

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[22] We note that, since the appellate court's holding in *Centocor*, at least one federal district court applying Texas law has followed this approach and stated its belief that this Court "will likely agree with the Court of Appeals' reasoning in *Centocor, Inc.*" *Murthy v. Abbott Labs.*, ___ F. Supp. 2d ___ 4:11-CV-105, 2012 WL 734149, at *8 (S.D. Tex. Mar. 6, 2012).

[23] *See* 21 U.S.C. §§ 301–99; 21 C.F.R. § 202.1 (1998) (regulating prescription drug advertisements).

[24] The court of appeals' reasoning that the new era of DTC advertising relegates physicians to a mere dispensary role of prescriptions fails to consider the important professional and ethical standards the law requires of physicians. *See* 22 TEX. ADMIN. CODE § 190.8(1) (listing some examples of acts that constitute a "[f]ailure to practice in an acceptable professional manner consistent with public health and welfare," including "prescription of any dangerous drug or controlled substance without first establishing a proper professional relationship with the patient").

the pharmaceutical company "ma[de] direct claims to consumers for the efficacy of its product" through prescription drug advertisements. *Cf. Perez*, 734 A.2d at 1247. Instead of DTC advertising prompting her to request Remicade from her doctors, Patricia's claims rest on the video that she viewed after her doctor had prescribed Remicade and after the infusion process had begun. *Cf. Norplant I*, 955 F. Supp. at 708 ("The court agrees with those courts that view such patient materials as an informational supplement to the physician-patient relationship. Moreover, because these materials are distributed by the [prescribing] physician, the court is of the opinion that the physician, as the learned intermediary, has a duty to review the materials before passing them on to the patient in order to ensure that any such materials that the physician chooses to pass on will accurately inform the patient about the drug."); *Banner v. Hoffmann-La Roche Inc.*, 891 A.2d 1229, 1236 (N.J. App. Div. 2006), *cert. denied* 921 A.2d 447 (N.J. 2007) (refusing to extend the *Perez* DTC advertising exception because "the placement of informational brochures in a physician's office cannot fairly be equated with a course of mass advertising or be deemed direct-to-consumer advertising so as to remove the predicates of the learned intermediary doctrine").

Furthermore, the record indicates that this informational video is not the type of misleading DTC advertising that concerned the *Perez* court. According to Swinney, the nurse who remained present with Patricia during all of her Remicade treatments at Dr. Bullen's clinic, the videos were available to help patients feel more relaxed about the infusion process, by explaining some of the benefits and side effects of the treatment process. After viewing the video, Dr. Matthews testified that she considered the video to be an educational tool to help inform patients about the infusion process. And Patricia admitted that the first time she saw any literature about Remicade was when

she received her first Remicade infusion at Dr. Bullen's clinic. Both Patricia and Swinney testified that Patricia was already receiving her first infusion when the video started. On this record, the rationale for adopting a DTC advertising exception to the learned intermediary doctrine is simply non-existent. *See Norplant II*, 165 F.3d at 379 (rejecting the plaintiffs' argument for an "'aggressive' marketing" exception because of "the absence of any evidence on the record that any of the five plaintiffs actually saw, let alone relied, on any marketing materials issued to them by [the manufacturer]"); *Ebel v. Eli Lilly & Co.*, 536 F. Supp. 2d 767, 782 (S.D. Tex. 2008), *aff'd*, 321 F. App'x 350 (5th Cir. 2009) (rejecting the DTC advertising exception because there was no evidence that the plaintiff relied on the marketing website). *But see Medrano*, 28 S.W.3d at 93 n.5 (rejecting the DTC exception on the facts of that case while noting that the court could "foresee a situation where a manufacturer's direct contact with the consumer could be received and relied on by that consumer outside the learned intermediary context").[25]

Even so, we must believe that patients who seek prescription drugs based solely on DTC advertising will obtain them only when the prescribing physician has evaluated the potential risks and benefits for the particular patient. To safeguard the public from harmful products and misleading advertising, both the federal government and Texas law regulate the design, marketing, and distribution of prescription drugs. *See, e.g.*, 21 U.S.C. §§ 301–99 (Federal Food, Drug, and

[25] The court of appeals' opinion relied heavily on evidence of Centocor's marketing strategy. 310 S.W.3d at 483–84, 506–08, 514, 516–18. While the Hamiltons introduced evidence that Centocor engaged in a multi-pronged marketing strategy meant to increase sales, including efforts to educate doctors of the financial benefits of the drug, dilute the effect of a negative peer review article, and encourage patients to "demand Remicade," its general marketing strategy has no bearing on Patricia's case because she admitted that her discussions about Remicade and the information she received all came through her physicians who were fully aware of the risk of lupus-like syndrome.

Cosmetic Act); TEX. HEALTH & SAFETY CODE §§ 481.061, .071, .074; TEX. OCC. CODE § 562.056(a). Drug manufacturers that fail to comply with FDA regulations can face criminal fines and imprisonment as well as civil penalties. *See* 21 U.S.C. §§ 331, 333, 335b; 21 C.F.R. § 202.1. Although pharmaceutical companies have increased DTC advertising since courts first adopted the learned intermediary doctrine, the fundamental rationale for the doctrine remains the same: prescriptions drugs require a doctor's prescription and, therefore, doctors are best suited to communicate the risks and benefits of prescription medications for particular patients through their face-to-face interactions with those patients.

Without deciding whether Texas law should recognize any of the other exceptions to the learned intermediary doctrine, we find no reason to adopt an exception where the physician-patient relationship existed, the pharmaceutical company provided a warning to the patient's prescribing doctors that included the side effect of which the patient complains, and the patient had already visited with her prescribing physician and decided to take the drug before she saw the informational video at issue. Accordingly, we hold that it was error for the court of appeals to create a DTC or fraudulent advertising exception to the learned intermediary doctrine based on the facts of this case.

IV. The Learned Intermediary Doctrine Within the Prescription Drug Context Is Not a Common-Law Affirmative Defense

The parties dispute whether the learned intermediary doctrine is an affirmative defense, which would shift to Centocor the burden to plead, prove, and request jury findings on the learned intermediary doctrine at trial. We agree with Centocor that, within the prescription drug context, the learned intermediary doctrine is more akin to a common-law rule rather than an affirmative defense.

The Hamiltons rely heavily on the appellate court's holding in *Coleman v. Cintas Sales Corp.*, 40 S.W.3d 544, 551–52 (Tex. App.—San Antonio 2001, pet. denied). *Coleman* involved a products-liability action brought by an employee against a uniform company when his uniform caught fire. *Id.* at 547. Cintas Sales Corporation did not argue the learned intermediary doctrine before the trial court but argued to the court of appeals that it had no duty to Coleman because Coleman's employer served as a learned intermediary. *Id.* at 549. The court of appeals stated that the "'learned intermediary' [doctrine is a] defense[] that must be pled and proved by the manufacturer in the trial court," and because Cintas failed to raise this issue to the trial court in its motion for summary judgment, the issue was not properly preserved for consideration on appeal. *Id.* at 551.

We find *Coleman* distinguishable from the instant case. *Coleman* did not involve a products-liability claim arising from a drug manufacturer's failure to warn about the risks associated with its prescription drug. *See id.* at 547. As previously discussed in Part III, for more than forty-five years, courts have applied the learned intermediary doctrine within products-liability claims against prescription drugs manufacturers. *See, e.g.*, *Gravis*, 502 S.W.2d 870; *Cornish*, 370 F.2d at 85. We have repeatedly referenced the doctrine's commonly recognized application in the prescription drug context. *See Alm*, 717 S.W.2d at 591–92; *Humble Sand*, 146 S.W.3d at 185. As explained above, doctors have a legal duty to pass prescription drug warnings on to their patients. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE § 74.104. And as the official comment to the *Restatement (Second) of Torts* notes, the learned intermediary doctrine applies particularly to the medical field and unavoidably unsafe products like prescription drugs, which, by law, cannot go from the manufacturer to the end

user except through a prescribing physician. *See Restatement (Second) of Torts* § 402A cmt. k. In other products-liability contexts, such as the sophisticated user or bulk supplier scenarios, however, the doctrine could apply to any type of product, not just those that are unavoidably unsafe, and the applicability of the learned intermediary doctrine in those contexts turns on whether the manufacturer's or supplier's reliance on the intermediary to warn the end user is reasonable. *See Alm*, 717 S.W.2d at 592 ("In determining whether a bulk supplier's duty to warn extends to ultimate users of a product, courts may consider whether the distributor is adequately trained, whether the distributor is familiar with the properties of the product and its safe use, and whether the distributor is capable of passing on its knowledge to consumers."). *Cf. Humble Sand*, 146 S.W.3d at 195 (placing the burden on the product supplier to prove that the warning the plaintiff claims the supplier should have given would not have been effectual).

In contrast to the non-prescription drug situation in *Coleman*, we find more persuasive the Sixth Court of Appeals' holding in *Wyeth-Ayerst Laboratories Co. v. Medrano*, 28 S.W.3d 87, 93–94 (Tex. App.—Texarkana 2000, no pet.), which directly addressed the issue in context of the plaintiff's failure-to-warn and Deceptive Trade Practices Act (DTPA) claims against the prescription drug manufacturer. In *Medrano*, the court held that the learned intermediary doctrine was not a common-law defense and that it, therefore, applied to all of the plaintiff's causes of action, including the DTPA claim. *Id.* at 94. The court reasoned:

> When the learned intermediary doctrine is asserted in a cause of action, it is used to show to whom a defendant, usually a prescription drug manufacturer, owes the duty to adequately warn. It is not used to show that the plaintiff has no valid case. Even when the learned intermediary doctrine applies, the manufacturer still has a duty to

> warn, and it can still be held liable directly to the plaintiff if the warning that it gave is inadequate.

Id. (citations omitted). The *Medrano* court's interpretation of the learned intermediary doctrine within the prescription drug context also comports with the Fifth Circuit's application of Texas law. *See, e.g.*, *Ackermann v. Wyeth Pharm.*, 526 F.3d 203, 207–08 (5th Cir. 2008) ("The learned-intermediary doctrine is not an affirmative defense. Under Texas law, it delineates to whom a defendant—usually a prescription drug manufacturer—owes the duty to warn, but it is not used to show that the plaintiff has no valid case."); *see also Norplant II*, 165 F.3d at 378 (making an *Erie* guess that Texas law considers the learned intermediary doctrine to be a common-law doctrine rather than a common-law defense).

Here, it is undisputed that Patricia received Remicade through a physician-patient relationship. As discussed hereafter in Part VI, the underlying basis for the Hamiltons' claims stems from Centocor's alleged failure to warn Patricia of the risks and dangers associated with Remicade. Therefore, as in most failure-to-warn cases, the Hamiltons had to prove that Centocor's warning was inadequate. *See, e.g.*, *Technical Chem. Co. v. Jacobs*, 480 S.W.2d 602, 605–06 (Tex. 1972); *Medrano*, 28 S.W.3d at 94. While the learned intermediary doctrine shifts the manufacturer's duty to warn the end user to the intermediary, it does not shift the plaintiff's basic burden of proof. *See Medrano*, 28 S.W.3d at 94. Doing so would create an anomalous situation where, once the defendant prescription-drug manufacturer invokes the learned intermediary doctrine, the plaintiff would be relieved of proving a key burden in any product warning case—that the product warning was inadequate. The burden on defendants in other industries to show reasonable reliance on an

intermediary to effectively deliver a warning has no application in products-liability cases against a prescription drug manufacturer when the plaintiff received the drug through the existence of a physician-patient relationship.[26]

V. The Non-Prescribing Physician Had No Duty to Warn

We now address the Hamiltons' conditional cross-issue. Because the learned intermediary doctrine applies and because we decline to adopt an exception to the doctrine in this context, the Hamiltons argue that we are implicitly expanding the doctrine and allowing drug manufacturers to bypass intermediary-prescribing physicians by sending informational videos and marketing materials to patients through non-prescribing, treating physicians and their clinics. By sending the Remicade patient video to Dr. Bullen, a non-prescribing physician, the Hamiltons claim that Centocor transferred its duty to warn to Dr. Bullen, who must warn Patricia of the risks associated with Remicade. In response, Dr. Bullen argues that the trial court correctly granted a directed verdict in his favor because, as a matter of law, he owed no duty to warn Patricia about medications that he did not prescribe. We agree with Dr. Bullen.[27]

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[26] Even if *Coleman* applied in this context and we considered the learned intermediary doctrine to be an affirmative defense, unlike the defendant in *Coleman*, Centocor has repeatedly asserted the doctrine both in the trial court and on appeal. Therefore, even under the *Coleman* holding, Centocor has properly pled and raised the learned intermediary doctrine, preserving it for us to consider on appeal.

[27] In the alternative, Dr. Bullen and amici TMA argue that we should not adopt the learned intermediary doctrine because the fundamental basis for the doctrine has changed with the evolving dynamics of contemporary society and the developing system of healthcare in the United States. For reasons stated above, we find this argument unpersuasive and, although future cases may give rise to the need for the courts to recognize an exception to the doctrine in other contexts, the learned intermediary doctrine generally applies within the context of the physician-patient relationship and the prescription drug manufacturer's duty to warn.

Despite the intricate web of modern healthcare providers and treatments, the bedrock of our healthcare system is the physician-patient relationship, and the ultimate decision for any treatment rests with the prescribing physician and the patient. As a matter of both necessity and practicality, the duty to warn the patient of the potential risks and possible alternatives to any prescribed course of action rests with the prescribing physician. *See Alm*, 717 S.W.2d at 591. The Hamiltons offer no case law in support of their duty-shifting position and we, too, have found none. While informational materials provided by healthcare providers, pharmaceutical and medical-device manufacturers, or the government are meant to educate patients and make them better informed about available treatment options,[28] a simple product brochure or short informational video cannot explain the complex intricacies of the human body or supplant the detailed, interconnected nature of the practice of medicine, which necessitates that an informed intermediary help determine the best course of treatment for a patient's particular symptoms. To hold that each healthcare provider owes a separate and individual duty to warn each patient of all possible risks associated with a treatment prescribed by any doctor would not only undermine the prescribing doctor's physician-patient relationship, but could thwart the efforts of prescription drug manufacturers to provide valuable educational information about available treatments. In most prescription drug contexts, the learned intermediary doctrine applies and the duty to warn the patient rests solely with the prescribing physician. *Cf. Torrington Co. v. Stutzman*, 46 S.W.3d 829, 837–38 (Tex. 2000) (discussing general

[28] *See, e.g.*, 21 U.S.C. § 355(r) (requiring the FDA to maintain a website that provides the official product label for all FDA-approved drugs and that will "improve[] [the] communication of drug safety information to patients and providers").

principles of duty and situations in which a party could undertake certain actions to assume a duty to another).

Here, the decision to prescribe Remicade to treat Patricia's condition was made well before she visited Dr. Bullen's infusion center and well before she saw Centocor's informational video. After reviewing Patricia's complicated medical history, tracking her symptoms, and confirming the Crohn's disease flare, Dr. Hauptman was faced with two available treatments—steroids or Remicade—and he and Patricia made the decision to try Remicade. While Dr. Bullen owed a duty to inform Patricia of the relevant risks associated with the treatment process, including the infusion method of delivery, and to obtain her informed consent to the treatment, which he properly performed, he owed no further duty to explain all of the potential risks associated with Remicade nor was he required to second-guess the professional judgment of Dr. Hauptman. *Cf. Morgan*, 30 S.W.3d at 467 (holding that a pharmacist did not owe a legal duty to warn a patient of all the possible adverse effects of a prescription drug).

Having satisfied his responsibilities, Dr. Bullen owed no additional duty to warn Patricia merely because he provided informational materials to her that he received from Centocor. Here, Centocor provided the materials as a supplement to the physician-patient relationship, not meant to supplant that relationship. Moreover, none of the allegedly misleading information from Centocor could change the fact that Patricia could not receive Remicade except through a prescription. On the facts of this case, we decline to carve out an additional exception to the learned intermediary doctrine or create a "shared intermediary" duty to warn that would (1) encourage prescription drug manufacturers to withhold educational materials from patients, and (2) require other healthcare

providers to second-guess the prescribing physician's decision and undermine the physician-patient relationship. Accordingly, we affirm the trial court's directed verdict in favor of Dr. Bullen, the infusion clinic, and its employees, and hold that, as a matter of law, Dr. Bullen owed no duty to warn Patricia of the potential side effect of lupus-like syndrome.[29]

VI. The Learned Intermediary Doctrine Applies to All of the Hamiltons' Claims

Because the learned intermediary doctrine applies, we must determine whether the doctrine applies to all of the Hamiltons' claims. Centocor argues that regardless of the pleadings and the questions submitted in the jury charge, all of the Hamiltons' claims, including common-law fraud by omission, were premised on Centocor's alleged failure to warn about Remicade's potential side effects. Therefore, Centocor contends that the learned intermediary doctrine applies to all of the Hamiltons' claims and, accordingly, that it had no duty to warn Patricia directly about Remicade's potential side effects. In response, the Hamiltons contend that it was their prerogative as the plaintiffs to plead and try their case under any theory of liability they chose. They argue that consumers routinely sue for common-law fraud when manufacturers' misrepresentations about their products cause harm, despite this Court's adoption of the *Restatement*'s position on strict products liability, and Texas courts have not imposed any additional burden on consumers to prove failure-to-warn elements from strict products-liability causes of action for common-law claims.

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[29] We do not hold that the non-prescribing, treating physician or the prescription drug manufacturer could never be held liable for information provided or positive representations made to the patient. On the facts of this case, however, the materials provided to Patricia by Centocor and through Dr. Bullen neither affected the decision to prescribe Remicade nor presented overtly false information. *Cf. Crocker v. Winthrop Labs., Div. of Sterling Drug, Inc.*, 514 S.W.2d 429, 433 (Tex. 1974).

Several federal courts applying Texas law have considered whether a patient can plead around the learned intermediary doctrine by bringing other common-law and non-products-liability claims against a prescription drug manufacturer. *See, e.g.*, *Norplant I*, 955 F. Supp. at 709. In *Norplant I*, the plaintiffs brought claims against a prescription drug manufacturer for "strict products liability, negligence, breach of implied warranty of merchantability, misrepresentation, and consumer fraud based upon the Texas [DTPA]" and alleged that the learned intermediary doctrine did not apply to "their claims for misrepresentation and violations of the DTPA arising out of a drug manufacturer's voluntary communications to consumers through physician-distributed materials." *Id.* at 709–10. Because the alleged misrepresentations and the allegedly false, misleading, and deceptive nature of the prescription drug manufacturer's materials were based on the manufacturer's failure to warn, the federal district court rejected the plaintiffs' argument:

> The gravamen of all of Plaintiffs' causes of action, including misrepresentation and violation of the DTPA, is that [the prescription drug manufacturer] failed to adequately warn of or disclose the severity of Norplant's side effects. Therefore, the learned intermediary doctrine applies to all of Plaintiffs' causes of action. Additionally, whether the failure to warn is couched as an affirmative misrepresentation or a misrepresentation by concealment, the allegation collapses into a charge that the drug manufacturer failed to warn. If the doctrine could be avoided by casting what is essentially a failure to warn claim under a different cause of action such as violation of the DTPA or a claim for misrepresentation, then the doctrine would be rendered meaningless.

Id. at 709; *see Ebel*, 536 F. Supp. 2d at 773 (applying Texas law) ("Where the crux of the suit is based on a failure to adequately warn, the learned intermediary doctrine may apply to strict liability, negligence, misrepresentation, and breach of warranty claims."); *see also Beale*, 492 F. Supp. 2d at 1372 (applying Florida law) (adopting *Norplant I*'s reasoning and listing other jurisdictions that have

applied the learned intermediary doctrine to all claims premised on the prescription drug manufacturer's alleged failure to warn); *Stafford v. Wyeth*, 411 F. Supp. 2d 1318, 1319–20 (W.D. Okla. 2006) (recognizing that all of the plaintiff's claims—negligence, design defect, failure to warn, and misrepresentation—hinged on the prescription drug manufacturer's alleged failure to warn). *But see Hill v. Wyeth, Inc.*, No. 4:03CV1526 JCH, 2007 WL 674251, at *2 (E.D. Mo. Feb. 28, 2007) (not reported) (applying Missouri law) (distinguishing *Norplant I* and refusing to dismiss all but the plaintiff's failure-to-warn claim because the plaintiff "clearly intend[ed] to pursue claims unrelated to" its failure-to-warn claim by alleging causes of action including breach of express and implied warranties and design defects). Moreover, Texas appellate courts have applied the learned intermediary doctrine to a variety of causes of action predicated on the alleged inadequacy of a prescription drug manufacturer's product warning. *See, e.g.*, *Rolen v. Burroughs Wellcome Co.*, 856 S.W.2d 607, 608 (Tex. App.—Waco 1993, writ denied) (involving a claim for breach of implied warranty of merchantability); *Stewart v. Janssen Pharmaceutica, Inc.*, 780 S.W.2d 910, 910 (Tex. App.—El Paso 1989, writ denied) (involving negligence and strict liability claims).

We find the *Norplant I* court's application of Texas law persuasive. Here, the Hamiltons initially pled a strict liability claim for failure to warn and retained that claim in their amended petition, but they decided not to carry it forward in their proposed jury charge. Furthermore, the Hamiltons' fraud-by-omission claim is premised solely on its allegation that Centocor knowingly omitted material facts about Remicade's potential to cause lupus-like syndrome. In sum, the crux of the Hamiltons' claims rests on Centocor's alleged failure to provide an adequate warning of the potential risks and side effects associated with Remicade. We hold that when a patient alleges a

fraud-by-omission claim against a prescription drug manufacturer for alleged omissions about a prescription drug's potential side effects, (1) the patient cannot plead around the basic requirements of a failure-to-warn claim, and (2) the learned intermediary doctrine applies.[30] Therefore, the learned intermediary doctrine applies to all of the Hamiltons' claims.

VII. The Hamiltons Presented No Evidence That the Allegedly Inadequate Warning Was the Producing Cause of Patricia's Injuries

Although we conclude that the learned intermediary doctrine applies to all of the Hamiltons' claims and find no reason to adopt any exception to the learned intermediary doctrine based on the facts of this case, as in other products-liability cases premised on a product manufacturer's failure to warn, if the warning to the intermediary was inadequate or misleading, then the manufacturer remains liable for injuries sustained by the end user. *See, e.g.*, *Alm*, 717 S.W.2d at 592. The parties dispute whether Centocor's warnings to Patricia's prescribing physicians were adequate. Although the jury did not make a specific adequacy finding, all of the Hamiltons' claims require an implicit finding that Centocor's warnings to Patricia and her medical providers were inadequate. Specifically, the jury found that Centocor misrepresented to Dr. Hauptman and Dr. Pop-Moody the

[30] Here, the Hamiltons submitted a failure-to-disclose fraud claim to the jury as opposed to a fraud claim based on an affirmative misrepresentation. *See Bradford v. Vento*, 48 S.W.3d 749, 755 (Tex. 2001). Their claims are not that the Remicade warnings contained overt misrepresentations or inaccurate information, but that the omission of additional information made the warning inadequate. We need not decide whether the learned intermediary doctrine applies against a prescription drug manufacturer in a common-law fraud or misrepresentation claim based on an overt misrepresentation, such as where a drug manufacturer states that its drug is not addictive or where it grossly misstates the number of side effects observed in clinical trials. *Cf. Crocker*, 514 S.W.2d at 433 ("Whatever the danger and state of medical knowledge, and however rare the susceptibility of the user, when the drug company positively and specifically represents its product to be free and safe from all dangers of addiction, and when the treating physician relies upon that representation, the drug company is liable when the representation proves to be false and harm results.").

probability that Patricia could suffer from drug-induced, lupus-like syndrome through its omission of material information in the product warning.

Generally, "[t]he adequacy of a warning is a question of fact to be determined by the jury." *Alm*, 717 S.W.2d at 592; *see Bituminous Cas. Corp. v. Black & Decker Mfg. Co.*, 518 S.W.2d 868, 873 (Tex. Civ. App.—Dallas 1974, writ ref'd n.r.e.). But when the prescribing physician is aware of the product's risks and decides to use it anyway, any inadequacy of the product's warning, as a matter of law, is not the producing cause of the patient's injuries. *See, e.g.*, *Stewart*, 780 S.W.2d at 912; *Ethicon Endo-Surgery, Inc. v. Meyer*, 249 S.W.3d 513, 516 (Tex. App.—Fort Worth 2007, no pet.); *see also Ebel*, 536 F. Supp. 2d at 780 ("[W]here the physicians were unequivocal that new information about the risks would not have changed their decision to prescribe the medication, an inadequate warning was not the proximate cause of plaintiff's injury," and "where a physician testifies that he was aware of the risks of which plaintiff complains, it is then the plaintiff's burden to prove that a different warning would have changed the physician's decision to prescribe the medication." (citations omitted)); *Ackermann*, 526 F.3d at 209 ("We need not determine, however, whether the warning for risk level of suicide was misleading, because, as [the prescription drug manufacturer] contends, this appeal is resolved on the second prong of the analysis, namely, whether any defect in the [manufacturer's] warning was a substantial cause of [the plaintiff's injury]."). *Cf. McNeil*, 462 F.3d at 373 ("Where the physician would have adequately informed a plaintiff of the risks of a disease, had the label been sufficient, but fails to do so on that account, and where the plaintiff would have rejected the drug if informed, the inadequate labeling could be a 'producing' cause of the injury, because it effectively sabotages the function of the intermediary.").

Even assuming that the Hamiltons presented sufficient evidence to show that Centocor's warning to Patricia's prescribing physicians was inadequate, the Hamiltons still had to prove that the inadequate warning was the producing cause of Patricia's injuries.[31] *See, e.g.*, *Jacobs*, 480 S.W.2d at 605–06; *Medrano*, 28 S.W.3d at 94–95; *Rolen*, 856 S.W.2d at 609; *Stewart*, 780 S.W.2d at 911. It is undisputed that all of Patricia's medical providers were aware that Patricia could potentially develop lupus-like syndrome as a side effect of Remicade. The Hamiltons presented no evidence that Patricia's prescribing physicians or Patricia would have acted differently had Centocor provided a different warning that included post-approval information about lupus-like syndrome. Not only did the Hamiltons lack subjective evidence, but they presented no objective evidence that a different warning would have affected the decision of a reasonable doctor to prescribe Remicade for Patricia's condition.

To support their argument that Centocor's warning misrepresented the risks of contracting lupus-like syndrome, causing Patricia's doctors to prescribe the drug, the Hamiltons focused on the three cases of lupus-like syndrome reported on Centocor's 2001 package insert. The package insert stated: "In clinical studies, three patients developed clinical symptoms consistent with a lupus-like syndrome . . . . No cases of lupus-like reactions have been observed in up to three years of long-term follow-up." In an attempt to show that this warning was misleading, the Hamiltons introduced several documents indicating that Centocor was aware of more post-approval incidents of drug-

[31] Although the learned intermediary doctrine bars the Hamiltons' fraud-by-omission claim because Centocor owed no duty to warn Patricia directly, *see Bradford*, 48 S.W.3d at 755, causation is a necessary element of all of the Hamiltons' claims. *See, e.g.*, *Koenig v. Purdue Pharma Co.*, 435 F. Supp. 2d 551, 553–54 (N.D. Tex. 2006) (applying Texas law and citing cases).

induced lupus. Specifically, an internal Centocor e-mail referenced at least 174 reports of lupus-like syndrome associated with Remicade as of April 25, 2002.[32] Dr. Matthews's testimony and other trial exhibits indicated that the FDA was aware of these additional post-approval reports. According to Dr. Matthews—the only expert in the FDA approval process to testify about the Centocor package inserts—although it initially seemed "not very clear" whether the statement, "[n]o cases of lupus-like reactions," broadly encompassed all post-approval studies, on closer inspection, Dr. Matthews affirmatively stated that the warning "referr[ed] to the long-term follow-up" of the specific patients in the pre-approval clinical studies. Dr. Matthews testified that, based on her review of all the post-approval reports for Remicade through 2003, the warning provided in the 2001 package insert was adequate. Moreover, despite its knowledge of the post-approval reports, the FDA did not require Centocor to change its package insert at that time.

Even assuming that Centocor's knowledge of at least 174 post-approval reports of lupus-like syndrome and its failure to include that information in the package insert and the informational video made the warning to Patricia's prescribing physicians inadequate or misleading, the undisputed evidence indicates that, even with those cases, the risk of experiencing drug-induced lupus was still "rare." Experts from both sides testified that "rare" is commonly understood in the medical industry to mean less than 1% or 2% of all cases. The uncontroverted testimony of Dr. Matthews indicated that the 174 reported cases were out of nearly 500,000 patients who had received Remicade post-FDA approval—a mere 0.03% of all cases and well below the 1% definition of "rare." *Cf. McNeil*,

[32] According to that e-mail, Centocor's reviewing physician characterized the reported cases as follows: 8 definite lupus; 18 probable lupus; 67 unknown or insufficient information; 57 probably delayed hypersensitivity and not lupus; 16 other cases probably not lupus; and 9 definitely not lupus.

462 F.3d at 368 n.4 ("We do not mean to suggest that *de minimis* differences in risk would send the adequacy question to the jury . . . ."). Furthermore, Dr. Matthews testified that based on her review of all the post-approval data, at the time of trial, she believed the chance of developing lupus-like syndrome was still rare. Therefore, even if the patients in the 174 post-approval cases actually developed lupus-like syndrome because of Remicade and even if that information were included in the package insert, such *de minimis* differences in risk are legally insufficient to create a fact question for the jury. Patricia's prescribing physicians would still have been faced with a decision of whether to prescribe a drug with a known rare side effect—a risk they were well aware of when they chose to prescribe Remicade.

Moreover, the Hamiltons failed to show that the warning's alleged inadequacies regarding lupus-like syndrome would have changed Patricia's prescribing physicians' decision to prescribe Remicade in light of her complicated medical history and serious ailments. Dr. Hauptman testified that, based on his review of the academic literature, the Remicade package insert, and information he received from Centocor and through other experts at national meetings, he considered lupus-like syndrome to be a very rare side effect of the drug. Dr. Hauptman stated that he would want to know if Centocor was aware of more cases of patients contracting lupus-like syndrome and he believed reasonable patients would want to know if the risk had become "common or serious." The fact that Dr. Hauptman would consider all clinical trials and post-approval evidence does not prove that he would not have prescribed Remicade—one of only two available treatments for Patricia's Crohn's disease—if additional reports would not have changed the relative risk of the side effect. Even if the additional reports mentioned in the Centocor e-mail constituted valid and reliable evidence of

an elevated risk of developing lupus-like syndrome beyond that of a "rare" Remicade side effect, the fact that Dr. Hauptman would have considered such information, if included in the package insert, does not prove that the presence of such information would have changed his decision to prescribe Remicade to Patricia—a critical element of the Hamiltons' claims.

Dr. Pop-Moody also testified that she was aware Remicade could cause lupus-like syndrome, but considered the cases very rare or "[l]ow on the differential." When questioned about the three cases of lupus-like syndrome mentioned on the Remicade package insert, Dr. Pop-Moody testified that those were the only cases she was aware of at that time. Instead of proving that greater risk of lupus-like syndrome would have changed Dr. Pop-Moody's decision to prescribe Remicade, the Hamiltons elicited no evidence to that effect. Like Dr. Hauptman, Dr. Pop-Moody admitted that she would have considered all available and pertinent information when making her decision to prescribe Remicade to Patricia. Yet again, the assertion that a doctor would consider all available information about a prescription drug's risks and benefits before prescribing it does not prove that the alleged omission, which would not have changed the relative risk of contracting a potential side effect, was a producing cause of the patient's injuries.

Not only did the Hamiltons fail to prove that Dr. Pop-Moody would have changed her prescription had Centocor provided information suggesting a higher risk of lupus-like syndrome, but the record indicates the opposite. Although post-approval studies after the Hamiltons filed suit in 2003 showed more reports of lupus-like syndrome and an increase in the number of patients in the pre-approval clinical studies that developed lupus-like syndrome, at the date of trial in 2006, Dr. Pop-Moody stated that she continued to prescribe "a lot of Remicade" and that she believed it to be

an effective drug for many of her patients. Dr. Pop-Moody specifically warned Patricia that she might have SLE or lupus-like syndrome in April 2003, but despite this warning, Patricia chose to continue receiving Remicade treatments and Dr. Pop-Moody continued prescribing them to her. Patricia's actions indicate that, even if Centocor provided a different warning to her doctors, she would likely have continued Remicade treatments for her serious medical condition despite the risk of lupus-like syndrome. Patricia was also aware of other potentially serious, yet rare, side effects from Remicade, such as cancer, but chose to take the drug anyway.

Because Patricia's prescribing physicians were aware of the potential risk of contracting lupus-like syndrome but chose to prescribe it in spite of those risks, and because the Hamiltons failed to present any evidence that including additional post-approval reports in the warning would have caused Patricia's physicians to change their prescription, the Hamiltons failed to meet their burden of proof. *See Stewart*, 780 S.W.2d at 912; *see also Ackermann*, 526 F.3d at 208 ("If, however, 'the physician was aware of the possible risks involved in the use of the product but decided to use it anyway, the adequacy of the warning is not a producing cause of the injury' and the plaintiff's recovery must be denied." (quoting *Porterfield v. Ethicon, Inc.*, 183 F.3d 464, 468 (5th Cir. 1999))). Accordingly, because there is no causation evidence to support the Hamiltons' claims, all of which are premised on Centocor's alleged failure to warn, the Hamiltons' claims must fail.[33] We therefore need not address Centocor's remaining issues.

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[33] Because Patricia's claims fail, Thomas cannot recover on his derivative claims for loss of consortium and loss of household services, nor can he recover exemplary damages for the fraud claim. *See Motor Exp., Inc. v. Rodriguez*, 925 S.W.2d 638, 640 (Tex. 1996); *Whittlesey v. Miller*, 572 S.W.2d 665, 667 (Tex. 1978); *see also Rosenzweig v. Dallas Area Rapid Transit*, 841 S.W.2d 897, 898 (Tex. App.—Dallas 1992, writ denied) (holding loss of consortium and loss of household services are derivative claims).

VIII. Conclusion

All of the Hamiltons' claims are premised on their theory that Centocor failed to adequately warn Patricia and her prescribing physicians of the risk that she could develop lupus-like syndrome from Remicade. Because the Hamiltons failed to meet their burden of proof on the causation element of their claims, as a matter of law, their claims fail. In sum, we hold that: (1) the learned intermediary doctrine generally applies within the context of the physician-patient relationship, and a prescription drug manufacturer fulfills its duty to warn its product's end users by providing an adequate warning to the prescribing physician; (2) the court of appeals erred by adopting a DTC advertising exception to the doctrine; (3) the learned intermediary doctrine is not a common-law affirmative defense, but a common-law rule and its applicability was not waived by Centocor; (4) Dr. Bullen, as the non-prescribing, treating physician, owed no duty to warn Patricia of the risks associated with Remicade beyond the risks directly attributable to the infusion process; (5) because all of the Hamiltons' claims are premised on Centocor's alleged failure to warn, the learned intermediary doctrine applies to all of their claims; and (6) the Hamiltons failed to introduce any evidence that the allegedly inadequate warning was the producing cause of Patricia's purported injuries. Accordingly, we reverse the portions of the court of appeals' judgment that are inconsistent with this opinion and render judgment that the Hamiltons take nothing.

_____

Paul W. Green
Justice

OPINION DELIVERED: June 8, 2012

IN THE SUPREME COURT OF TEXAS

NO. 10-0316

CITY OF AUSTIN, PETITIONER,

v.

HARRY M. WHITTINGTON, ET AL., RESPONDENTS.

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

Argued December 6, 2011

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

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

In this appeal from the City of Austin's (City) condemnation of property to build a parking garage for a nearby convention center and a facility to chill water to cool nearby buildings, we examine and define the scope of judicial review of legislative takings. The Texas Constitution and the Local Government Code authorize takings by municipalities when the municipality determines the property is necessary for a public use and provides just compensation to the owner. TEX. CONST. art. I, § 17; TEX. LOC. GOV'T CODE § 251.001(a). We have long held that judicial review is proper to challenge a taking on the basis of fraud, bad faith, or arbitrary and capricious determinations by

the condemnor. Today we reaffirm that principle. On judicial review of the City's taking, the property owners alleged that the City's determination that the property was necessary for public use was fraudulent, in bad faith, and arbitrary and capricious. The jury agreed, the trial court entered judgment on the verdict (invalidating the taking), and the court of appeals affirmed. __ S.W.3d __. Because we conclude that the City's determinations were not fraudulent, in bad faith, or arbitrary and capricious, we reverse the judgment of the court of appeals and remand for entry of judgment in accordance with this opinion.

I. Procedure for Takings

Article I, section 17 of the Texas Constitution requires that condemned property be taken for a public use and be justly compensated: "No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by consent of such person . . . ." TEX. CONST. art. I, § 17. The Local Government Code imposes an additional restriction on municipal takings. Section 251.001 of the Local Government Code adds that the condemnor must consider the taking necessary for public use: "When the governing body of a municipality considers it necessary, the municipality may exercise the right of eminent domain for a public purpose to acquire public or private property . . . for any other municipal purpose the governing body considers advisable." TEX. LOC. GOV'T CODE § 251.001(a). In short, these provisions require the municipality to demonstrate: (1) it intends to put the property to public use (the public use requirement); and (2) the condemnation is necessary to advance or achieve that public use (the necessity requirement).

Procedurally, the condemnor typically negotiates with the landowner to purchase the property. *See Hubenak v. San Jacinto Gas Transmission Co.*, 141 S.W.3d 172, 179 (Tex. 2004); TEX. PROP. CODE §§ 21.0112(a), 21.012(a). If they are unable to agree on damages, the condemnor files a condemnation petition in county or district court. TEX. PROP. CODE §§ 21.001, 21.012, 21.013; *Hubenak*, 141 S.W.3d at 179. The petition must, among other things, describe the property to be condemned and the purpose for which the condemnor intends to use the property. TEX. PROP. CODE § 21.012(b). The judge of the court then appoints "'three disinterested freeholders who reside in the county as special commissioners to assess the damages.'" *Hubenak*, 141 S.W.3d at 179 (quoting TEX. PROP. CODE § 21.014). The special commissioners hold a hearing to assess the value of the property to be condemned (and any damage to the remainder). TEX. PROP. CODE §§ 21.014–.015; *Hubenak*, 141 S.W.3d at 179.

If any party files written objections to the special commissioners' findings with the court, "'the court shall cite the adverse party and try the case in the same manner as other civil causes.'" *Hubenak*, 141 S.W.3d at 179 (quoting TEX. PROP. CODE § 21.018). During that litigation, the condemnor may take possession of the condemned property by paying the damages determined by the special commissioners and executing a bond approved by the court to secure payment of potential additional costs that could be awarded at trial or on appeal. TEX. PROP. CODE § 21.021(a).

II. Factual Background

Harry Whittington and members of his family (collectively "the Whittingtons") acquired Block 38 in Austin, Texas in 1981. Block 38 is cater-cornered to the Austin convention center and was used for surface parking. The City opened the convention center in 1992. An 1,100 space

parking garage a block west of the west entrance to the convention center has 600 spaces to serve the convention center and 500 spaces for monthly leases. In 1998, Austin voters approved an expansion to the convention center to more than double its size, financed by an increase in the hotel tax. That expansion was completed in 2002 and added an entrance on the north side.

After the expansion, a feasibility study indicated a lack of hotel rooms in close proximity to the convention center. The City sought to address not only the hotel room issue but also the need for additional parking after the doubling in size of the convention center. The City sought to add approximately 500 parking spaces near the new north entrance to the convention center.

The City pursued a project that would include an 800-room hotel, residential space, retail shops, and underground parking that could support the expanded convention center. In 1998, the City began the process of selecting a developer to design and build the hotel project. The City chose H.L. Hotels, LLC (a venture between Hilton Hotel Corp. and Landmark Organization, Inc.) as the developer in July 1999.

The City created Austin Convention Enterprises, Inc., a nonprofit public facility corporation that issued tax exempt bonds to fund the project.[1] The City also granted $15 million toward the project from convention center revenue. *See* TEX. LOC. GOV'T CODE § 380.001(a). The construction and financing for the project cost approximately $280 million. The developer received a 4.5% fee

[1] Municipal bonds are often used to finance public capital projects. SECURITIES INDUSTRY & FINANCIAL MARKETS ASSOCIATION, THE FUNDAMENTALS OF MUNICIPAL BONDS 1 (6th ed. 2012). The municipality, or an authority it creates, issues or sells the bonds to raise proceeds to perform the capital improvement. *Id*. at 2, 4. The municipality then pays the holder of the bond the agreed interest (called a coupon) on a fixed schedule, either through the municipality's general revenue or a specific revenue stream. *Id*. at 1, 3, 24. The bonds issued for the hotel project were funded through the revenue stream of the hotel project. The municipality sometimes uses a sinking fund to collect revenue to repay the principal to the holder when the bond matures, typically in 1 to 30 years. *Id*. at 23, 51.

(of the construction portion for the project) in the form of third-tier bonds, totaling approximately $10.5 million. After the project bonds are retired in 26–30 years from their issuance, the City will own the hotel (which accounts for 73.52% of the project) and the developer will own the residential and retail portions (which account for 26.48% of the project).

Before H.L. Hotels broke ground on the project, the City was investigating ways to make the project's debt coverage ratios more favorable (such as increasing revenue or decreasing expenses) to allow the project bonds to sell on favorable terms. The City had planned to build an underground garage with 500 spaces to support the hotel and another 500 spaces to support the expanded convention center. That plan required the garage to extend to the street on three sides and underneath the street on the west side. However, the close proximity to a train corridor on the south side of the project and a park on the west side of the project prevented construction of as wide of a garage as planned and the project encountered water at the fourth level of excavation—making it less feasible to excavate deeper to accommodate for the smaller footprint of the garage. In October 1999, the City determined that building a smaller garage was the most feasible option for lowering the overall project cost in order to obtain favorable financing. The City's decision to build a smaller garage had the practical effect of reducing the hotel project budget by $10–12 million.[2] H.L. Hotels broke ground in June 2001 and completed the project in December 2003.

[2] The Whittingtons state in their briefing that H.L. Hotels benefitted from the decision to not build the larger underground garage. However, there is no evidence in the record to support this assertion. The Whittingtons did not call the project developer or an expert to testify as to any alleged benefit the developer might have received. When counsel for the Whittingtons asked the convention center director if the project would take less time to complete with the smaller underground garage, he testified that he did not know. The only evidence of any impact on the developer was that the project cost was reduced by $10-12 million, which would have resulted in a lesser fee to the developer of at least $450,000 in light of its 4.5% fee.

The City sought to acquire land elsewhere to build a garage to serve the expanded convention center. The City looked at acquiring Block 38 or a vacant block three blocks south of Block 38. City staff considered but decided against cancelling the 500 leases in the existing garage near the west side of the convention center because it relied on the steady stream of income from the monthly leases and the garage and its elevator were not located near the new north entrance to the convention center. The City chose to try to acquire Block 38 because of its close proximity to the north convention center entrance. At the time, the Whittingtons were leasing half of Block 38 to the City for convention center parking.

In 2001, Austin Energy, the municipal utility department of the City, approached City convention center staff about constructing a district cooling plant near the expanded convention center. A district cooling plant provides chilled water to cool the air in nearby buildings. Utilities use district cooling plants to shift the demand for electricity from peak usage hours during the day time to off-peak hours at night to freeze water. During the day, the melting ice chills water that is piped to cool nearby buildings. By shifting energy demand to off-peak hours, utilities are able to avoid building more power plants. District cooling is not regulated by the Public Utility Commission or the City Council.

Austin Energy previously built a district cooling plant on the west side of downtown Austin (District Plant 1). A loop of pipes connects the plant to the buildings it cools, including the convention center and expansion. Austin Energy predicted that District Plant 1 would reach full capacity in 2005, but later revised that estimate to 2007 after the economy slowed and fewer buildings used the program. However, Austin Energy was contractually obligated to meet more

demand than was actually occurring at the time. Austin Energy also sought to build a second district plant to be able to serve its customers if District Plant 1 required down time.

Austin Energy entered an agreement with the convention center department for the department to find a suitable location for a second district plant (District Plant 2). The agreement set out guidelines for a suitable location. Austin Energy preferred a location near the east portion of the chilled water loop for two main reasons. First, proximity to the loop was a significant factor because laying the pipe to connect to the loop costs around $1,500 per linear foot. Second, farther distances between the loop and District Plant 2 would require more pump horsepower to achieve sufficient flow of chilled water.

In addition to Block 38, the City considered several other properties for District Plant 1.[3] The City decided to acquire Block 38 to support a parking garage for the expanded convention center and District Plant 2. The garage would occupy 70% of the block and the cooling plant would occupy the remaining 30%.

The City and the Whittingtons could not agree on a price for Block 38, so the City Council passed a resolution in August 2001 authorizing a condemnation suit to acquire Block 38.[4] On October 17, 2001, the City wrote a final offer letter to the Whittingtons. The letter stated that the "plant will be used to provide chilled water necessary to operate the air conditioning systems of the Convention Center Expansion and" the hotel project. The project manager for District Plant 2, in

[3] Those other properties included: (1) 5th Street and San Jacinto Boulevard; (2) East Cesar Chavez and Red River Street, (3) 5th Street and Lamar Boulevard; and (4) several vacant lots the City owned east of Interstate Highway 35.

[4] The City Council passed previous condemnation resolutions, but the earlier resolutions had procedural defects.

an email to the author of that letter, noted that, "to be completely clear, someone's pointed out that actually those buildings are currently going to be served from [District Plant 1] until the new plant is built . . . . So this new plant is not absolutely necessary for operation of the buildings mentioned but a redundancy is much better." District Plant 1 provided service to the convention center expansion and the hotel project for some time even after District Plant 2 became operational.

The City filed a condemnation suit in October 2001. The trial court appointed three special commissioners, who awarded the Whittingtons $7,650,000. Both parties filed objections to the award. The City deposited that amount into the registry of the court in January 2002 and took possession of Block 38. TEX. PROP. CODE § 21.021. The City then spent $15–18 million building a 740-space parking garage on 70% of Block 38, which opened in February 2005, and constructed District Cooling Plant 2 on the remaining portion of Block 38.

The trial court granted the City's motion for partial summary judgment concluding there were no genuine issues of material fact on the City's right to take Block 38. The Whittingtons also asserted that the City had not condemned the twenty-foot strip of land bisecting Block 38.[5] The jury awarded $7,750,000 in damages, and the trial court entered judgment on that award. The judgment specified that, as a county court, the trial court lacked authority to decide matters regarding title and made no determination on whether the City also took the twenty-foot strip. The court of appeals determined that the City failed to meet its summary judgment burden as to either public use or

[5] The twenty-foot strip of land is essentially an alley but has never been used by the public as an alley.

necessity. *Whittington v. City of Austin*, 174 S.W.3d 889, 906 (Tex. App.—Austin 2005, pet. denied) (*Whittington I*).

Shortly before the Whittingtons filed that appeal, they filed a declaratory judgment action in district court. The district court determined that the City had not condemned the twenty-foot strip of land bisecting Block 38. On appeal, the court of appeals held that the county court judgment, which failed to adjudicate the issue of the twenty-foot strip, was not final and the district court did not have jurisdiction to review that judgment. *City of Austin v. Whittington*, __ S.W.3d __, __ (Tex. App.—Austin 2007, no pet.) (*Whittington II*). The court of appeals vacated the district court judgment and dismissed the case. *Id*. at __.

On remand, the case was transferred to district court. The City amended its petition to clarify that it was also seeking to condemn the twenty-foot strip. The parties agreed to submit this issue to the trial court separately. The trial court found that the City had not properly condemned the twenty-foot strip. After a trial on the remaining issues, the jury found that: (1) the taking was not necessary to advance or achieve a public use; (2) the taking was for economic development purposes; and (3) the decision to take the property was fraudulent, in bad faith, and arbitrary and capricious as to the parking garage and the district plant. After post-verdict motions, the trial court concluded as a matter of law that: (1) the taking was necessary to advance or achieve a public use; and (2) that Government Code section 2206.001—the statute prohibiting takings for economic development—did not apply retroactively to the proceeding (disregarding the jury's contrary answers). However, the trial court entered judgment for the Whittingtons because it determined that legally and factually sufficient evidence supported the jury's findings that the taking was fraudulent,

in bad faith, and arbitrary and capricious. The trial court awarded the Whittingtons attorney's fees of $779,418.57.

On appeal, the court of appeals upheld the jury's finding that the City's taking as to the district plant was in bad faith because it determined that the City misrepresented the necessity of the district cooling plant to chill the air of nearby buildings, citing that District Plant 1 performed those tasks even after the plant was built on Block 38. __ S.W.3d __, __ (*Whittington III*). The court of appeals modified the Whittingtons' attorney's fee award to $674,418.57. *Id*.

The City filed a petition for review, which we granted. 54 Tex. Sup. Ct. J. 811 (Tex. Apr. 15, 2011). The City asserts that: (1) there is no exception to invalidate takings for public use, even if the takings were fraudulent, in bad faith, or arbitrary and capricious; (2) legally insufficient evidence supports the jury's findings that the taking was fraudulent, in bad faith, or arbitrary and capricious; (3) the City properly took the twenty-foot strip; and (4) the court of appeals opinion in *Whittington III* was defective because it only addressed the district cooling plant and not also the parking garage. Though they did not file a notice of appeal, the Whittingtons assert that (1) the City's taking violated Government Code section 2206.001 because it was for economic development purposes; and (2) the taking was not necessary for a public use.

III. The Scope of Judicial Review

The parties first ask us to clarify the scope of judicial review. The City asserts that: (1) fraud, bad faith, and arbitrariness and capriciousness are simply means of proving that the City's stated use was actually private; and (2) this inquiry is one for the court, not the jury. We disagree with the first assertion because this Court has long recognized that fraud, bad faith, and arbitrariness and

capriciousness are exceptions that may invalidate takings, but we agree with the second assertion that this inquiry is generally a question of law for the Court.

We held in 1940 that the "question of what is a public use is a question for the determination of the courts; however, where the legislature has declared a certain thing to be for a public use, such declaration of the legislature must be given weight by the courts."[6] *Hous. Auth. of City of Dallas v. Higginbotham*, 143 S.W.2d 79, 83 (Tex. 1940). We explained that, "'[w]here the Legislature declares a particular use to be public use the presumption is in favor of this declaration, and will be binding upon the courts unless such use is clearly and palpably of a private character.'" *Id*. at 83 (quoting *West v. Whitehead*, 238 S.W. 976, 978 (Tex. Civ. App.—San Antonio 1922, writ ref'd)).

But the presumption favoring the legislative declarations that the property is being taken for public use and is necessary for that use does not abrogate judicial review. We held in *Higginbotham* that "[t]he law is well established in this state that where the power of eminent domain is granted, a determination by the condemn[or] of the necessity for acquiring certain property is conclusive in the absence of fraud." *Id*. at 88 (citing *West*, 238 S.W. at 978). Since *Higginbotham*, we have clarified that judicial review may nullify a taking where the condemnor's decision was fraudulent, in bad faith, or arbitrary and capricious. *See FKM P'ship Ltd. v. Bd. of Regents of the Univ. of Houston Sys.*, 255 S.W.3d 619, 629 n.9 (Tex. 2008) ("'Once the presumption of necessity arises, the defendant can contest the fact of necessity only by establishing affirmative defenses such as fraud

[6] Our jurisprudence often refers to these takings as "legislative" ones because the Texas Legislature has delegated its condemnation authority to legislative bodies of local governments, which determine the public use and necessity and take the property. *See Burch v. City of San Antonio*, 518 S.W.2d 540, 542-43 (Tex. 1975).

(that, contrary to the ostensible public use, the taking would actually confer only a private benefit), bad faith, or arbitrariness.'" (quoting *Whittington I*, 174 S.W.3d at 898)).

In the absence of allegations that the condemnor's determinations of public use and necessity were fraudulent, in bad faith, or arbitrary and capricious, the legislative declaration that a specific taking is necessary for a public use is conclusive. *Coastal Indus. Water Auth. v. Celanese Corp. of Am.*, 592 S.W.2d 597, 600 (Tex. 1979) ("In the absence of allegations that the condemnor acted arbitrarily or unjustly, the legislature's declaration that a specific exercise of eminent domain is for public use is conclusive . . . ."); *see FKM P'ship*, 255 S.W.3d at 629–30. If such allegations are asserted, the trial court must inquire into whether the condemnor's determinations of public use or necessity were fraudulent, in bad faith, or arbitrary and capricious. *See FKM P'ship*, 255 S.W.3d at 630.

As the parties concede, this inquiry is an affirmative defense and the landowner bears the burden of proving his allegations as to this defense. *See id*. at 629 ("we have held that the agency's determination of public necessity is presumptively correct, absent *proof by the landowner* of the agency's fraud" (emphasis added)). The inquiry into whether the determinations of public use or necessity were fraudulent, in bad faith, or arbitrary and capricious is a question of law for the court. *See Maher v. Lasater*, 354 S.W.2d 923, 925 (Tex. 1962) ("the ultimate question of whether a particular use is a public use is a judicial question to be decided by the courts"); *Higginbotham*, 143 S.W.2d at 88 (approvingly noting that question of necessity was not submitted to the jury).[7] The trial

[7] In *Higginbotham*, we noted that courts and juries should not second guess the advisability of takings because takings for such projects as railway lines might result in the same taking being upheld in one county and invalidated in another. 143 S.W.2d at 89 ("The reason for the rule seems to be that: If different courts and juries were allowed to pass

court should only submit the issue to a jury if the underlying facts are in dispute. *See Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 313 (Tex. 2006)*; Richey v. Brookshire Grocery Co.*, 952 S.W.2d 515, 518 (Tex. 1997). If the court (or the jury when the underlying facts are in dispute) finds that the condemnor's determinations of public use or necessity were fraudulent, in bad faith, or arbitrary and capricious, the taking is invalid.

Here, the Whittingtons allege that the City's determinations of public use and necessity were fraudulent, in bad faith, and arbitrary and capricious. The trial court initially only ruled on whether the City took the twenty-foot strip and submitted the remaining issues to the jury.[8] However, the City and the Whittingtons do not dispute the underlying facts on these issues; rather, they dispute the legal effect of those facts (*e.g.*, whether those facts amount to fraud, bad faith, or arbitrariness and capriciousness). Because these issues are legal questions, we review them de novo. *See Chrysler Ins. Co. v. Greenspoint Dodge of Houston, Inc.*, 297 S.W.3d 248, 252 (Tex. 2009).[9]

IV. The Parking Garage

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on the necessity or advisability of condemning each tract out of the many which go to make up a right of way for a railway line, straight courses from point to point, with the consequent lessening of mileage, would in many, if not all, cases be impossible to secure. So in the case of depot grounds. One jury might hold, on competent evidence, that the land in question was not necessary to the purposes of the railroad. Another might render a like verdict as to any other tract sought to be subjected to its uses, and by such a course the company could be excluded altogether." (quotation marks omitted)). That rationale likewise necessitates that, although fraud, bad faith, and arbitrariness and capriciousness are the subject of judicial cognizance, their uniform application necessitates that they are questions of law for the court.

[8] The trial court ruled as a matter of law after the verdict that the taking was necessary for a public use and that Government Code section 2206.001 (prohibiting takings for economic development purposes) did not retroactively apply to this taking.

[9] The Whittingtons assert that the City waived the argument that fraud, bad faith, and arbitrariness and capriciousness are questions of law for the court. The City properly objected to these questions in its Motion to Bifurcate and its Motion to Disregard the Jury Verdict and Motion for Judgment Notwithstanding the Verdict. *See Hoffman-LaRoche Inc. v. Zeltwanger*, 144 S.W.3d 438, 450 (Tex. 2004) (pure legal questions may be raised in post-verdict motions).

The City took possession of Block 38 for two distinct public purposes (the parking garage and the district plant). We analyze each separately.

A. Fraud

We first examine whether City's determination that the parking garage was necessary for a public use was fraudulent. The parties' agreed to define fraud as "the taking of property for private use under the guise of public use, even though there may be no fraudulent intent on the part of the condemnor."[10] *See Higginbotham*, 143 S.W.2d at 83 ("'Where the Legislature declares a particular use to be public use the presumption is in favor of this declaration, and will be binding upon the courts unless such use is clearly and palpably of a private character.'" (quoting *West*, 238 S.W. at 978)); *see also Whitfield v. Klein Indep. Sch. Dist.*, 463 S.W.2d 232, 235 (Tex. Civ. App.—Houston [14th Dist.] 1971, writ ref'd n.r.e.) (holding proof of fraud in taking does not require proof of fraudulent intent).

1. Fraud in the Public Use of the Parking Garage

The parties agreed to define public use as:

> a use which the public is entitled to share indiscriminately in as a matter of right. A use is public when the public obtains some definite right or use in the undertaking to which the property is devoted. What is important in the public-use determination is the character of the right inuring to the public, not the extent to which the public's right is exercised.

[10] The City objected and proposed an alternate definition of fraud, but has not pursued that issue on appeal. As our inquiry is a question of law, these definitions in the jury charge should instead have been conclusions of law. We may review conclusions of law to determine their correctness. *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002). But we will not reverse an erroneous conclusion if the trial court rendered the proper judgment. *Id*. Because any change in the definition would not yield a different outcome here, we do not address whether the parties' definition of fraud is legally correct in its entirety.

> A "public use" is not a private use. A taking may not be used to confer a private benefit on a particular private party or parties through the use of the property. A taking may not be used for a public use that is merely a pretext to confer a private benefit on a particular private party or parties.

This Court has defined public use in similar circumstances as when the public obtains some definite right or use in the undertaking to which the property is devoted. *Coastal States Gas Producing Co. v. Pate*, 309 S.W.2d 828, 833 (Tex. 1958); *see also Higginbotham*, 143 S.W.2d at 84 ("'It is immaterial if the use is limited to the citizens of a local neighborhood, or that the number of citizens likely to avail themselves of it is inconsiderable, so long as it is open to all who choose to avail themselves of it.'"(quoting *West,* 238 S.W. at 978)). Public use, however, does not include a benefit to the public welfare or good under which any business that promotes the community's comfort or prosperity might be benefitted from the taking.[11] *Pate*, 309 S.W.2d at 833.

In 2001, the City Council authorized a condemnation lawsuit "for the construction of a parking garage for the Austin Convention Center . . . ." The Whittingtons assert that the taking was fraudulent as to the parking garage because it "favored one private party over another at public expense" by "reliev[ing] H.L. Hotels of its obligation to provide parking for the Convention Center."

We disagree. The parking garage was to provide parking for the expanded convention center. This is a public use. *Pate*, 309 S.W.2d at 833.[12] The effect of the City's decision to take Block 38

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[11] In 2003, the Legislature added section 21.023 to the Property Code, which requires a governmental entity acquiring property through eminent domain to notify landowners of their right to repurchase the property if the public use for which the property was acquired is cancelled before the tenth anniversary of the acquisition. TEX. PROP. CODE § 21.023.

[12] *See* TEX. LOC. GOV'T CODE § 251.001(a)(1) (authorizing home rule municipalities to "exercise the right of eminent domain for a public purpose" such as providing, enlarging, or improving auditoriums); *id*. at § 251.001(a)(5) (authorizing home rule municipalities to "exercise the right of eminent domain for a public purpose," including "for any other municipal purpose the governing body considers advisable").

rather than build the larger underground garage with the hotel project was, at best, an incidental benefit to the H.L. Hotels.[13] The decision not to build the larger underground garage resulted in a cost savings to the hotel project of approximately $10–12 million, resulting in fewer bonds being issued. The direct impact to the project developer was that its fee would be reduced if the overall project cost was reduced. There was no evidence introduced at trial to prove a benefit to H.L. Hotels due to the lower cost of the project. We hold that the City's determination that the parking garage was a public use was not fraudulent.

2. Response to the Dissent

The dissent argues that the developer benefitted from the taking because, even though the project budget was reduced by $10–12 million, the developer took third-tier bonds in lieu of its 4.5% fee. __ S.W.3d __, __ (Hecht, J., dissenting). The dissent reasons that only a short time elapsed between the decision to negotiate exclusively with the developer and the decision to not build the underground garage and that the bonds in lieu of the fee were not adjusted when the plans changed. *Id*. But this assertion is devoid of any record support. The only testimony the dissent cites is from the convention center director stating that the developer took bonds in lieu of its fee. *Id*. at __, n.15. But the director never testified that the amount of bonds was not reduced after the parking garage plans were altered.[14] Nor did the Whittingtons put on any evidence proving that it was. The director

[13] There is no evidence in the record of a benefit to H.L. Hotels, and there is evidence to suggest it received a diminished fee as a result of the project costing less. *See supra* note 2.

[14] The convention center director testified:

"Q. How much did [the developer] make out of this project in fees?

"A. I'm not sure exactly how much they made at the end. There was—they took—in lieu of fees, they took

merely testified as to an approximate amount of bonds the developer ultimately received. Second, even if the amount of bonds in lieu of fees had been reduced—and there is no evidence it had—the dissent assumes the developer received a benefit without corresponding work performed with respect to the garage. The developer's fee compensates it for such costs as the design of the structure and the permitting process. The developer performed sufficient design work on the garage to determine what variances were needed. The developer then applied for those variances but they were not granted. In short, there is no evidence, much less proof, that the developer received the same fee when the plans for the garage were altered, and even if it had, there is evidence that the developer performed work associated with the fee. In sum, the record plainly refutes the dissent's assertion that the Whittingtons proved the developer benefitted from the decision to not build the garage.

3. Fraud in the Necessity of the Parking Garage

We next address whether the City's determination concerning the necessity of the parking garage was fraudulent. The Whittingtons assert that the determination of necessity for the garage was fraudulent because the City could cancel the 500 leases in its existing garage and therefore would not need to build a garage on Block 38.

We disagree that the City did not actually consider the garage necessary for parking for the convention center. The jury charge did not define "necessary." The statutory constraint on the City's

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some third-tier bonds.

* * *

"Q. . . . [D]id you say that they got $10 million worth of bonds for their development fees?

"A. That was—yeah, that was in lieu of fees. They got the third-tier bonds."

right to take here is that the City must "consider[] it necessary." TEX. LOC. GOV'T CODE § 251.001(a). When there are allegations of fraud with regard to the necessity of a taking such as this, the question is whether the condemnor actually considered the taking necessary for the public use—not whether the court believes the taking was actually necessary. *See Higginbotham*, 143 S.W.2d at 83. "The city council is the authority to exercise the power of eminent domain and must itself officially express the intention and necessity to condemn the land in question." *Burch v. City of San Antonio*, 518 S.W.2d 540, 545 (Tex. 1975). We look to official materials such as orders, resolutions, and minutes to examine the City's determinations of public use and necessity. *See Horton v. Mills Cnty.*, 468 S.W.2d 876, 878 (Tex. Civ. App.—Austin 1971, no writ.).

The City Council declared that public necessity required taking Block 38 for the parking garage. The evidence confirms that the City's determination of necessity was not fraudulent. Testimony from the director of the convention center department indicated that the existing garage and especially its elevator were too far from the new north entrance to the convention center to serve the expansion. That belief led the City staff to recommend the taking to the City Council because they believed it was necessary to accommodate parking requirements for the expanded convention center. We hold that the City's determination that the taking was necessary for a public use was not fraudulent.

B. Bad Faith

Our second inquiry on the parking garage is whether the City's determination that the parking garage was necessary for a public use was in bad faith. The parties agreed to define bad faith as "more than negligence or lack of diligence. Bad faith implies an intent to injure, or some other improper motive. Mere bad judgment does not qualify as bad faith. Rather, the Whittingtons must show that the City knowingly disregarded their rights."[15]

1. Bad Faith in the Public Use of the Parking Garage

The Whittingtons assert that the taking was in bad faith as to the parking garage because it relieved H.L. Hotels of an obligation to provide parking for the expanded convention center. We disagree. As previously addressed, the City's decision to take Block 38 rather than build the larger underground garage with the hotel project was, at best, an incidental benefit to H.L. Hotels—especially in light of the percentage fee it received as the project developer combined with the lower project cost of building a smaller garage. *See supra* Part IV.A.1. The evidence indicates that this decision was made because $10-12 million in hotel project costs needed to be cut to obtain favorable financing, and the additional construction difficulties of not obtaining variances and encountering water in the excavation made the garage a prime candidate for the cost savings to the hotel project. The City instead pursued the acquisition of Block 38, which was cater-cornered to the new north entrance to the convention center and was being leased to the City for convention center parking at the time. This does not prove that the City "knowingly disregarded [the Whittingtons']

[15] We express no opinion as to the complete accuracy of this definition but note that any variation would not affect our holding. *See supra* note 10.

rights" or had some intent to injure the Whittingtons. We hold that the City's determination that the parking garage was for a public use was not made in bad faith.

2. Bad Faith in the Necessity of the Parking Garage

We next address whether the City's determination of necessity for the parking garage was made in bad faith. The Whittingtons assert that the determination of necessity as to the garage was made in bad faith because the City could cancel the 500 leases in its existing garage, thereby removing the need to build a garage on Block 38.

We disagree. The City Council declared that public necessity required taking Block 38 for the parking garage. The evidence confirms that the City's determination of necessity was not in bad faith (defined here as an intent to injure the Whittingtons or some other improper motive). Rather, testimony indicated that the City was concerned with locating the parking garage close to the new north entrance of the convention center—which could not feasibly be done in conjunction with the hotel project due to construction and financing issues. We hold that the City's determination that the taking was necessary for the parking garage was not in bad faith.

C. Arbitrary and Capricious

Our third inquiry is whether the City's determination that the parking garage was necessary for a public use was arbitrary and capricious. The parties agreed to define arbitrary and capricious as:

> a decision not done according to reason or judgment and is a willful and unreasoning action, action without consideration and in disregard of the facts and circumstances that existed at the time the condemnation was decided upon. When there is room for two opinions, an action cannot be deemed arbitrary when it is exercised honestly and upon due consideration, regardless of how strongly one believes an erroneous

> conclusion was reached. A showing that alternate plans are feasible or better does not make the condemnation determination arbitrary or capricious.

See Ludewig v. Houston Pipeline Co., 773 S.W.2d 610, 614 (Tex. App.—Corpus Christi 1989, writ denied); *Wagoner v. City of Arlington*, 345 S.W.2d 759, 763 (Tex. Civ. App.—Fort Worth 1961, writ ref'd n.r.e.).[16]

The Whittingtons assert that the City's determination of the necessity for the parking garage was arbitrary and capricious because the City (1) failed to consider reasonable alternatives to condemning Block 38; and (2) abdicated its decision on the need to condemn Block 38 to H.L. Hotels.

1. Consideration of Alternatives

The Whittingtons rely on *Houston Lighting and Power Co. v. Klein Independent School District* to support their assertion that failure to consider alternatives is arbitrary and capricious. 739 S.W.2d 508 (Tex. App.—Houston [14th Dist.] 1987, writ denied). In *Houston Lighting and Power*, a utility sought to condemn school district property for a high-voltage power line. *Id.* at 511. The school argued that the decision was arbitrary and capricious because of the potential health risks to the students resulting from the power line's magnetic fields. *Id*. The court of appeals held that the jury could have found that the utility failed to take these concerns into consideration, which could be an action "not done according to reason or judgment." *Id*. at 518. The Whittingtons assert that the City Council "wholly failed to consider any alternatives in deciding to condemn," and acted arbitrarily and capriciously just as the condemnor in *Houston Lighting and Power* did.

[16] We express no opinion as to the legal accuracy of this definition but note that any variation would not affect our holding. *See supra* note 10.

We disagree. The City Council was considering Block 38 as the alternative parking solution for the hotel project. Testimony indicated that the City was concerned with locating the parking garage close to the new north entrance of the convention center—which could not feasibly be done in conjunction with the hotel project due to construction and financing issues. The record also indicates that City staff considered an additional site for a parking garage as well as cancelling the 500 leases in the existing garage near the west side of the convention center.

The definition of arbitrariness and capriciousness here does not require the chosen course to be more feasible or better than the alternative. Rather, it forbids decisions not made according to reason or judgment. The decision here that a parking garage close to the new convention center entrance that would not adversely affect the financing for the hotel project was made according to reason and judgment. Moreover, the rationale of *Houston Lighting and Power* does not apply to these facts because the City did, in fact, consider alternatives for the parking garage, such as building the garage as part of the hotel project, cancelling the leases in the other garage, or building a garage on an alternate site. We hold that the City's determination that the parking garage was necessary for a public use was not arbitrary and capricious due to a failure to consider alternatives.

2. Abdicating the Decision to Condemn

The Whittingtons also rely on *Malcomson Road Utility District v. Newsom* for their assertion that a condemnor acts arbitrarily and capriciously by abdicating its decision on the need to condemn to a private developer. 171 S.W.3d 257 (Tex. App.—Houston [1st Dist.] 2005, pet. denied). In *Malcomson*, the condemnor did not conduct due diligence on where to locate a detention pond but instead followed the recommendation of a developer to locate the pond on another owner's property

nearby. *Id*. at 272–73. The developer agreed to pay the costs of the condemnation in the event it did not succeed. *Id*. at 273–74. The court of appeals held that a fact issue existed as to whether the District declined to exercise its discretion in determining what land to condemn. *Id*. at 273. The Whittingtons assert that the City abdicated the decision of the need to condemn to H.L. Hotels here, which amounts to arbitrariness and capriciousness.

We disagree. We need not decide here whether a condemnor acts arbitrarily and capriciously by abdicating the condemnation decision to a developer. Here, the City did not abdicate the decision to condemn Block 38 to H.L. Hotels. When financing and construction issues for building a larger underground garage with the hotel project began to surface, the City began negotiating with the Whittingtons to acquire Block 38. There is evidence that the City staff had a brief conversation with the developer, and the developer made several phone calls to Harry Whittington in the fall of 1999 to discuss parking—after City staff had already begun negotiating with the Whittingtons. However, there is no evidence that the developer made the decision to acquire Block 38 or funded the condemnation of Block 38 as the developer in *Newsom* did. 171 S.W.3d at 273–74. Rather, the City undertook the due diligence and did not rely on the developer to determine the new location of the garage or fund the condemnation. Because the City did consider alternatives and did not abdicate the determinations to a private developer, its determination that Block 38 was necessary for a parking garage was not arbitrary and capricious.

V. The District Plant

The City also took possession of Block 38 to build District Plant 2 for use with its chilled water program. We assess separately the City's determinations of public use and necessity as to the district plant.

A. Fraud

We must first decide whether the City's determination that the district plant was necessary for a public use was fraudulent. The parties agreed to define fraud as "the taking of property for private use under the guise of public use, even though there may be no fraudulent intent on the part of the condemnor."[17]

1. Fraud in the Public Use of the District Plant

In 2001, the City Council authorized a condemnation lawsuit "for the construction of . . . a district cooling plant for Austin Energy . . . ." The Whittingtons assert that the taking was fraudulent because district cooling is not a public use.

We disagree. We have defined public use in similar circumstances as when the public obtains some definite right or use in the undertaking to which the property is devoted. *Pate*, 309 S.W.2d at 833. "'It is immaterial if the use is limited to the citizens of a local neighborhood, or that the number of citizens likely to avail themselves of it is inconsiderable, so long as it is open to all who choose to avail themselves of it.'" *Higginbotham*, 143 S.W.2d at 84 (quoting *West*, 238 S.W. at 978). Public use, however, does not include a benefit to the public welfare or good under which

[17] *See supra* note 10.

any business that promotes the community's comfort or prosperity might be benefitted from the taking. *Pate*, 309 S.W.2d at 833.

A home rule municipality that provides electric service is serving a public use.[18] While the Local Government Code does not expressly authorize takings for district cooling, it does authorize takings "as necessary to efficiently carry out" its purposes of providing public utilities and "for any other municipal purpose the governing body considers advisable." TEX. LOC. GOV'T CODE §§ 251.001(a)(5), 552.002(b). The City considered district cooling as a method of efficiently assisting the electric utility by shifting demand from peak to off-peak times, thereby avoiding having to build more power plants. Moreover, the chilled water service is available to any customer that applies, though pricing for the service is determined by the cost of connecting the customer to the chilled water loop. While district cooling may be limited in its geographic scope, it is available to all who apply and agree on pricing with the City. We hold that the district plant here was serving a public use. *See Pate*, 308 S.W.2d at 833; *Higginbotham*, 143 S.W.2d at 84.

2. Fraud in the Necessity of the District Plant

The Whittingtons assert that the City's determination of necessity for District Plant 2 was fraudulent because the City misrepresented to the Whittingtons that it was necessary to serve the convention center expansion and the hotel project. The City's final offer letter to the Whittingtons stated the "plant will be used to provide chilled water necessary to operate the air conditioning systems of the Convention Center expansion and" the hotel project. As evidence of fraud, the

[18] *See* TEX. LOC. GOV'T CODE § 251.001(a)(1) (authorizing home rule municipalities to "exercise the right of eminent domain for a public purpose" such as providing, enlarging, or improving electric power systems).

Whittingtons point to an email from the project manager for District Plant 2 to the author of the final offer letter stating: "to be completely clear, someone's pointed out that actually those buildings are currently going to be served from [District Plant 1] until the new plant is built . . . . So this new plant is not *absolutely* necessary for operation of the buildings mentioned but a redundancy is much better." (emphasis added). District Plant 1 still provided service to the convention center expansion and the hotel project for some time even after District Plant 2 became operational due to a decrease in customer demand as a result of economic market conditions.

The project manager's statement is not evidence of fraud for multiple reasons. First, the statement that the district plant was not absolutely necessary was in a class of communications not ordinarily relevant to the inquiry of whether the City Council's determination of necessity was fraudulent, in bad faith, or arbitrary and capricious. To assess the City's determinations, we look to official materials such as orders, resolutions, and minutes. *See Horton*, 468 S.W.2d at 878. Our purpose in restricting our review to these materials is that the words of one city council member or city employee do not ordinarily bind the entire city council. *See, e.g.*, *AT&T Commc'ns of Tex., LP v. Sw. Bell Tel. Co.,* 186 S.W.3d 517, 528-29 (Tex. 2006) ("But the statement of a single legislator, even the author and sponsor of the legislation, does not determine legislative intent"). Therefore, emails by City employees are not among the items we ordinarily consider in undertaking this review.

Here, the Whittingtons argue that the City Council ratified the acts of its employees, adopting the email as its own. Specifically, the City's 2006 resolution stated that the

> public necessity to acquire Block 38 in its entirety . . . is hereby confirmed and ratified . . . and all acts done or initiated by employees, attorneys or representatives of the City to acquire or condemn Block 38 in its entirety . . . are hereby authorized,

> ratified, approved, confirmed and validated and declared to be valid in all respects and purposes as of the respective dates thereof for the public necessity and for the public use as a City parking garage, a chilling plant, and other municipal facilities.

Assuming without deciding that the ratification elevated the email to have the force of a City Council resolution, we disagree that it demonstrates that the City's determination of necessity was fraudulent. As an initial matter, this argument equates "necessary" with "absolutely necessary." The Local Government Code only requires that the condemnor consider the taking necessary for the public use. TEX. LOC. GOV'T CODE § 251.001(a). The email the Whittingtons rely on states that the district plant was not "*absolutely* necessary" for the operation of the convention center expansion and the hotel project. *See United States v. Comstock*, 130 S.Ct. 1949, 1956 (2010) (differentiating "necessary" and "absolutely necessary" under the federal constitution's Necessary and Proper Clause). Moreover, even had the email stated that the district plant was not necessary, the City Council expressed a clear belief in its 2006 resolution that the district plant was necessary. This determination of necessity was one of the two purposes the resolution accomplished (the other being the inclusion of a twenty-foot strip in the taking, addressed *infra* at Part VI). We interpret statutes and ordinances to avoid absurd results. *Carreras v. Marroquin*, 339 S.W.3d 68, 73 (Tex. 2011). The Whittingtons invite us to interpret the resolution in a way that negates one of its two purposes. We decline to do so.

The evidence instead indicates that District Plant 2 was necessary to perform district cooling in the future. Consumer demand for the program increased over time, and the City needed additional capacity to meet not only the demand but also its contractual obligations. In addition, District Plant 2 was needed as a backup in the event that District Plant 1 required down time. This evidence

confirms that the City determined District Plant 2 to be necessary—even if we were to assume the City did not believe it was *absolutely* necessary.

B. Bad Faith

Our second inquiry on the district plant is whether the City determined in bad faith that the plant was necessary. The charge defines bad faith as "more than negligence or lack of diligence. Bad faith implies an intent to injure, or some other improper motive. Mere bad judgment does not qualify as bad faith. Rather, the Whittingtons must show that the City knowingly disregarded their rights."[19] The Whittingtons argue that the City's decision to take Block 38 was made in bad faith because the City misrepresented to the Whittingtons that the district plant was necessary to serve the convention center expansion and the hotel project.

We disagree. As previously addressed, the evidence confirmed the City's representation to the Whittingtons that the district plant was necessary to serve the convention center expansion and the hotel project due to future demand and the need for a backup for the existing district plant. *See supra* Part V.A.2. Likewise, we hold that the City's determination that the district plant was necessary was not made in bad faith as it did not evidence an intent to injure the Whittingtons or a knowing disregard of their rights.

C. Arbitrary and Capricious

Our third inquiry as to the district plant is whether the City's determination that the plant was necessary was arbitrary and capricious. The charge defined arbitrary and capricious as:

[19] *See supra* note 10.

> a decision not done according to reason or judgment and is a willful and unreasoning action, action without consideration and in disregard of the facts and circumstances that existed at the time the condemnation was decided upon. When there is room for two opinions, an action cannot be deemed arbitrary when it is exercised honestly and upon due consideration, regardless of how strongly one believes an erroneous conclusion was reached. A showing that alternate plans are feasible or better does not make the condemnation determination arbitrary or capricious.[20]

The Whittingtons assert that the City's determination of the necessity for the district plant was arbitrary and capricious because the City Council failed to consider reasonable alternatives to condemning Block 38 for the district plant.

We disagree. The evidence indicates that City staff investigated multiple alternative locations for the district plant and that the City Council determined the plant was necessary. *See supra* note 2. Because only the City Council has the power to condemn for the City, only it may make the determinations of public use and necessity. *Burch*, 518 S.W.2d at 543-45. But this does not mean that investigation of alternatives must be conducted exclusively by the City Council rather than by City staff. The Whittingtons cite no authority for this proposition, and we are not aware of any.[21] We hold that the City's determination that the district plant was necessary was not arbitrary and capricious.

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[20] *See supra* note 10.

[21] Neither *Newsom* nor *Houston Power and Lighting*, on which the Whittingtons rely, indicate that a condemnor's governing body cannot delegate some due diligence to the condemnor's staff. *Newsom* involved a condemnor delegating all due diligence to a private developer that was interested in the condemnation decision. 171 S.W.3d at 272–73. Here, City staff investigated the alternative locations for District Plant 2. In *Houston Lighting and Power*, the condemnor ignored a potential health risk to students of taking school property for a high-voltage power line. 739 S.W.2d at 517-18. The failure by the condemnor to consider a risk is not at issue here.

VI. The Twenty-Foot Strip

Also at issue in this appeal is whether the City took the twenty-foot strip of land bisecting Block 38. The City's original plan in 1830 created Block 38, which indicated there was a twenty-foot wide alley. In 1929, the Legislature relinquished fee title to the center of the alleys in the City to owners of the abutting land.[22] Act of July 17, 1929, S.B. 18, 41st Leg., 3d C.S., § 1, 1929 Tex. Gen. Laws 239. The language in the deeds with which the Whittingtons acquired Block 38 referred to: "Block Thirty-eight . . . being all of Lots One through Eight (1–8), inclusive, in said Block, and all alleys and easements heretofore existing, none of such alleys having been opened and all such alleys and easements having been relinquished by the City of Austin, Texas." Subsequent deeds among the Whittingtons described the property as: "All of Block Thirty-eight (38), being Lots One (1) through Eight (8)." The City's 2001 condemnation resolution described the property to be taken as "Lots 1–8, inclusive, Block 38." The City passed a resolution in 2006 stating that public use and necessity had required the taking of Block 38 (including the strip) in 2001 and that if a court determined the City did not take the strip, City staff were authorized to negotiate to acquire it and file a condemnation suit if negotiations were not successful. The City then amended its condemnation pleading to include the twenty-foot strip.

The issue was tried to the court by agreement of the parties. The trial court found that Harry Whittington acquired all of Block 38 (including the twenty-foot strip) in 1981, and concluded that:

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[22] The law provided: "there shall be and is hereby relinquished to each owner of land abutting streets, alleys or highways in the City of Austin, Texas, the fee title to the center of the street, alley or highway upon which the particular land abuts, and for the distance along such street, alley or highway that the land abuts." Act of July 17, 1929, S.B. 18, 41st Leg., 3d C.S., § 1, 1929 Tex. Gen. Laws 239. The law preserved any then-existing easements. *Id*. at § 2.

(1) the City's 2001 condemnation resolution description of "Lots 1–8, inclusive, Block 38" did not encompass the twenty-foot strip; and (2) there is no easement on the strip. The City challenges these last two conclusions. We review conclusions of law de novo. *BMC Software Belgium, NV v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002).

A. The 2001 Resolution

The City argues that the 1929 relinquishment law means the Whittingtons took title to the strip when they acquired Block 38 and the City's reference to "Lots 1–8, inclusive, Block 38" in the 2001 resolution included the strip. The Whittingtons argue that the 1929 relinquishment law vested title in alleys to landowners at the time but did not change the legal description of the alleys.

We agree with the Whittingtons that the 2001 resolution did not include the strip. The 1929 relinquishment law granted fee simple title in the strip to the adjoining landowners. Act of July 17, 1929, S.B. 18, 41st Leg., 3d C.S., § 1, 1929 Tex. Gen. Laws 239. However, the strip was then a separate parcel of land. As the trial court found, Harry Whittington acquired this strip in 1981 in a deed referring to "Block Thirty-eight . . . being all of Lots One through Eight (1–8), inclusive, in said Block, *and all alleys* and easements heretofore existing, none of such alleys having been opened and all such alleys and easements having been relinquished by the City of Austin, Texas." (emphasis added). The use of "and" in the 1981 deed indicates that "Lots 1–8, inclusive" does not encompass the strip. The City's 2001 condemnation resolution only referred to "Lots 1–8, inclusive, Block 38" and did not include the twenty-foot strip.

The City points to a line of cases indicating that alleys are presumed to be covered by descriptions of adjoining lots. *See Cox v. Campbell*, 143 S.W.2d 361, 362–64 (Tex. 1940);

Amerman v. Missouri, K. & T. Ry. Co. of Tex., 182 S.W. 54, 57 (Tex. Civ. App.—Galveston 1915, writ ref'd). However, these cases refer to alleys that involve easements. *See Angelo v. Biscamp*, 441 S.W.2d 524, 526 (Tex. 1969). When an easement is abandoned, the landowner is vested with unencumbered fee simple title, and the presumption of an intent to convey the easement no longer applies. *Id.* The 1929 relinquishment law vested fee simple title to the strip in the owners of Lots 1–8 at that time. The presumption that conveying the lots also conveyed the alley no longer applied.[23] *See Angelo*, 441 S.W.2d at 526. Accordingly, the 2001 resolution did not include the strip.

B. The 2006 Resolution

The question then is whether the 2006 resolution and pleading amendment include the twenty-foot strip and are permissible. The City asserts that the 2006 resolution and pleading amendment cured any defect and took the strip. The Whittingtons respond that the trial court lacked jurisdiction to add the strip to the condemnation proceeding because it would prejudice them.[24]

We agree with the City. The language of the 2006 resolution clearly indicated the City's belief that, as of 2001, public use and necessity required condemning all of Block 38, including the strip: "The public necessity to acquire Block 38 in its entirety, including, but not limited to, the

[23] This Court has long recognized a presumption that narrow strips of land that are small in size and value compared to the adjoining tract are conveyed with the larger, adjoining tract—a policy known as the "strip and gore doctrine." *Angelo*, 441 S.W.2d at 526–27. The City does not assert that doctrine here.

[24] The Whittingtons also assert that the City Council only authorized taking the strip if the current proceeding finds the City did not take the strip. We disagree. The 2006 resolution indicated the City believed in 2001 that all of Block 38, the strip included, was necessary for public use. While the 2006 resolution did authorize separate negotiations and a condemnation proceeding if this proceeding determined the City did not take the strip, the resolution did not prohibit its use in this proceeding.

[strip], for the public purpose of a City parking garage, a chilling plant, and other municipal facilities is hereby confirmed and ratified as of the effective date of [the 2001 resolution]."

The next inquiry is whether the 2006 resolution and pleading amendment were permissible. We have held that taking less land than a resolution specified is within a court's subject matter jurisdiction if it does not prejudice the landowner. *FKM P'ship,* 255 S.W.3d at 626. We have also held that taking additional land is within a court's jurisdiction if the parties so stipulate because the stipulation indicates no material prejudice to the landowner. *State v. Nelson*, 334 S.W.2d 788, 791–92 (Tex. 1960). In *FKM Partnership*, we left open the question of whether a trial court has jurisdiction when the condemnor amends its pleadings to take additional land after the commissioner's hearing. 255 S.W.3d at 626 n.3.

As the parties indicate, the inquiry here is whether the Whittingtons were prejudiced by the pleading amendment that included the strip. The Whittingtons' expert testified that the strip had no independent value if the City took Lots 1–8. The jury agreed, finding the same value for Block 38 with or without the strip. Further, there is no indication that the Whittingtons were unprepared to litigate the issue and were denied a continuance. Therefore, we hold that the inclusion of the twenty-foot strip in the trial court proceedings did not prejudice the Whittingtons, and the City's 2006 resolution properly took the twenty-foot strip.

VII. Economic Development

The Whittingtons raise two other arguments supporting their request that we should nonetheless affirm the court of appeals conclusion that the taking is invalid: (1) section 2206.001 of the Government Code invalidates the taking; and (2) the taking was not necessary for a public use.

A. Preservation

We must first determine whether the Whittingtons may raise such points of error as they did not file a notice of appeal. Texas Rule of Appellate Procedure 25.1 requires that "[a] party who seeks to alter the trial court's judgment or other appealable order must file a notice of appeal." TEX. R. APP. P. 25.1(c). The rule further provides that "[t]he appellate court may not grant a party who does not file a notice of appeal more favorable relief than did the trial court except for just cause." *Id*.

The Whittingtons argue that a litigant is only attacking a judgment (and must only file a notice of appeal) if it seeks greater relief than awarded in the judgment. *See Tex. Disposal Sys. Landfill, Inc. v. Waste Mgmt. Holdings, Inc.*, 219 S.W.3d 563, 574 n.11 (Tex. App.—Austin 2007, pet. denied) (allowing cross-point that did not seek greater relief); *Dean v. Lafayette Place (Section One) Council of Co-Owners, Inc.*, 999 S.W.2d 814, 818 (Tex. App.—Houston [1st Dist.] 1999, no pet.) ("The independent grounds for affirmance can be raised in a cross-point as long as the appellee is not requesting greater relief than that awarded by the trial court."). We agree. Here, the Whittingtons do not seek greater relief than the judgment provided. They only seek the same relief the judgment provided in the event that we rule for the City on its points of error. Accordingly, we address the Whittingtons' points of error.

B. Whether Section 2206.001 Is Retroactive

The Whittingtons first point of error is that section 2206.001 of the Government Code invalidates the taking because it was for economic development purposes. Section 2206.001 states: "A governmental or private entity may not take private property through the use of eminent domain

if the taking . . . is for economic development purposes . . . ." TEX. GOV'T CODE § 2206.001(b)(3). The charge asked:

> Does the City of Austin seek to take the Whittingtons' property for economic development purposes?
>
> The City may not take private property if the taking is for economic development purposes.
>
> A condemnation for "economic development purposes" does not include a condemnation for a public building or the provision of utility services.[25]

The jury answered "yes" as to both the parking garage and the district plant. The trial court disregarded the answer, holding that section 2206.001 does not apply retroactively to this case.

We disagree that section 2206.001 is not retroactive, but we hold that the statutory exceptions apply. Section 2206.001 was added in 2005—after the City filed its condemnation proceeding in 2001. Act of Aug. 31, 2005, 79th Leg., 2d C.S., S.B. 7, Ch. 1, § 1, 2005 Tex. Gen. Laws 1. The Texas Constitution provides 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. We generally presume that statutes are prospective unless they are expressly made retroactive. TEX. GOV'T CODE § 311.022; *State v. Fidelity Deposit Co. of Md.*, 223 S.W.3d 309, 311–12 (Tex. 2007) per curiam). Section 2206.001 is not expressly retroactive. Act of Aug. 31, 2005, 79th Leg., 2d C.S., S.B. 7, Ch. 1, § 1, 2005 Tex. Gen. Laws 1. However, applying procedural, remedial, or jurisdictional statutes retroactively does not violate the Constitution's prohibition on retroactive laws. *Univ. of Tex. Sw.*

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[25] *See* TEX. GOV'T CODE § 2206.001(c)(4)–(5). The City objected to the lack of a definition of economic development but does not raise that issue in this Court.

Med. Ctr. v. Estate of Arancibia, 324 S.W.3d 544, 548 (Tex. 2010). This is because procedural and remedial laws generally do not affect vested rights, which are property rights that the Constitution protects like any other property. *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 219 (Tex. 2002). Such procedural and remedial laws that do not affect vested rights should be enforced as they exist at the time judgment is rendered. *Tex. Mun. Power Agency v. Pub. Util. Comm'n of Tex.*, 253 S.W.3d 184, 198 (Tex. 2007).

In this context, a condemnor only obtains a vested right in property it seeks to take once it obtains a judgment in its favor. TEX. PROP. CODE § 21.065 ("A judgment of a court under this chapter vests a right granted to a condemnor."); *see also Middleton v. Tex. Power & Light Co.*, 185 S.W. 556, 559 (Tex. 1916) (holding that a vested right is a property right). The City has yet to obtain a judgment in its favor on the taking of Block 38. Accordingly, we must apply section 2206.001 as it currently exists. *Tex. Mun. Power Agency*, 253 S.W.3d at 198.

C. Whether Section 2206.001 Invalidates the Taking

The question then is whether section 2206.001 invalidates the City's taking. The jury found that the taking was for economic development purposes as to both the parking garage and district plant. The trial court's basis for disregarding this finding (that the law was not retroactive) was in error. *See supra* Part VII.B. We must uphold that finding unless the City conclusively proved that the taking was not for economic development purposes. *See Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001) (per curiam).

The City asserts that the parking garage is a public building and the district plant is for the provision of utility services—both of which are statutory exceptions to section 2206.001's

prohibition on takings for economic development purposes that were incorporated into the charge.[26] TEX. GOV'T CODE § 2206.001(c)(4)–(5). The Government Code does not define the "public building" or "utility services," and because they have acquired technical or particular meanings, we construe them accordingly. TEX. GOV'T CODE § 311.011(b).

We conclude the evidence conclusively establishes that the parking garage is a public building. The garage is open to the public, but the primary purpose of the garage is to support the expanded convention center.[27] The City owns the garage and receives the income from those who park in the garage. Providing, enlarging, or improving auditoriums are public uses under the Local Government Code, and land may be condemned by a municipality if considered necessary for those public uses. TEX. LOC. GOV'T CODE § 251.001(a)(1). We have concluded that the parking garage serving the expanded convention center in this situation is a public use. *See supra* Part IV.A.1. It follows that the garage, which is owned by the City and for a public use, is a public building.

Moreover, the evidence conclusively establishes that the district plant is for the provision of utility services. The parties do not dispute that electricity is a utility service. The Whittingtons assert that district cooling provides chilled water, not electricity, and is not a utility because it is not regulated.

We disagree. There are two factors that indicate the district plant is assisting the municipal electric utility. First, district cooling shifts demand from peak to off-peak times, thereby avoiding

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[26] The City has not asserted, and we do not decide, whether the district plant is also a public building.

[27] *See Higginbotham*, 143 S.W. 2d at 84("'It is immaterial if the use is limited to the citizens of a local neighborhood, or that the number of citizens likely to avail themselves of it is inconsiderable, so long as it is open to all who choose to avail themselves of it.'"(quoting *West,* 238 S.W. at 978)).

the need to build more power plants. Second, the district plant still uses municipal electricity to cool subscribing buildings by freezing water at night and circulating chilled water during the day. Without district cooling, those customers would be consuming municipal electricity during the daytime as there are no other providers of district cooling in the area. We determined that the district plant here serves a public use by assisting the electric utility. *See supra* Part V.A.1; *see* TEX. LOC. GOV'T CODE § 552.002(b)(authorizing takings "as necessary to efficiently carry out" the purposes of providing public utilities). It follows that the district plant is providing utility services by assisting the City's electric utility. Because the City conclusively established that the parking garage and district plant fell within statutory exceptions to section 2206.001 of the Government Code, that section does not invalidate the City's taking.

VIII. Necessity for Public Use

The Whittingtons' second point of error is that the taking was not necessary for a public use and is thus invalid. The charge asked: "Is the taking of the Whittingtons' property necessary to advance or achieve a public use?" The jury answered "no" as to both the parking garage and the district plant. The trial court disregarded the jury's answer, holding that the taking was necessary to advance or achieve a public use as a matter of law.

We must note that the proper inquiry for a court is to determine whether the condemnor's determinations of public use and necessity were fraudulent, in bad faith, or arbitrary and capricious (if the landowner so alleges). *See supra* Part III. As part of this inquiry, we have held that the parking garage and district plant serve public uses. *See supra* Parts IV.A.1, V.A.1. Further, we have held that the City's determinations of necessity as to the parking garage and district plant were not

fraudulent, in bad faith, or arbitrary and capricious. *See supra* Parts IV.A.2, IV.B.2, IV.C, V.A.2, V.B, and V.C. This ends the judicial inquiry into the legislative determinations of public use and necessity. *See supra* Part III. We overrule the Whittingtons second point of error.

IX. Conclusion

We hold that the City's determination that Block 38 was necessary for public use was not fraudulent, in bad faith, or arbitrary and capricious. We further hold that City's taking included the twenty-foot wide strip of land bisecting Block 38, and its inclusion in the underlying proceeding did not prejudice the Whittingtons. Moreover, we conclude that, although section 2206.001 of the Government Code is retroactive as applied here, it does not invalidate the City's taking because the purposes for the taking fall within statutory exceptions to section 2206.001. Because we have affirmed the City's right to take the land at issue, we reverse the judgment of the court of appeals and remand for entry of judgment in accordance with this opinion.

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Eva M. Guzman
Justice

OPINION DELIVERED: August 31, 2012

IN THE SUPREME COURT OF TEXAS

NO. 10-0316

CITY OF AUSTIN, PETITIONER,

v.

HARRY M. WHITTINGTON, ET AL., RESPONDENTS

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

JUSTICE HECHT, joined by JUSTICE WILLETT, concurring in part and dissenting in part.

The Court states, and the parties agree, that "[a] taking may not be used to confer a private benefit on a particular private party or parties through the use of the property."[1] The City of Austin contracted with a private developer, H. L. Hotels, LLC, to build a hotel with an underground parking lot near the convention center, but soon afterward decided to relieve the developer of its obligation to construct the parking lot. Instead, the City condemned the Whittingtons' nearby property for the parking lot, reducing the cost of the hotel project by some $10-12 million. The Whittingtons argue that the reduction benefitted the developer, and therefore the taking was invalid.

The premises underlying the Whittingtons' argument are not in question. The Court states that:

[1] *Ante* at ___ (quoting a jury instruction to which the parties agreed).

- a condemnor's "fraud, bad faith, and arbitrariness and capriciousness . . . may invalidate takings";[2]

- "fraud [means] 'the taking of property for private use under the guise of public use, even though there may be no fraudulent intent on the part of the condemnor'";[3]

- "this inquiry is an affirmative defense and the landowner bears the burden of proving his allegations";[4]

- "[t]he trial court should only submit the issue to a jury if the underlying facts are in dispute";[5]

- "the jury found that . . . the decision to take the [Whittingtons'] property was fraudulent, in bad faith, and arbitrary and capricious";[6]

- "the City and the Whittingtons do not [now] dispute the underlying facts on these issues; rather, they dispute the legal effect of those facts (*e.g.*, whether those facts amount to fraud, bad faith, or arbitrariness and capriciousness)";[7]

- thus, "[t]he inquiry . . . is a question of law for the court".[8]

Two issues remain: did the reduction in the cost of the hotel project benefit the developer, and if so, did that benefit invalidate the taking.

The first issue is conceded by the City. As the Court notes, "[t]he Whittingtons state in their briefing that H. L. Hotels benefitted from the [City's] decision to not build the . . . underground

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[2] *Ante* at ___.

[3] *Ante* at ___ (quoting a jury instruction to which the parties agreed).

[4] *Ante* at ___ (citation omitted).

[5] Ante at ___.

[6] *Ante* at ___.

[7] *Ante* at ___.

[8] *Ante* at ___.

garage" as part of the hotel project.[9] In its Brief, the City explains: "H.L. Hotels asked to be relieved of its obligation to provide the parking spaces for convention center usage. The City acquiesced and, as one of the consequences, the hotel project had a cost savings of around $10 million."[10] This benefitted the developer and the City knew it. As the City states in its Reply Brief, the "evidence shows . . . that the City knew the hotel developer would financially benefit from the City's choice to condemn [the Whittingtons' property] instead of forcing the building of the parking facility as part of the hotel garage facility."[11] This was no careless statement. At oral argument, much of counsel's attention was directed to whether the developer benefitted from the City's decision to excuse it from building the parking lot. The Whittingtons' counsel emphasized that "the result was $10 or $12 million benefit to the developer, no benefit to the City." In response, the City's counsel conceded that "there clearly was a benefit to the developer of the hotel" when the City "let [it] off the hook for $10 million in investment" but argued that "there was a benefit to the City, too" because it did not get a parking garage with the problems the developer projected.

Unwilling to take the City at its word, the Court attempts to make a better case for the City than the City can make for itself. The Court seems to fault the Whittingtons for "not call[ing] the project developer or an expert to testify as to any alleged benefit the developer might have

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

[10] Petitioner's Brief on the Merits 3-4 (citation omitted).

[11] Petitioner's Reply Brief 20.

received."[12] But the evidence of benefit came from the City's own witness.[13] At one point in its opinion, the Court states that the record establishes that the reduction in the project cost from omitting the underground garage was a benefit to the City and actually hurt the developer by reducing its fee.[14] But the Court ignores the City's own evidence that the developer received bonds in lieu of a fee, in the same amount after it was relieved of the obligation to build the parking lot as before.[15] Later, the Court retreats to the position that "[t]he effect of the City's decision to take [the Whittingtons' property] rather than build the larger underground garage with the hotel project was,

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

[13] The City's convention center director testified as follows:

"Q. How much reduction in cost was it to get rid of that parking requirement?

"A. I believe it was in the 10, $12 million range.

"Q. So 10 or $12 million that that no longer had to be in this construction project because the Whittington block was going to be used instead.

"A. I think a 10 or $12 million reduction would be — was the cause of the necessity for the investors to get them to invest, and the parking was the means by which that was accomplished for the reduction."

[14] *Ante* at ___ n.2 ("The only evidence of any impact on the developer was that the project cost was reduced by $10-12 million, which would have resulted in a lesser fee to the developer of at least $450,000 in light of its 4.5% fee.").

[15] The City's convention center director testified as follows:

"Q. How much did [the developer] make out of this project in fees?

"A. I'm not sure exactly how much they made at the end. There was — they took — in lieu of fees, they took some third-tier bonds.

* * *

"Q. . . . [D]id you say that they got $10 million worth of bonds for their development fees?

"A. That was — yeah, that was in lieu of fees. They got the third-tier bonds."

at best, an incidental benefit to the H.L. Hotels."[16] But the City's own evidence is that the value of the reduction in the developer's construction obligation was $10-12 million, and there was no corresponding reduction in the remuneration to the developer.

The Court's evidentiary inventions, even if the City would adopt them, and even if the record would support them, neither of which is true, are contradicted by the jury's verdict. Even if there were evidence in the record that the City has not found or will not cite to bolster its own position, and there is not, the jury was free to disbelieve that evidence and find from the evidence cited, as they did, that the City's taking of the Whittingtons' property was a guise to benefit the developer. The Court's conclusion contradicts the record, the verdict, the judgment, the affirmance, the briefs, and the arguments. It simply cannot be disputed that the condemnation of the Whittingtons' property was a significant benefit to the developer. While it may be difficult to assign a precise dollar value to that benefit, the City acknowledges that had the developer not been relieved of its obligation to build underground parking, the project could not have been financed.[17]

The second issue, the one the City actually argues rather than concedes, and the Court ignores, is whether the benefit to the developer invalidates the taking. This issue is much more difficult. It is useful to think of possible circumstances along a continuum from one extreme to another. Had the City condemned the Whittingtons' property and simply deeded it over to a private developer for use in a commercial project, the condemnation would very likely be invalid. Apart

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[16] *Ante* at ___.

[17] The City's convention center director testified: "Either we had to increase the revenue that the investors would believe, and the feasibility company was not willing to increase the revenue numbers, their projections. And so, the only other alternative was to reduce the expense side to increase our debt service coverage."

from the statutory prohibition against "the use of eminent domain . . . for economic development purposes",[18] it would be difficult to argue that such a taking had a public purpose.[19] On the other end of the spectrum, had the City planned from the beginning to meet the convention center's parking needs by taking the Whittingtons' property, wholly apart from whether it could also encourage construction of the hotel project, it would be difficult to argue that a taking for public parking lacked a public purpose. The present case lies between these two clearer situations.

The parties have not been entirely clear in describing the effect of the abandonment of the underground parking component of the hotel project. It appears that after the City accepted the developer's proposal over competing offers, and the two reached agreement, a concern arose that investors might not buy the bonds used to finance the project unless either the revenue projections were increased or the construction costs were decreased. The City concluded that the latter course was its only alternative, and that the only means of achieving it was to relieve the developer of its parking construction obligation. In essence, the City agreed to accept less than it had bargained for. This was clearly a benefit to the developer and a detriment to the City, but the change may have been necessary to salvage the project. Merely renegotiating the deal and seeking parking elsewhere is not, in my view, a taking. But the City began to explore acquisition of the Whittingtons' property only nine days after accepting the developer's proposal, which provided for parking as part of the hotel project. Nothing in the record explains why the parking component of the developer's proposal

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[18] TEX. GOV'T CODE § 2206.001(b)(3). The parties dispute whether this statute, enacted in 2005 after the events in this case, applies retroactively.

[19] *But see generally Kelo v. City of New London*, 545 U.S. 469 (2005).

became problematic in so short a time. Rather, a fair inference — indeed, a strong one — is that financing problems were apparent before the proposal was accepted, and that going forward would require a contribution to the project, which the City found by condemning the Whittingtons' property. From the evidence, one could conclude as the jury did, that the City condemned the Whittingtons' property to "sweeten the deal" for the private interests involved — that, in the language of the jury charge, the taking was "for private use [to benefit the developer] under the guise of public use [for public parking], even though there may [have been] no fraudulent intent on the part of the condemnor", the City. The City agrees, and the Court holds, that if this conclusion were true, as found by the jury, the taking would be invalid.

I do not suggest that the legitimacy of this taking depends on the subjective intent of the individual actors. Whether the taking was fraudulent or in bad faith, as defined in the agreed jury instructions and approved by the Court, should be an objective inquiry. But it is important to realize that the viability of a project of the magnitude of the one in this case depends on many factors. While the City might have condemned the Whittingtons' property for public parking independently of its hopes for a hotel project, it did not do so, and perhaps, could not have done so. Nothing in the record before us suggests that the City ever had any such intent. In these circumstances, the evidence supports the jury's verdict, and their finding is, as a legal matter, a defense to the taking.

I am fully mindful that the power of eminent domain is broad, that the public-use requirement is a limited restriction on that power, and that the judiciary must necessarily give deference to the more political departments' determinations of what is public use. But because the power of eminent domain is broad and the right of property ownership is fundamental, the power must be exercised

with complete rectitude; though public use is a narrow restriction of the power of eminent domain, it cannot be construed so broadly as to effect no restraint at all; and judicial deference does not require abdication of responsibility.

I agree with the Court generally on the other issues addressed. But from its conclusion that the City's taking of the Whittingtons' property for parking was valid, I respectfully dissent.

Nathan L. Hecht
Justice

Opinion delivered: August 31, 2012

IN THE SUPREME COURT OF TEXAS

NO. 10-0318

ETAN INDUSTRIES, INC. AND ETAN INDUSTRIES, INC., D/B/A CMA CABLEVISION AND/OR CMA COMMUNICATIONS, PETITIONER,

v.

RONALD LEHMANN AND DANA LEHMANN, RESPONDENTS

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

PER CURIAM

Defendant Etan Industries, Inc. contends that the tort claims against it are barred by the two-year statute of limitations. It also argues that the declaratory judgment against it was unwarranted. We agree and accordingly reverse and render judgment for Etan.

Etan, a cable television and internet provider, had cable lines running on two properties owned by Ronald and Dana Lehmann (the Lehmanns). The properties were located on Highways 77 and 290. Etan's cable lines were placed on poles belonging to Bluebonnet Electric Cooperative, Inc., an electricity provider. Bluebonnet had easements on the Lehmann properties allowing it to place and operate "an electric transmission or distribution line or system" on the properties. Etan and Bluebonnet[1] had written agreements known as joint use or pole attachment agreements. The

[1] Herein, Etan refers to Etan Industries, Inc., d/b/a CMA Cablevision, and relevant predecessors in interest. Bluebonnet refers to Bluebonnet Electric Cooperative, Inc. and relevant predecessors in interest.

agreements allowed Etan to make use of Bluebonnet's poles, but only "to the extent [Bluebonnet] may lawfully do so," and stated that Etan was responsible for obtaining its own easements and rights-of-way from property owners.

The Lehmanns purchased the Highway 77 property in 1986. At the time, Bluebonnet had lines running within an easement on this property. In December 2000, Etan hung a cable on Bluebonnet's poles. Ronald's brother Steven also owned property along Highway 77. Steven immediately noticed Etan's cable on his own property and on Ronald's property, and notified Ronald. Steven thereafter had several conversations with employees of Bluebonnet and Etan, described below. Steven testified that he would always "fully apprise" Ronald of the conversations. Ronald likewise confirmed that Steven "told me everything" about the conversations.

Ronald and Steven decided Steven would call Bluebonnet about the new line. The day after noticing the line, Steven called Bluebonnet and was told the line belonged to Etan. Steven called Etan and spoke to Etan employee Jerry Smith. Smith told Steven that Etan had an easement and that Smith would send a copy of it to Steven. Steven waited for "a while" and called Smith back. Smith told Steven he was having trouble locating the easement but would find it and send it. In Summer 2001, Steven called Smith again. This time, Smith told Steven that Smith had been mistaken and Etan did not have an easement on the Highway 77 property. Smith claimed however that Etan had an oral agreement with Bluebonnet allowing Etan to use Bluebonnet's easements. According to Ronald's testimony, Smith told Steven that Etan was "like in partnership" with Bluebonnet, and Etan could use Bluebonnet's easement. Based on this representation, "[w]e just dropped it."

In December 2002, Ronald read a newspaper article about *Marcus Cable Associates, L.P. v. Krohn*, 90 S.W.3d 697 (Tex. 2002). In that case, we held that an easement permitting an electric cooperative to construct and maintain "an electric transmission or distribution line or system" did not allow a cable television provider under a joint use agreement to place cable television lines in the easement. *Id.* at 699, 706–07. The Lehmann brothers both testified that they understood the case to hold a cable company could not hang a communication line in an electrical transmission easement. According to Steven, the *Krohn* decision "just threw up a red flag and I went to investigate it some more." The brothers decided to contact Bluebonnet. In December 2002, Steven spoke to a Bluebonnet representative, who informed Steven that Etan could use the Bluebonnet poles under the pole attachment agreements but that Etan was required to obtain its own easements from property owners. Bluebonnet informed Steven that without a separate easement Etan was trespassing. Steven understood Bluebonnet's position—that Etan was required to obtain its own easements—to contradict Smith's earlier representation that Etan did not need a separate easement. Ronald, likewise, understood that "[w]e had two conflicting stories." Bluebonnet told Steven that it would contact Etan "and try to get this thing worked out," but Steven and Ronald did not hear back from Etan or Bluebonnet. Also during this time period, Ronald went to the courthouse to look for property records of easements. Ronald was not a lawyer but had some experience conducting real estate transactions and reviewing real property records. He was unable to locate any Etan easements on his properties.

Steven and Ronald eventually decided to contact a lawyer in mid to late 2003. The lawyer contacted Bluebonnet and requested documentation regarding the easements on his clients'

properties. Bluebonnet informed the lawyer that locating the documents would take some time. In July 2004, the lawyer received documents from Bluebonnet. No Etan easement was produced. The documents included Bluebonnet easements on the properties, and also included pole attachment agreements stating that "[e]ach party shall be responsible for obtaining its own easements and rights-of-way." In or about August 2004, Ronald and Steven met with their lawyer and reviewed the documents.

Steven filed suit against Etan for trespass in December 2004. Steven's case settled in September 2005. In October 2005, Ronald and Dana Lehmann filed suit pertaining to the Highway 290 property. In April 2006, the Lehmanns added claims pertaining to their Highway 77 property. Ronald testified that he waited to sue on the Highway 77 property because Steven had sued on his Highway 77 property, and Ronald decided to "watch and see" what happened in Steven's suit.

The jury rejected trespass and other tort claims pertaining to the Highway 290 property, and found that Etan had obtained a prescriptive easement on this property.

With respect to the Highway 77 property, the jury found that Etan had trespassed on and made a negligent misrepresentation concerning this property. On the issue of limitations, the jury found in Question 5 that the Lehmanns filed their claims within two years of the date they discovered or in the exercise of reasonable diligence should have discovered the injury to their property. The jury found in Question 6 that Etan fraudulently concealed its wrongful conduct pertaining to the trespass and misrepresentation claims. It found in Question 7 that the Lehmanns knew or in the exercise of reasonable diligence should have known of Etan's fraudulent concealment on July 1, 2004, the date their attorney received the above-described documents relating to the

easements and pole attachment agreements. The trial court rendered judgment on the verdict for actual damages of $15,000 and attorney's fees of $65,000, and also awarded a declaratory judgment and a permanent injunction. The court of appeals affirmed, with one justice dissenting. 308 S.W.3d 489.

We agree with Etan that the Lehmanns' common-law tort claims were barred by limitations. The applicable statute of limitations runs for two years from the day the cause of action accrues. TEX. CIV. PRAC. & REM. CODE § 16.003. Generally, a cause of action accrues when a wrongful act causes a legal injury. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 221 (Tex. 2003). The date a cause of action accrues is normally a question of law. *Id.*; *Exxon Corp. v. Emerald Oil & Gas Co.*, 348 S.W.3d 194, 202 (Tex. 2011).

The Lehmanns contend that Etan's fraudulent concealment made their claims timely. A defendant's fraudulent concealment of wrongdoing can toll the running of the limitations period. *Kerlin v. Sauceda*, 263 S.W.3d 920, 925 (Tex. 2008). However, even if we fully credit the Lehmanns' contention that Etan misrepresented that it had a legal right to use the Bluebonnet easements, and assume without deciding that these statements can be characterized as a fraudulent concealment under Texas law, the legal effect of that concealment does not extend the limitations period indefinitely. "The estoppel effect of fraudulent concealment ends when a party learns of facts, conditions, or circumstances which would cause a reasonably prudent person to make inquiry, which, if pursued, would lead to discovery of the concealed cause of action." *Borderlon v. Peck*, 661 S.W.2d 907, 909 (Tex. 1983); *see also BP Am. Prod. Co. v. Marshall*, 342 S.W.3d 59, 67 (Tex. 2011).

As described above, in December 2000, the Lehmanns discovered that a cable had been placed on their property on the day it was placed there, and knew the next day that Etan had installed the line.

In December 2002, the Lehmanns learned about this Court's *Krohn* decision, and correctly understood it to hold that an electric utility's easement could not be used by a cable television company. Also by this date, (1) Etan had admitted to the Lehmanns that Etan did not have an easement on the property, (2) Bluebonnet had informed the Lehmanns that Etan needed its own easement to use the Bluebonnet poles on the Lehmanns' properties and that without a separate easement Etan was trespassing, (3) the Lehmanns knew they had received conflicting information from Etan and Bluebonnet, and (4) Etan had failed to produce, and Ronald had not independently uncovered, any documentation suggesting that Etan had a right to use the Lehmann property, despite Etan's prior representations that it would provide such documentation.

On these facts, we hold as a matter of law that the estoppel effect of the alleged fraudulent concealment ended in December 2002 at the latest. By that date, the Lehmanns were apprised of facts, conditions, and circumstances sufficient to cause a reasonable person to make inquiry that would lead to the discovery of the concealed cause of action. Because the Lehmanns did not file suit until more than two years after this date, their claims were time-barred. *See Kerlin*, 263 S.W.3d at 925 (rejecting fraudulent concealment finding because, as a matter of law, plaintiff could have discovered existence of claims through reasonable diligence before limitations expired); *Marshall*, 342 S.W.3d at 69 (same); *Emerald Oil*, 348 S.W.3d at 209 (concluding as a matter of law that assertion of fraudulent concealment was unavailing because plaintiffs had "actual knowledge of

alleged injury-causing conduct" more than two years before filing suit); *PPG Indus., Inc. v. JMB/Houston Ctrs. Partners Ltd. P'ship*, 146 S.W.3d 79, 94 (Tex. 2004) (holding that limitations begins to run as a matter of law once claimant is on notice that "something is amiss").

Etan also challenges the trial court's award of declaratory relief. The trial court awarded a declaratory judgment stating that neither Bluebonnet's easements nor Etan's pole attachment agreements with Bluebonnet provided Etan with easements or other rights-of-way on the Lehmanns' properties.

Etan argues that the claims for declaratory judgment were moot because Etan had removed its lines from the Lehmanns' properties prior to trial. We agree. We have recently noted that a request for declaratory judgment is moot if the claim presents "no live controversy." *Tex. A & M Univ.-Kingsville v. Yarbrough*, 347 S.W.3d 289, 290 (Tex. 2011). We further explained that declaratory relief is not warranted unless the claim presents a "substantial controversy" of "immediacy and reality." *Id.* at 291 (quoting *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941)). The trial court had no reason to declare that Etan could not place lines on the Lehmanns' property in the future, absent a reasonable basis for concluding that without a declaratory judgment Etan might do so in defiance of the court's judgment finding it liable for trespass. We see no basis for reaching this conclusion on this record. *Cf. Krohn v. Marcus Cable Assocs., L.P.*, 201 S.W.3d 876, 882 (Tex. App.—Waco 2006, pet. denied) (holding that property owner's request for injunctive relief against cable company was moot once the cable in issue was removed).

The Uniform Declaratory Judgment Act (UDJA) is not appropriately employed to remedy a trespass occurring prior to trial that is the subject of a separate common-law trespass claim. As

the Lehmanns themselves describe the purpose of the Act in their brief, it is intended as a means of determining the parties' rights when a controversy has arisen but before a wrong has been committed, "and is preventative in nature." *See Cobb v. Harrington*, 190 S.W.2d 709, 713 (Tex. 1945) (describing Act as instrumentality wielded "in the interest of preventative justice," and intended as a remedy "when a real controversy has arisen and even before the wrong has actually been committed").

Further, the only apparent benefit to the Lehmanns from the declaratory judgment was the award of attorney's fees under the UDJA. *See* TEX. CIV. PRAC. & REM. CODE § 37.009. We have held that simply repleading a claim as one for a declaratory judgment cannot serve as a basis for attorney's fees, since such a maneuver would abolish the American Rule and make fees "available for all parties in all cases." *MBM Fin. Corp. v. Woodlands Operating Co.*, 292 S.W.3d 660, 669 (Tex. 2009). When a claim for declaratory relief is merely "tacked onto" statutory or common-law claims that do not permit fees, allowing the UDJA to serve as a basis for fees "would violate the rule that specific provisions should prevail over general ones." *Id.* at 670. The declaratory judgment claim must do more "than merely duplicate the issues litigated" via the contract or tort claims. *Id.*

By these standards the declaratory judgment and attorney's fees awarded thereunder were not warranted. The declaratory judgment simply duplicated the issues litigated under the trespass claim by declaring, consistent with the Lehmanns' theory of trespass, that neither Bluebonnet's easements nor the pole attachment agreements between Bluebonnet and Etan gave Etan the right to place its lines on the Lehmanns' properties. We agree with the court of appeals' dissent "that declaratory relief was improper because the declarations in this case add nothing to what would be

implicit or express in a final judgment for the other remedies sought in the same action." 308 S.W.3d at 518 (Waldrop, J., dissenting).[2]

Accordingly, we grant Etan's petition for review, and without hearing oral argument, TEX. R. APP. P. 59.1, we reverse the court of appeals' judgment and render judgment that the Lehmanns take nothing on their claims.

OPINION DELIVERED: December 16, 2011

[2] Etan also challenges, on various grounds, the trial court's award of a permanent injunction and damages. These remedies are available only if liability is established under a cause of action. *See Valenzuela v. Aquino*, 853 S.W.2d 512, 514 n.2 (Tex. 1993) ("No final relief, including a permanent injunction, can be granted in a contested case without a determination of legal liability . . . ."); *Cooper v. Litton Loan Servicing, LP*, 325 S.W.3d 766, 769 (Tex. App.—Dallas 2010, pet. denied) (noting that "[a] permanent injunction is not a cause of action but an equitable remedy," and that "[t]o obtain an injunction a party must first assert a cause of action"). Because, for the reasons above, the Lehmanns' causes of action cannot be sustained, we need not reach these issues.

IN THE SUPREME COURT OF TEXAS

NO. 10-0321

TEXAS DEPARTMENT OF PUBLIC SAFETY, PETITIONER,

v.

STEPHEN JOSEPH CARUANA, RESPONDENT

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

Argued September 14, 2011

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

CHIEF JUSTICE JEFFERSON filed a concurring opinion, in which JUSTICE LEHRMANN joined.

The issue in this case is whether a peace officer's arrest report must be excluded from evidence if not sworn as required by law. Because it is no less a criminal offense to make a false statement in a governmental record than it is to make one under oath, we hold that an officer's failure to swear to a report does not deprive it of the assurance of veracity or render it inadmissible. Consequently, we reverse the court of appeals' judgment[1] and remand the case to that court.

[1] ___ S.W.3d ___ (Tex. App.–Austin 2010).

Stephen Joseph Caruana, age 21, was arrested by state trooper Eric Flores for driving while intoxicated.[2] A person arrested for driving while intoxicated in Texas is deemed to have consented to submit to the taking of a breath or blood specimen to determine its alcohol concentration.[3] Under the state Administrative License Revocation ("ALR") program, if the person refuses to provide a specimen, or if the specimen provided has an alcohol concentration in excess of the legal limit, the Texas Department of Public Safety will automatically suspend the person's driver's license.[4] Flores requested a breath specimen from Caruana and read him the statutory warning about possible consequences of providing or refusing to provide a specimen.[5] Caruana provided a specimen that tested 0.163 and 0.157, about twice the legal limit.

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[2] "A person commits an offense if the person is intoxicated while operating a motor vehicle in a public place." TEX. PENAL CODE § 49.04(a). A person under 21 years of age, a "minor" under the Alcoholic Beverage Code, "commits an offense if the minor operates a motor vehicle in a public place . . . while having any detectable amount of alcohol in the minor's system." TEX. ALCO. BEV. CODE §§ 106.01, 106.041(a).

[3] TEX. TRANSP. CODE § 724.011(a) ("If a person is arrested for an offense arising out of acts alleged to have been committed while the person was operating a motor vehicle in a public place . . . while intoxicated, . . . the person is deemed to have consented, subject to this chapter, to submit to the taking of one or more specimens of the person's breath or blood for analysis to determine the alcohol concentration or the presence in the person's body of a controlled substance, drug, dangerous drug, or other substance.").

[4] TEX. TRANSP. CODE §§ 724.035(a) ("If a person refuses the request of a peace officer to submit to the taking of a specimen, the department shall: (1) suspend the person's license to operate a motor vehicle on a public highway for 180 days . . . ."), 524.012(b) ("The department shall suspend the person's driver's license if the department determines that: (1) the person had an alcohol concentration of a level specified by Section 49.01(2)(B), Penal Code, while operating a motor vehicle in a public place . . . ."); TEX. PENAL CODE § 49.01(1) ("'Alcohol concentration' means the number of grams of alcohol per: (A) 210 liters of breath; (B) 100 milliliters of blood; or (C) 67 milliliters of urine."); *id.* § 49.01(2) ("'Intoxicated' means: . . . (B) having an alcohol concentration of 0.08 or more.").

[5] TEX. TRANSP. CODE § 724.015 (before requesting that a person submit to the taking of a specimen, an officer shall inform the person, orally and in writing, of, e.g., that a refusal or over- limit result will result in a license suspension). Flores read Caruana a "Statutory Warning" from a standard form DIC-24 that stated in part: "You will be asked to give a specimen of your breath and/or blood. . . . If you refuse . . . [,] [y]our license . . . to operate a motor vehicle will be suspended . . . . If you are 21 years of age or older and submit to the taking of a specimen and an analysis of the specimen shows that you have an alcohol content of 0.08 or more, your license . . . to operate a motor vehicle will be suspended . . . ."

Flores filed an arrest report with the Texas Department of Public Safety. When a person provides a specimen that fails the alcohol concentration test, suspension of his driver's license is governed by chapter 524 of the Texas Transportation Code.[6] The arresting officer is required to send the department "a sworn report of information relevant to the arrest."[7] Had Caruana refused to provide the requested specimen, administrative suspension of his driver's license would have been governed by chapter 724 of the Texas Transportation Code. In that situation, the arresting officer must only "make a written report of the refusal" for the department.[8] Chapter 724 does not require the report to be sworn.[9]

The Department suspended Caruana's driver's license, and Caruana requested an administrative hearing to challenge the suspension.[10] At that hearing, conducted by an administrative law judge ("ALJ") employed by the State Office of Administrative Hearings

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[6] TEX. TRANSP. CODE § 524.011(a) ("An officer arresting a person shall comply with Subsection (b) if: (1) the person is arrested for [driving while intoxicated], submits to the taking of a specimen of breath or blood and an analysis of the specimen shows the person had an alcohol concentration of a level specified by Section 49.01(2)(B), Penal Code . . . .").

[7] *Id.* § 524.011(b)(4)(D).

[8] TEX. TRANSP. CODE § 724.032(a)(4); *see also id.* §724.031 (if a person refuses the request for a specimen, "the peace officer shall request the person to sign a statement" regarding the request, warning, and refusal).

[9] *Id.* §724.031.

[10] *See* TEX. TRANSP. CODE § 524.031 ("If, not later than the 15th day after the date on which the person receives notice of suspension . . . , the department receives at its headquarters in Austin, in writing, including a facsimile transmission, or by another manner prescribed by the department, a request that a hearing be held, a hearing shall be held as provided by this subchapter.").

("SOAH"),[11] the Department called Flores to testify and offered his report of the incident.[12] Although the report stated that Flores had sworn to it,[13] he admitted on questioning by Caruana's counsel that he had not actually done so. Caruana's counsel objected to admission of the report on that basis.

Under the Administrative Procedure Act and SOAH rules, ALR proceedings are governed by "the rules of evidence as applied in a non-jury civil case in a district court of this state".[14] Rule 803(8) of the Texas Rules of Evidence, applicable in district courts, states that the following are not excluded from evidence by the hearsay rule:

> Records, reports, statements, or data compilations, in any form, of public offices or agencies setting forth:
>
> (A) the activities of the office or agency;
>
> (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding in criminal cases matters observed by police officers and other law enforcement personnel; or

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[11] *See id.* § 524.033(a) ("A hearing under this subchapter shall be heard by an administrative law judge employed by the State Office of Administrative Hearings.').

[12] Caruana's counsel requested Flores' presence, as the certified breath test operator, pursuant to former 1 TEX. ADMIN. CODE §159.15(a) (2008) (State Office of Admin. Hearings, Hearings) (applicable to cases under Chapter 524 of the Transportation Code), repealed by 34 Tex. Reg. 329 (2009). Under the current provisions, a defendant may request a subpoena from the ALJ for the breath test operator or technical supervisor, under §159.101, and issue a subpoena for other witnesses, under limitations set by those rules. 1 TEX. ADMIN. CODE §§159.101 (Breath Test Operator and Technical Supervisor), .103 (Subpoenas) (2012), adopted by 34 Tex. Reg. 330, 332-333 (2009).

[13] The statement read: "SWORN AND SUBSCRIBED before me on the *14th* day of *January*, *2008* *Scott Haag* ~~Notary Public~~ *Peace Officer #4885*, State of Texas".

[14] TEX. GOV'T CODE § 2001.081 ("The rules of evidence as applied in a nonjury civil case in a district court of this state shall apply to a contested case except that evidence inadmissible under those rules may be admitted if the evidence is: (1) necessary to ascertain facts not reasonably susceptible of proof under those rules; (2) not precluded by statute; and (3) of a type on which a reasonably prudent person commonly relies in the conduct of the person's affairs."); 1 TEX. ADMIN. CODE § 159.211(b) (2012), replacing 1 TEX. ADMIN. CODE § 159.23(b) (2009), adopted by 19 Tex. Reg. 10221, 10228 (1994), repealed by 34 Tex. Reg. 329 (2009).

> (C) in civil cases as to any party and in criminal cases as against the state, factual findings resulting from an investigation made pursuant to authority granted by law;
>
> unless the sources of information or other circumstances indicate lack of trustworthiness.[15]

SOAH's Rule 159.23,[16] in effect at the time, also provided that "[a]n officer's sworn report of relevant information shall be admissible as a public record."[17] Rule 803(8) does not require that reports be sworn to be admissible. Rule 159.23 did not specifically address unsworn reports.

The ALJ overruled Caruana's objection. Flores then testified that everything in the report was true and correct "to the best of my knowledge." Based on the report and the breath test results, the ALJ sustained the suspension of Caruana's driver's license.

Caruana appealed to the county court, which reversed the administrative ruling. On appeal by the Department, a divided court of appeals affirmed the county court.[18] The majority concluded that to admit unsworn reports in evidence would be inconsistent with Rule 159.23's specific provision making sworn reports admissible and would allow the Department to circumvent the statutory requirement that reports be sworn.[19] To sustain the suspension of Caruana's license, the Department was required to prove not only that the alcohol concentration in his breath exceeded the

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[15] TEX. R. EVID. 803(8).

[16] 1 TEX. ADMIN. CODE § 159.23(c)(7) (2008), repealed by 34 Tex. Reg. 329 (2009), replaced by 1 TEX. ADMIN. CODE §159.211 (2012), adopted by 34 Tex. Reg. 334, 335 (2009); *see also* former 1 TEX. ADMIN. CODE §159.15(c) (2009).

[17] 1 TEX. ADMIN. CODE § 159.23(c)(7) (2009).

[18] ___ S.W.3d ___ (Tex. App.–Austin 2010).

[19] *Id.* at ___.

legal limit, but that he had been operating a motor vehicle in a public place at the time and that there was probable cause to arrest.[20] Flores did not provide such evidence himself, and therefore, the majority held, without the report there was no evidence to support the ALJ's ruling.[21] The dissent argued that admission of unsworn reports was not specifically prohibited by Rule 159.23 and is permitted by Rule 803(8).[22]

We granted the Department's petition for review.[23]

The Department argues that the court of appeals misconstrued the text of Rule 159.23. We agree. By expressly providing for the admission of sworn reports, the rule does not imply that unsworn reports are inadmissible. The inverse of a statement is not always true. Thus, if B is true when A is true — all men (A) are mortal (B) — it does not follow that B is false when A is false — all other creatures (not-A) are immortal (not-B). The fact that a sworn report (A) is admissible (B) does not mean that an unsworn report (not-A) is inadmissible (not-B); as a matter of logic, the former simply does not speak to the latter. By expressly making sworn reports admissible, Rule 159.23 does not foreclose the admission of unsworn reports; rather, it leaves the matter to Rule 803(8), which imposes no condition that public offices' reports be sworn.

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[20] "The issues that must be proved at a hearing by a preponderance of the evidence are: (1) whether: (A) the person had an alcohol concentration of a level specified by Section 49.01(2)(B), Penal Code, while operating a motor vehicle in a public place . . . ; and (2) whether reasonable suspicion to stop or probable cause to arrest the person existed." TEX. TRANSP. CODE § 524.035(a). "If the administrative law judge finds in the affirmative on each issue in Subsection (a), the suspension is sustained." TEX. TRANSP. CODE § 524.035(b). "If the administrative law judge does not find in the affirmative on each issue in Subsection (a), the department shall: . . . (2) reinstate the person's driver's license . . . ." TEX. TRANSP. CODE § 524.035(c).

[21] ___ S.W.3d at ___.

[22] *Id.* at ___ (Jones, C.J., dissenting).

[23] 54 Tex. Sup. Ct. J. 538 (Feb. 8, 2011).

Furthermore, the admission of unsworn reports does not subvert the statutory ALR scheme. Chapter 724, which governs cases in which a driver has refused to provide a specimen, has its origins in a 1969 statute, which required an officer's report to be sworn.[24] The requirement assured the report's truthfulness by subjecting the officer to the criminal penalty for perjury.[25] But in the 1973 overhaul of the Texas Penal Code, the Legislature created a new offense — for making a false statement in a governmental record[26] — and set the penalty the same as that for perjury.[27] When the license suspension statute was revised in 1983, the requirement that an officer's report be sworn was dropped in lieu of a provision specifically stating that the report was a governmental record under the Penal Code.[28] That provision was retained for refusal cases when the Legislature, in 1993, adopted a comprehensive, statewide ALR program,[29] but was dropped in the 1995 recodification, obviously as surplusage, given the Penal Code's broad definition of governmental records —

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[24] Act of May 24, 1969, 61st Leg., R.S., ch. 434, § 2, 1969 Tex. Gen. Laws 1468, 1468, formerly TEX. REV. CIV. STAT. ANN. art. 6701*l*-5, § 2.

[25] TEX. PENAL CODE art. 302 (1925) ("Perjury is a false statement, either written or verbal, deliberately and wilfully made, relating to something past or present, under the sanction of an oath, or such affirmation as is by law equivalent to an oath, where such oath or affirmation is legally administered, under circumstances in which an oath or affirmation is required by law, or is necessary for the prosecution or defense of any private right, or for the ends of public justice.").

[26] Act of May 24, 1973, 63rd Leg., R.S., ch. 399, § 1, 1973 Tex. Gen. Laws 883, 948, codified as TEX. PENAL CODE § 37.10 ("A person commits an offense if he: (1) knowingly makes a false entry in, or false alteration of, a governmental record . . . ."); *see* STATE BAR COMM. ON REVISION OF THE PENAL CODE, TEXAS PENAL CODE: A PROPOSED REVISION 270 (Final Draft Oct. 1970) ("[Proposed § 37.10] broadens Texas law to include a prohibition against making false entries in governmental records.").

[27] Both are Class A misdemeanors. Act of May 24, 1973, 63rd Leg., R.S., ch. 399, § 1, 1973 Tex. Gen. Laws 883, 948, codified as TEX. PENAL CODE § 37.10(c); TEX. PENAL CODE § 37.02(b).

[28] Act of May 27, 1983, 68th Leg., R.S., ch. 303, § 4, 1983 Tex. Gen. Laws 1568, 1579, formerly TEX. REV. CIV. STAT. ANN. art. 6701*l*-5, §§ 2(d) and 2(h).

[29] Act of May 29, 1993, 73rd Leg., R.S., ch. 886, § 9, 1993 Tex. Gen. Laws 3515, 3526, formerly TEX. REV. CIV. STAT. ANN. art. 6701*l*-5, § 2(t).

"anything . . . kept by government for information".[30] Though it may certainly be argued that the formality of an oath focuses the affiant's attention on the importance of complete truthfulness, the Legislature concluded that the desired assurance of veracity was provided by the criminal penalty for making a false statement in a governmental record.

The 1993 statute provided for the first time for administrative license suspension in cases when a driver's specimen failed to pass the alcohol concentration test[31] (which were formerly handled by the courts) — now chapter 524. These provisions required that the officer's report be sworn.[32] Though it is not clear why the requirement should have been included for failure cases when it had been abandoned for refusal cases, it is perfectly clear that the purpose of the requirement — an assurance of truthfulness — is as fully served in failure cases by the criminal penalty for making a false statement in a governmental record as it is in refusal cases.

Although chapters 524 and 724 describe the arresting officer's report differently, nothing in the differences suggests that the report should be sworn in failure cases and not sworn in refusal cases. In failure cases, the report must

> (1) identify the arrested person;
>
> (2) state the arresting officer's grounds for believing the person committed the offense;

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[30] Act of May 24, 1973, 63rd Leg., R.S., ch. 399, § 1, 1973 Tex. Gen. Laws 883, 948, codified as TEX. PENAL CODE § 37.01(1), now § 37.01(2).

[31] Act of May 29, 1993, 73rd Leg., R.S., ch. 886, § 1, 1993 Tex. Gen. Laws 3515, 3516-3520, formerly TEX. REV. CIV. STAT. ANN. art. 6687b-1, now TEX. TRANSP. CODE §§ 524.001-.051.

[32] Act of May 29, 1993, 73rd Leg., R.S., ch. 886, § 1, 1993 Tex. Gen. Laws 3515, 3516, formerly TEX. REV. CIV. STAT. ANN. art. 6687b-1, § 3(a), now TEX. TRANSP. CODE § 524.011(b)(4)(D).

(3) give the analysis of the specimen if any; and

(4) include a copy of the criminal complaint filed in the case, if any.[33]

In refusal cases, the report must

> (1) show the grounds for the officer's belief that the person had been operating a motor vehicle . . . while intoxicated; and
>
> (2) contain a copy of:
>
> (A) the refusal statement requested . . . ; or
>
> (B) a statement signed by the officer that the person refused to:
>
> (i) submit to the taking of the requested specimen; and
>
> (ii) sign the requested statement . . . .[34]

In both situations, the report must be filed within five days of the arrest on a form prescribed by the Department.[35] Department regulations echo the statutory requirement that the report be sworn in failure cases but otherwise prescribe the same information in both reports, except for differences due to whether the driver refused to give a specimen or the specimen failed the test.[36] In both instances, a report's veracity is assured by the prohibition against false statements in government records.

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[33] TEX. TRANSP. CODE § 524.011(c).

[34] *Id.* § 724.032(b).

[35] *Id.* §§ 524.011(b)(4), 742.032(c).

[36] *Compare* 37 TEX. ADMIN. CODE § 17.4(1) (2012) (Tex. Dep't Pub. Safety, ALR Reports) (for refusal cases) *with id.* § 17.4(2) (for failure cases).

SOAH's Rule 159.23 applied to officer reports in both refusal and failure cases alike, just as the rule that replaced it does, current Rule 159.211.[37] The court of appeals read the rule to exclude unsworn reports only in failure cases, but nothing in the rule justifies the distinction. If under the rule only sworn reports are admissible, then unsworn reports are inadmissible in both failure and refusal cases. That is Caruana's reading of the rule. But without an arrest report in evidence, the proof necessary to sustain suspension of a license in a refusal case can come only from the arresting officer, who would usually find it difficult, if not impossible, to recall a particular arrest. SOAH's rule, as construed by Caruana, would hinder and often preclude license suspensions in refusal cases. Nothing in chapter 724 suggests that the Legislature intended such a result. The lack of any requirement that the arrest report be sworn should make license suspension easier if anything, certainly not harder. It is unreasonable to conclude that SOAH presumed upon itself to create impediments to license suspension where none existed in the statute by adopting procedural rules for ALR proceedings. The only reasonable conclusion, fully supported by Rule 803(8), is that arrest reports are admissible without being sworn.

The court of appeals was concerned that allowing admission of reports under Rule 803(8) makes Rule 159.23's express admission of sworn reports mere surplusage. We think that SOAH, in crafting its rules, was understandably careful to adhere to all statutory requirements. But chapter 524 requires only that arrest reports be sworn; it does not make verification a condition of inadmissibility, any more than the five-day deadline, or the requirement that approved forms be used. Read literally, Rule 159.23 is consistent with chapter 524.

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[37] 1 TEX. ADMIN. CODE § 159.211.

The court of appeals was also concerned that the Department not be allowed to circumvent chapter 524's requirement of a sworn report. But chapter 524 does not prescribe the consequence for a failure to satisfy that requirement or others. If some sanction should be imposed, it need not be automatic exclusion of an arrest report. If the Department's failure to follow statutory procedures substantively affects a suspension hearing, the ALJ certainly has authority to provide a remedy in that case.

In that regard, we note that public offices' reports which meet the requirements of Rule 803(8) are not excluded from evidence as hearsay "unless the sources of information or other circumstances indicate lack of trustworthiness."[38] In determining whether such circumstances exist, an ALJ has discretion to consider whether an officer's failure to swear to a report casts doubt on the facts stated in it or was merely an oversight. In this case, the ALJ concluded that the report should be admitted. That conclusion was not precluded by SOAH's rules or by chapter 524.

The concurrence argues that "peace officers' reports, when offered by [DPS] in an ALR proceeding, lack the trustworthiness necessary to come within the public records hearsay exception",[39] period, "because of the 'presumed unreliability of law enforcement observations in an adversarial, investigative setting'".[40] We do not share this presumption. Rule 803(8) excludes investigative reports when offered against the defendant in a criminal case, not because law enforcement officers are disinclined to be truthful, but because a criminal case pits law enforcement

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[38] TEX. R. EVID. 803(8).

[39] *Post* at ___.

[40] *Post* at ___ (citing *Fischer v. State*, 252 S.W.3d 375 (Tex. Crim. App. 2008)).

and defendants as adversaries, and conviction should not be based on an officer's testimony offered *in absentia*. ALR proceedings are civil, not criminal. Law enforcement investigation reports are commonly admitted in civil cases — car wrecks, for example. The concurrence cites no authority for the categorical exclusion of such reports in civil cases that, in the concurrence's words, "share[] many characteristics of a criminal prosecution for the same underlying conduct."

The concurrence founders on the fact that Rule 803(8) does not distinguish between sworn and unsworn reports. A report is no less admissible in a civil case merely because it is unsworn, nor is a report any more admissible against the defendant in a criminal case because it is sworn. No case cited by the concurrence draws the distinction it does. The concurrence argues that the administration of an oath "impresses upon [the officer] the seriousness of the matter and reinforces that his statement is subject to penalties if untrue."[41] But by statute, "an unsworn declaration may be used in lieu of a written sworn declaration, verification, certification, oath, or affidavit required by statute or required by a rule, order, or requirement adopted as provided by law" as long as it is "subscribed . . . as true under penalty of perjury".[42] *Id*. § 132.001(c)(2). The verity of a declaration is thus assured by the criminal penalties for perjury, not a raised arm.[43]

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[41] *Post* at ___.

[42] TEX. CIV. PRAC. & REM. CODE § 132.001(a), (c)(2).

[43] The concurrence also argues that because Flores' report fails to state that it was made under penalty of perjury, he did not have "the seriousness of the matter" impressed upon him. But, even accepting the concurrence's interpretation of § 132.001(c)(2) , the report's standard form still includes language showing that it is to be "sworn and subscribed to" by its author. Although the jurat should have been completed by a notary public, instead of Flores, its language still served to put Flores on notice of his duty to tell the truth, of which, of course, he should already have been aware.

Finally, the concurrence would exclude unsworn reports in Chapter 724 "refusal" cases even though nothing in the law requires that they be sworn. Surely a report that meets all requirements of law should be admissible.

The ALJ acted within his discretion in admitting the officer's report. Thus, the judgment of the court of appeals must be reversed. In accordance with the Department request, we remand the case to the court of appeals to consider whether the ALJ's ruling sustaining suspension of Caruana's license was supported by substantial evidence.

Nathan L. Hecht
Justice

Opinion issued: March 30, 2012

IN THE SUPREME COURT OF TEXAS

NO. 10-0321

TEXAS DEPARTMENT OF PUBLIC SAFETY, PETITIONER,

v.

STEPHEN JOSEPH CARUANA, RESPONDENT

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

CHIEF JUSTICE JEFFERSON, joined by JUSTICE LEHRMANN, concurring.

The moment an officer pulls a driver over for suspected drunk driving, the officer and the driver are adversaries. Absent a roadside confession, the driver will plead innocence, and the officer will accumulate evidence to suspend the driver's license or worse. The officer's subsequent report is more than an official public record. At a minimum, it is an accusation that threatens the defendant's ability to get to work or school. The inclination to believe the officer's account is strong—his mission is to protect the public from the scourge of drunk driving. But the law requires skepticism. It insists that the state prove its case before a driver's license may be suspended. In the context of this case, the law requires the officer to swear that the contents of his report are true. I disagree that a court can disregard the officer's refusal to take that oath. Courts, accustomed to mediating adversarial disputes, regularly exclude documents that are created under circumstances

that call their credibility into doubt. Most business records fall outside that category. Records implying criminal conduct do not.

I recognize that license suspension is a civil action, but the underlying accusation bears all the hallmarks of a criminal case in which the individual faces the threat of incarceration. The Texas Legislature has written a statute, and SOAH a rule, that carefully negotiates the roles of the two adversaries before our Court today. Because the driver here had an opportunity to confront his accuser, who took an oath before testifying at the hearing, I concur in the Court's judgment. I cannot join the opinion, however, because the Court's holding would excuse not only the officer's failure to swear to the truth of the report, but would permit suspension of a driver's license even if the officer never formally swears to the facts the report depicts. I would not go that far.

I. Peace officers' unsworn reports are inadmissible under the Texas Rules of Evidence when offered by the Department in an Administrative License Revocation hearing.

The Court reasons that SOAH rule 159.23's statement that sworn reports are admissible as public records does not require the converse. Instead, the Court concludes that unsworn reports about driver intoxication are always admissible as public records under our evidentiary rules. I disagree. I would hold that peace officers' reports, when offered by the Department in an ALR proceeding, lack the trustworthiness necessary to come within the public records hearsay exception. A peace officer's report is admissible only if it satisfies rule 159.23's requirement that it be sworn or if the officer swears in court to its contents. *See* 1 TEX. ADMIN. CODE § 159.23(c)(7) (2009) ("An officer's sworn report of relevant information shall be admissible as a public record."), *repealed* 34 Tex. Reg. 334, 335 (2009) (now codified at 1 TEX. ADMIN. CODE § 159.211); *see also* TEX. TRANSP.

CODE §§ 524.002, 724.003 (granting SOAH rulemaking authority over license suspension hearings).

Texas Rule of Evidence 803(8) permits the admission of public records that suggest the government has no ax to grind:

> **Public Records and Reports**. Records, reports, statements, or data compilations, in any form, of public offices or agencies setting forth:
>
> (A) the activities of the office or agency;
>
> (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding in criminal cases matters observed by police officers and other law enforcement personnel; or
>
> (C) in civil cases as to any party and in criminal cases as against the state, factual findings resulting from an investigation made pursuant to authority granted by law;
>
> *unless the sources of information or other circumstances indicate lack of trustworthiness*.

TEX. R. EVID. 803(8) (emphasis added); *see also* FED. R. EVID. 803(8).[1]

Important to any 803(8) analysis is not just whether the document qualifies under provision (A), (B), or (C), but also whether it satisfies the rule's catchall trustworthiness requirement. Rule 803(8) of both the Federal and Texas Rules of Evidence makes clear that a public record is admissible only if there is no reason to doubt that its author's observations are totally reliable.

The rule provides for the admission of a public record when the author has a legal duty to report it. According to the Federal Advisory Committee, the "[j]ustification for the [public records

[1] The Texas hearsay exception for public records and reports is similar to the federal rule. *Compare* FED. R. EVID. 803(8), *with* TEX. R. EVID. 803(8). When the federal and Texas rules of evidence are similar, we look to federal case law and the Federal Advisory Committee Notes when interpreting the Texas rules. *See Bradley v. State ex rel. White*, 990 S.W.2d 245, 248–49 (Tex. 1999).

hearsay] exception is the assumption that a public official will perform his duty properly and the unlikelihood that he will remember details independently of the record." FED. R. EVID. 803(8) advisory committee's note. This rationale does not extend to the state's use of police reports, which are excluded from the public records exception under both the Federal and Texas Rules of Evidence when offered against a defendant in a criminal case. FED. R. EVID. 803(8)(A)(ii)–(iii);[2] TEX. R. EVID. 803(8)(B)–(C).[3] As noted by the Fifth Circuit,

> [O]stensibly, the reason for this exclusion is that observations by police officers at the scene of the crime or the apprehension of the defendant were not as reliable as observations by public officials in other cases because of the adversarial nature of the confrontation between the police and the defendant in criminal cases.

United States v. Quezada, 754 F.2d 1190, 1193–94 (5th Cir. 1985) (quoting S. REP. NO. 93-1277 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7064). Thus, "the reason for Federal Rule of Evidence 803(8)(B), after which the Texas rule was modeled, was the presumed unreliability of observations that are made by officers at the scene of a crime."[4] *Pondexter v. State*, 942 S.W.2d

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[2] Federal Rule 803(8) was amended in 2011 for stylistic purposes. The substance of former Rule 803(8)(B) and (C) is now found in 803(8)(A)(ii) and (iii).

[3] This exclusion from the public records hearsay exception only precludes a police report from being admitted as documentary evidence against the defendant in a criminal case—it does not prohibit the police officer from testifying about the events observed in the inadmissible report. Although a law enforcement officer's report is inadmissible under Rule 803(8)(B), an officer may refer to the report to refresh memory, (but only after claiming insufficient recollection), and may then testify from refreshed memory, even though the officer's testimony is identical to the contents of his or her offense report. *See* TEX. R. EVID. 803(5); *Baker v. State*, 177 S.W.3d 113, 123 (Tex. App.—Houston [1st Dist.] 2005, no pet.).

[4] The federal courts of appeals are generally in agreement that the public records exception presumes the unreliability of criminal police reports containing on-the-scene observations of police officers when offered by the government in criminal cases. *See United States v. Dowdell*, 595 F.3d 50, 70–71 (1st Cir. 2010) ("The Rule's enactment history indicates that 'the reason for this exclusion is that observations by police officers at the scene of the crime or the apprehension of the defendant are not as reliable as observations by public officials in other cases because of the adversarial nature of the confrontation between the police and the defendant in criminal cases.'") (citation omitted); *United States v. Hatfield*, 591 F.3d 945, 952 (7th Cir. 2010) (noting that the concern of the drafters of the exception in Rule 803(8)(B) was "that reports by law enforcers are less reliable than reports by other public officials because of law

577, 585 (Tex. Crim. App. 1996). While these concerns are not implicated when officers are "conducting routine business matters," they are applicable when the report is the precursor to prosecution. *Id.* at 585.

The Court of Criminal Appeals has explained that "[b]oth the federal and Texas hearsay rules have always excluded the crime-scene or investigation observations of law enforcement officers because their factual observations, opinions, and narrations are made while the officer is 'engaged in the often competitive enterprise of ferreting out crime.'" *Fischer v. State*, 252 S.W.3d 375, 382 (Tex. Crim. App. 2008) (quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948)). The Court of Criminal Appeals noted that "[t]he reason for this exclusion [in 803(8)] is the inherently adversarial nature of any on-the-scene or *post hoc* investigation of a criminal suspect." *Id.* at 382–83.[5]

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enforcers' adversary relation to a defendant against whom the records are sought to be used"); *United States v. Russell*, 156 F.3d 687, 691–92 (6th Cir. 1998) ("[W]e are also mindful that police investigative reports used against a defendant in a criminal trial are generally regarded as unreliable and are excluded as a matter of law as inadmissible hearsay at trial."); *United States v. Brown*, 9 F.3d 907, 911 (11th Cir. 1993) ("In excluding from the public records exception those matters observed by police officers and other law enforcement personnel, Congress was concerned about the adversarial nature of the relationship between law enforcement officials and defendants in criminal proceedings. . . . Congress was aware of the inherent bias that might exist in reports prepared by law enforcement officials in anticipation of trial.") (citations omitted); *United States v. Enterline*, 894 F.2d 287, 290 (8th Cir. 1990) ("It is clear that the exclusion [in Rule 803(8)(B)] concerns matters observed by the police at the scene of the crime. Such observations are potentially unreliable since they are made in an adversary setting, and are often subjective evaluations of whether a crime was committed."); *Quezada*, 754 F.2d at 1193 ("The law enforcement exception in Rule 803(8)(B) is based in part on the presumed unreliability of observations made by law enforcement officials at the scene of a crime, or in the course of investigating a crime . . . ."); *United States v. Hernandez-Rojas*, 617 F.2d 533, 535 (9th Cir. 1980) (stating that "the subjective report made by a law enforcement official in an on-the-scene investigation . . . lack[s] sufficient guarantees of trustworthiness because [it is] made in an adversary setting [and is] likely to be used in litigation").

[5] *See also Cole v. State*, 839 S.W.2d 798, 811–12 (Tex. Crim. App. 1990) (noting that Rule 803(8)'s "broad language, read in light of the legislative history as a whole, leads to the conclusion that Congress' broader concern was with the potentially prejudicial influence of an adversarial setting and with a defendant's confrontation rights"); *McLeod v. State*, 56 S.W.3d 704, 710 (Tex. App.—Houston [14th Dist.] 2001, no pet.) ("The exclusionary clause [in Texas Rule of Evidence 803(8)(B)], which prohibits from this hearsay exception matters observed by police officers, only applies where possible impairment of judgment is implicated, such as observations made by officers at the scene of a crime."); *Perry v. State*, 957 S.W.2d 894, 899 (Tex. App.—Texarkana 1997, pet. ref'd) (noting that the limitation on the admissibility of police reports in the criminal context is "based on the presumption that observations by an officer at a scene of a crime are not as reliable as observations by other public officials" because of "the adversarial nature of the

Therefore, because of the "presumed unreliability of law enforcement observations in an adversarial, investigative setting," under our evidentiary rules, police reports are excluded from the public records hearsay exception in criminal cases when offered against the defendant. *Id.* at 385.

This same rationale applies to the observations and conclusions of police officers made in DWI investigations. As the Court of Criminal Appeals has explained:

> [O]n-the-scene observations and narrations of a police officer conducting a roadside investigation into a suspected DWI offense are fraught with the thought of a future prosecution: the police officer is gathering evidence to use in deciding whether to arrest and charge someone with a crime. Calculation and criminal litigation shimmer in the air; the officer is gathering evidence, he is not making an off-hand, non-reflective observation about the world as it passes by.

Id. at 384.[6]

An ALR hearing shares many characteristics of a criminal prosecution for the same underlying conduct. The Court overlooks the fact that civil cases in which police reports are admissible generally involve two private parties and a claim for monetary damages—cases involving insurance claims or liability for car wrecks, for example.[7] *See United States v. Smith*, 521 F.2d 957,

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confrontation between the defendant and the police in the criminal context") (citations omitted).

[6] Although *Fischer* addressed whether a law enforcement officer's factual observations of a DWI suspect, contemporaneously dictated on his patrol-car videotape, were admissible under the present sense impression exception to the hearsay rule, the Court of Criminal Appeals looked to the rationale behind the exclusion of police reports from the public records exception to conclude that the officer's observations were inadmissible. *Id.* at 376, 383. The Court held that, although the public records exception does not trump the present sense impression exception, the same reasons for excluding law enforcement reports under the public records exception required them to hold that such observations should not be admissible as present sense impressions. *Id.* Although *Fischer* did not involve the precise question before us, its discussion regarding the exclusion of police reports under the public records exception is equally applicable here.

[7] *See, e.g.*, *McRae v. Echols*, 8 S.W.3d 797, 799–800 (Tex. App.—Waco 2000, pet. denied) (holding that an officer's conclusions and opinions regarding a collision between a car and a forklift in an accident report fell within the public records exception to the hearsay rule); *Sciarrilla v. Osborne*, 946 S.W.2d 919, 923–24 (Tex. App.—Beaumont 1997, pet. denied) (holding that state trooper's written report regarding his accident reconstruction investigation and findings fell within the business records and public records exceptions to the hearsay rule).

966 (D.C. Cir. 1975) ("In many cases where police records are offered, the litigation is civil in nature and between private parties. Thus the record has not been prepared at the behest of either party, the [issue regarding the trustworthiness of documents prepared with an eye towards litigation] does not arise, and the records are routinely admitted."). But in this case, the defendant and the State are rivals. In an ALR proceeding, the police officer is an interested party who prepares a criminal offense report to wield the strong arm of the State against a person accused of unlawful acts.[8]

After the Department suspends a defendant's license, the driver has the right to challenge that decision in an administrative hearing. In that adversarial setting, the Department must prove that the State had reasonable suspicion to stop or probable cause to arrest the defendant for driving while intoxicated. TEX. TRANSP. CODE § 524.035. This mirrors the elements of a criminal DWI prosecution. *See* TEX. PENAL CODE § 49.04(a) ("A person commits an offense if the person is intoxicated while operating a motor vehicle in a public place."). As in a criminal trial, the State seeks to punish.

Accordingly, the sources of information comprising a DWI report and the circumstances under which it is made call its trustworthiness into question, generally making it inadmissible as a public record under Texas Rule of Evidence 803(8)—whether the report is sworn or unsworn. *See* TEX. R. EVID. 803(8) (allowing admission of "records, reports . . . of public offices or agencies . . . unless the sources of information or other circumstances indicate lack of trustworthiness"). Trooper Flores's report would be inadmissible as a public record if offered by the State in Caruana's DWI

[8] *Cf. Layton City v. Peronek*, 803 P.2d 1294, 1297 (Utah Ct. App. 1990) (holding that a jail incident report offered by the government in a civil probation revocation proceeding "is on substantially the same footing" as a police report in a criminal case and thus lacks sufficient reliability to be admissible as a business or public record).

prosecution. It should be equally inadmissible as a public record to suspend his license. The only vehicle for admission of peace officer DWI reports in ALR proceedings is SOAH rule 159.23, which requires that the report be *sworn*. This is true even in refusal cases, where peace officers are only required to submit a "written report of the refusal." TEX. TRANSP. CODE § 724.032(a)(4).

The Court correctly notes that rule 159.23 applies to both refusal and failure cases. The court of appeals read rule 159.23 to exclude unsworn reports only in failure cases, relying on the Fourth Court of Appeals' decision in *Texas Department of Public Safety v. Pruitt*, 75 S.W.3d 634 (Tex. App.—San Antonio 2002, no pet.). In *Pruitt*, the court of appeals held that a report in a refusal case need not be sworn in order to be admissible because the officer was not required to file a sworn report under the Transportation Code. *Id.* at 638–39. The court of appeals below agreed with *Pruitt*'s reasoning and concluded that its holding logically implied that in failure cases, where "the statutory language specifically requires a 'sworn report,' as opposed to merely a written one, [the report] must be properly sworn in order to be admissible." ___S.W.3d at___. Thus, the court of appeals read rule 159.23 to exclude unsworn reports in failure cases, but not in refusal cases.

As the Court notes, nothing in the rule justifies this distinction. Rule 159.23 does not differentiate between the two types of cases. To the contrary, the rule requires sworn reports in *both* failure and refusal cases. The Court worries that making an unsworn report inadmissible in both a failure and a refusal case would compromise the Department's case in the latter. According to the Court, "without an arrest report in evidence, the proof necessary to sustain suspension of a license in a refusal case can come only from the arresting officer, who would usually find it difficult, if not impossible, to recall a particular arrest." ___S.W.3d at ___. More burdensome? Yes, but we should

embrace a burden that guards against wrongfully penalizing the innocent. In any event, in refusal cases, the Department need not prove the defendant was actually intoxicated, it need only show that he refused a breath or blood alcohol concentration test.[9] If the officer cannot recall the particular arrest, he may use the report to refresh his memory at the hearing. *See* TEX. R. EVID. 612. Requiring an officer to testify from refreshed memory would no more "hinder and often preclude license suspension hearings in refusal cases," than it would hinder and preclude convictions in criminal DWI trials.[10] ___S.W.3d ___.

II. If, however, the officer appears and is subject to cross- examination under oath, it is within the administrative law judge's discretion to admit an unsworn report.

Forensic science reports are inadmissible in the criminal context because they lack the normal components of trustworthiness. The risk that a conviction will rest on an inaccurate entry on a page motivates its exclusion. That risk can be tolerably minimized when the officer takes an affirmative oath that its contents are true. SOAH rule 159.23 adopts that approach by making it clear that sworn reports are admissible in ALR proceedings. But the rule does not end there. It provides other safeguards for both sworn and unsworn reports:

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[9] In an administrative hearing in which the Department seeks to suspend an individual's license based on a refusal to submit a specimen, it must prove four things: (1) reasonable suspicion or probable cause existed to stop or arrest the person; (2) probable cause existed to believe the person was operating a motor vehicle in a public place while intoxicated; (3) the person was placed under arrest by the officer and was requested to submit to the taking of a specimen; and (4) the person refused to submit to the taking of a specimen on request of the officer. *See* TEX. TRANSP. CODE § 724.042; *Tex. Dep't of Pub. Safety v. Gilfeather*, 293 S.W.3d 875, 879 (Tex. App.—Fort Worth 2009, no pet.) (en banc).

[10] Moreover, in refusal cases, the defendant's signed statement of refusal, *see* TEX. TRANSP. CODE § 724.031, would be admissible against the defendant in an ALR hearing as an admission by party-opponent. *See* TEX. R. EVID. 801(e)(2).

> However, the defendant shall have the right to subpoena the officer. . . . If the defendant timely subpoenas an officer and the officer fails to appear without good cause, *information* obtained from that officer shall not be admissible.

1 TEX. ADMIN. CODE § 159.23 (emphasis added). Thus, rule 159.23 also conditions the admissibility of the peace officer's report on the subpoenaed officer's availability for cross-examination. *See Richardson v. City of Pasadena*, 513 S.W.2d 1, 3–4 (Tex. 1974) (noting that the right to cross-examine a witness is vital and applies even in administrative proceedings). SOAH, by rule, gives the civil ALR defendant safeguards available to criminal defendants to maximize the trustworthiness of information used to suspend or revoke a driver's license.

The U.S. Supreme Court's recent hearsay and Confrontation Clause cases provide a useful comparison. The Confrontation Clause guarantees a defendant's right to confront "those who 'bear testimony'" against him. *Crawford v. Washington*, 541 U.S. 36, 51 (2004). "A witness's testimony against a defendant is thus inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination." *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2531 (2009). Thus, an ex parte out-of-court affidavit is inadmissible in a criminal prosecution for cocaine possession, because the defendant had no opportunity to confront the analyst who prepared the report. *Id.* at 2542.

The Flores report falls within the core class of "testimonial" statements that the U.S. Supreme Court described as "the principal evil at which the Confrontation Clause" is directed. *Crawford*, 541 U.S. at 50.[11] Included within this class are forensic science reports, which are

[11] "To rank as 'testimonial,' a statement must have a 'primary purpose' of 'establish[ing] or prov[ing] past events potentially relevant to later criminal prosecution.'" *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2714 n.6 (2011) (plurality opinion) (citing *Davis v. Washington*, 547 U.S. 813, 822 (2006)).

"affidavits" and are "functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination.'" *Melendez-Diaz*, 129 S. Ct. at 2532 (citation omitted). Because "[f]orensic evidence is not uniquely immune from the risk of manipulation," forensic science "affidavits do not qualify as traditional official or business records." *Id.* at 2536–38. As the Court explained, "business and public records 'are generally admissible absent confrontation . . . because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial." *Bullcoming*, 131 S. Ct. at 2714 n.6 (citing *Melendez-Diaz*, 129 S. Ct. at 2539–40). Thus, forensic reports, containing testimonial statements, may not be introduced against the accused at trial unless the person who made the report is unavailable and the accused had an opportunity, pre-trial, to cross-examine that witness. *Id.* at 2710.

> The right of confrontation includes not only "a personal examination," but also
>
> > (1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth';[and] (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.

Maryland v. Craig, 497 U.S. 836, 845–46 (1990) (citations omitted). These elements of confrontation—physical presence, oath, cross-examination, and observation of the demeanor of the witness by the trier of fact—enhance the accuracy of the fact-finding process by ensuring that evidence admitted against the defendant is reliable and subject to rigorous adversarial testing. *Id.* at 846; *Romero v. State*, 173 S.W.3d 502, 505 (Tex. Crim. App. 2005).

Rule 159.23 provides analogous safeguards. It requires that a peace officer's report be sworn to be admissible. Even a sworn report is inadmissible if an officer does not appear in response to a subpoena. This is likely because an officer's failure to testify in support of his report indicates a lack of trustworthiness. Similarly, I would hold that unsworn reports, offered alone, are inadmissible under our evidentiary rules because they lack the same attributes of trustworthiness. On the other hand, if the officer appears, testifies under oath, and is subject to cross-examination, the concerns inherent in admitting unsworn police reports are minimized because the introduction of the report under such circumstances does not "colli[de] with confrontation rights" of an accused.[12] FED. R. EVID. 803(8) advisory committee's note. As noted by the dissent below, hearsay problems may be overcome by administering an oath, requiring the witness's presence at trial, and subjecting the witness to cross-examination. ___ S.W.3d ___, ___ (Jones, C.J., dissenting) (concluding that "any problems with the perception, memory, narration, or sincerity of the facts stated in the unsworn report were overcome by Officer Flores's live testimony, under oath and subject to cross-examination, that the facts stated in the report were true and correct"). In that situation, it is within

[12] In fact, Congress excluded police reports in criminal cases from the public records exception precisely to avoid admission of evidence that is not subject to cross-examination. 2 KENNETH S. BROUN, MCCORMICK ON EVIDENCE § 296, at 332 (6th ed. 2006); *see also Enterline*, 894 F.2d at 290 ("The exclusion [of matters observed by law enforcement officers in a criminal case] seeks to avoid admitting an officer's report of his observations in lieu of his personal testimony of what he observed."); *United States v. Sawyer*, 607 F.2d 1190, 1193 (7th Cir. 1979) ("In our view, the legislative history of Rules 803(8)(B) and (C) indicates that Congress intended to bar the use of law enforcement reports as a substitute for the testimony of the officer. Thus, Representative Dennis, in offering the amendment which excluded law enforcement reports from admission at criminal trials, stated: What I am saying here is that in a criminal case, . . . we should not be able to put in the police report to prove your case without calling policemen. I think in a criminal case you ought to have to call the policeman on the beat and give the defendant the chance to cross examine him, rather than just reading the report into evidence. That is the purpose of this amendment.") (citing 120 CONG. REC. H2387–88 (statement of Rep. Dennis)); *United States v. Grady*, 544 F.2d 598, 604 (2d Cir. 1976) ("In adopting this exception, Congress was concerned about prosecutors attempting to prove their cases in chief simply by putting into evidence police officers' reports of their contemporaneous observations of crime.").

the judge's discretion to determine whether the lack of trustworthiness accompanying an unsworn report has been overcome.

The Court asserts that the "verity of a declaration is thus assured by the criminal penalties for perjury, not a raised arm." ___S.W.3d at ___. It cites to recently amended section 132.001 of the Civil Practice and Remedies Code, which provides that "an unsworn declaration may be used in lieu of a written sworn declaration, verification, certification, oath, or affidavit required by statute or required by rule." TEX. CIV. PRAC. & REM. CODE § 132.001(a). This version of the statute was not in effect at the time Trooper Flores's report was written, and the statute, by its terms, does not apply to the unsworn declaration in this case. *See* Act of June 17, 2011, 82d Leg., R.S., ch. 847, § 3, 2011 Tex. Gen. Laws 2119, 2120 ("Section 132.001, Civil Practice and Remedies Code, as amended by this Act, applies only to an unsworn declaration executed on or after the effective date of this Act [September 1, 2011]. An unsworn declaration executed before the effective date of this act is governed by the law in effect immediately before the effective date of this Act, and that law is continued in effect for that purpose."). Even if it did, Trooper Flores's report does not comport with the statute's requirement that the unsworn declaration be "subscribed by the person making the declaration as true under penalty of perjury." TEX. CIV. PRAC. & REM. CODE § 132.001(c)(2). Instead, the report merely states that Trooper Flores "certif[ies] the following information is true and correct." By requiring that the person declare under penalty of perjury that the contents of the unsworn declaration are true, section 132.001 serves the same function as requiring a person to take an oath—it impresses upon the author the seriousness of the matter and reinforces that his statement is subject to criminal penalties if untrue.

III. Conclusion

The Court holds that a license may be taken away—even when the driver swears he is innocent—if an officer's unsworn report charges the driver with intoxication. I believe an oath is required. The oath should be taken, as the rule requires, when the officer signs the report. Failing that, the officer must take the oath in court so that the defendant's right to cross-examine his accuser is guaranteed. Because Caruana had the opportunity to confront Trooper Flores after he took an oath in open court, the administrative law judge had discretion to admit the report. For these reasons, I concur in the judgment.

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Wallace B. Jefferson
Chief Justice

OPINION DELIVERED: March 30, 2012

IN THE SUPREME COURT OF TEXAS

NO. 10-0353

PRAIRIE VIEW A&M UNIVERSITY, PETITIONER,

v.

DILJIT K. CHATHA, RESPONDENT

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

Argued December 6, 2011

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

CHIEF JUSTICE JEFFERSON filed a dissenting opinion in which JUSTICE LEHRMANN joined.

The Texas Commission on Human Rights Act (TCHRA)[1] is a comprehensive fair employment practices act and remedial scheme, modeled after Title VII of the federal Civil Rights Act of 1964 (Title VII),[2] that provides the framework for employment discrimination claims in Texas. At issue here is section 21.202 of the TCHRA, which obligates a claimant to file a complaint with the Texas Workforce Commission civil rights division (TWC) or the Equal Employment

[1] As we have previously observed, courts refer to Chapter 21 of the Labor Code as the Texas Commission on Human Rights Act. *Waffle House, Inc. v. Williams*, 313 S.W.3d 796, 798 n.1 (Tex. 2010). However, the Commission on Human Rights has been replaced with the Texas Workforce Commission civil rights division. *Id.* Throughout this opinion, we refer to Chapter 21 of the Labor Code as the TCHRA.

[2] Title VII is codified at 42 U.S.C. §§ 2000e to 2000e-17.

Opportunity Commission (EEOC) not later than the 180th day after the date an allegedly unlawful employment practice occurs. The term "occur" is not defined in the TCHRA, but we have previously interpreted it to mean when a discriminatory employment decision is made—not when the effects of that decision become manifest in later events. Our interpretation mirrored the United States Supreme Court's interpretation of Title VII until recently. But, in 2009, Congress enacted the Lilly Ledbetter Fair Pay Act (Ledbetter Act), amending Title VII to provide that a discriminatory pay decision occurs each time a paycheck is received and not just when an initial salary decision is made.[3] Thus, when a claimant files a discriminatory pay claim under federal law, the 180-day limitations period begins each time a claimant receives a paycheck containing a discriminatory amount. The Texas Legislature has not similarly amended the TCHRA.

As a matter of first impression, we must determine whether the federal Ledbetter Act applies to a claim brought under the TCHRA so that the 180-day limitations period begins anew each time a claimant receives a paycheck containing a discriminatory amount. Because Title VII and the TCHRA are no longer analogous where discriminatory pay claims are concerned, and because the Legislature—and not this Court—is the proper governmental branch to amend the TCHRA, we hold that the federal Ledbetter Act does not apply to a claim brought under the TCHRA. Thus, in accordance with the TCHRA and our precedent, we conclude that a pay discrimination complaint must generally be brought within 180 days of the date the claimant is informed of the compensation decision. We further hold that the 180-day filing requirement is a mandatory statutory requirement

[3] *See* Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111–2, 123 Stat. 5.

that must be complied with before filing suit, and, as such, is a statutory prerequisite to suit under section 311.034 of the Government Code. Because the claimant here failed to timely file her complaint with the TWC, we conclude that her suit is jurisdictionally barred by section 311.034. We therefore reverse the court of appeals' judgment and render judgment dismissing the suit.

I. Factual and Procedural Background

Respondent Dr. Diljit K. Chatha is a professor at Prairie View A&M University (the University). Chatha began employment at the University in 1987 and applied for a promotion from associate professor to full professor in 2003. She was initially denied the promotion but received it in 2004. At that time, she complained to the University that her salary was inequitable but was told there were no funds available for a salary adjustment. About two years after her promotion, Chatha filed a complaint with the EEOC and the TWC, alleging race and nationality-based pay discrimination. Chatha is of Indian national origin. In her complaint, Chatha marked the "continuing action" box, alleging discrimination between September 1, 2005 and September 26, 2005.[4] After receiving right-to-sue notices from the EEOC and the TWC, Chatha filed suit against the University in state court under the TCHRA. The University responded by filing a plea to the jurisdiction, asserting Chatha's TWC complaint was untimely filed pursuant to the 180-day

[4] A claimant may file a complaint with either the EEOC, the federal agency authorized to investigate charges of discrimination, or the TWC, the Texas equivalent. *See* 42 U.S.C. § 2000e-5(e)(1); TEX. LAB. CODE §§ 21.201, .202; 40 TEX. ADMIN. CODE. § 819.41(c). If a state has its own employment discrimination laws, as Texas does, Title VII requires the EEOC to defer charges of discrimination it receives from employees in those states to state or local fair employment practices agencies for at least sixty days, in this case the TWC, so that attempts to resolve disputes can first be undertaken under state law. 42 U.S.C. § 2000e-5(c); *see Schroeder v. Tex. Iron Works, Inc.*, 813 S.W.2d 483, 485 (Tex. 1991) (overruled on other grounds by *In re United Servs. Auto. Ass'n*, 307 S.W.3d 299, 310 (Tex. 2010)). Thus, charges that are filed by Texas employees with the EEOC are contemporaneously filed with the TWC. 42 U.S.C. § 2000e-5(d).

limitations period under the TCHRA. *See* TEX. LAB. CODE § 21.202. The University specifically alleged that Chatha was aware of the alleged discriminatory salary in 2004, yet failed to file a complaint until 2006. Chatha responded that the federal Ledbetter Act applies to a discriminatory pay claim brought under the TCHRA because one of the TCHRA's purposes is to execute the policies of Title VII. *See id.* § 21.001(1). The trial court denied the University's plea.

The University brought an interlocutory appeal, *see* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8), and the court of appeals affirmed, holding that the Ledbetter Act applies to claims brought under the TCHRA, and Chatha's claim was therefore timely because she received a paycheck containing an alleged discriminatory amount within 180 days of the date she filed her complaint with the TWC. 317 S.W.3d 402, 404, 407. In reaching this decision, the court of appeals relied on (1) the general purposes provision of the TCHRA, and (2) two federal district court decisions that had applied the Ledbetter Act to the TCHRA. *Id.* at 407. We granted review to determine whether the Ledbetter Act applies to a pay discrimination claim brought under the TCHRA.[5]

[5] We have jurisdiction over this interlocutory appeal pursuant to Texas Government Code sections 22.001 and 22.225 because the court of appeals in this case held differently from a prior decision of another court of appeals on a question of law material to the resolution of this case. *See* TEX. GOV'T CODE §§ 22.001(a)(2), 22.225 (c); *compare* 317 S.W.3d at 409, *with, e.g.*, *Cooper-Day v. RME Petroleum Co.*, 121 S.W.3d 78, 83–84 (Tex. App.—Fort Worth 2003, pet. denied) (concluding that pay discrimination occurs when an employee is informed of the discriminatory pay, not when the last discriminatory paycheck is received).

II. Analysis

A. Legal Framework

The TCHRA was "enacted to address the specific evil of discrimination and retaliation in the workplace," as well as to coordinate and conform with federal anti-discrimination and retaliation laws under Title VII. *See City of Waco v. Lopez*, 259 S.W.3d 147, 153–55 (Tex. 2008). Although from its inception the TCHRA was not an exact replica of Title VII, both the TCHRA and Title VII similarly define unlawful employment practice,[6] and as part of each act's administrative process impose a strict 180-day statute of limitations for filing an employment discrimination complaint with the appropriate governmental agency, running from the date the alleged unlawful employment practice occurs. The TCHRA provides:

> (a) A complaint under this subchapter must be filed not later than the 180th day after the date the alleged unlawful employment practice occurred.
>
> (b) The [TWC] shall dismiss an untimely complaint.

TEX. LAB. CODE § 21.202.[7] Prior to the federal Ledbetter Act's enactment in 2009, Title VII and the TCHRA contained virtually identical language concerning the 180-day limitations period.

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[6] *Compare* 42 U.S.C. § 2000e-2(a) ("It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."), *with* TEX. LAB. CODE § 21.051 ("An employer commits an unlawful employment practice if because of race, color, disability, religion, sex, national origin, or age the employer: (1) fails or refuses to hire an individual, discharges an individual, or discriminates in any other manner against an individual in connection with compensation or the terms, conditions, or privileges of employment; or (2) limits, segregates, or classifies an employee or applicant for employment in a manner that would deprive or tend to deprive an individual of any employment opportunity or adversely affect in any other manner the status of an employee.").

[7] Similarly, Title VII provides that "[a] charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . . ." 42 U.S.C. § 2000e-5(e)(1).

Although we have always considered the TCHRA's plain language and our precedent in interpreting the TCHRA, *see, e.g.*, *Caballero v. Central Power & Light Co.*, 858 S.W.2d 359, 359–61 (Tex. 1993), we have looked to federal law for guidance in situations where the TCHRA and Title VII contain analogous statutory language, *see, e.g.*, *Specialty Retailers v. DeMoranville*, 933 S.W.2d 490, 492 (Tex. 1996) (per curiam). Therefore, we previously looked to federal case law in interpreting the 180-day limitations provision in section 21.202 for defining when an unlawful employment practice occurs. *See id.* In *Speciality Retailers*, we held that the 180-day limitations period in the TCHRA commences "when the employee is informed of the allegedly discriminatory employment decision, not when that decision comes to fruition." *Id.* at 493. There, an employee was informed that she would be fired if her leave of absence lasted longer than one year. *Id.* at 492. When the employee did not return to work after a year, her employment was terminated. *Id.* We concluded that the 180-day limitations period began when the employee was informed of the alleged discriminatory policy, not when her employment was actually terminated a year later. *Id.* at 493. We noted a distinction between an act of continuing discrimination and an effect of past discrimination, and determined that the termination of her employment after a year's leave of absence could only be considered an effect of past discrimination. *Id.*

We cited as authority United States Supreme Court precedent—specifically, the *Ricks* decision—in reaching our conclusion. *See id.* at 492–93 (citing *Del. State Coll. v. Ricks*, 449 U.S. 250, 258 (1980)). In *Ricks*, a professor was denied tenure, and in accordance with the university's policy regarding unsuccessful tenure applicants, Ricks was instead offered a "terminal" one year contract. 449 U.S. at 253. Two months before his termination, Ricks filed an EEOC complaint

alleging employment discrimination. *Id.* at 254. The Supreme Court held that Ricks's complaint was barred because it was filed more than 180 days after he was notified of the Board's decision to deny tenure. *Id.* at 257–58. It was the denial of tenure that constituted the allegedly discriminatory employment decision, not the actual termination one year later. *Id.* at 258. The Supreme Court noted that it is possible for the effects of a discriminatory employment practice to be most painful at a time far removed from the discriminatory decision itself, but, nonetheless, the discriminatory act occurs when the discriminatory decision is made. *Id*.[8]

Twenty-seven years later, the Supreme Court reaffirmed the holding of *Ricks* in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 628–29 (2007). In *Ledbetter*, the Court recognized that a paycheck containing a discriminatory amount is not a present violation, but rather the effect of a prior act of discrimination. *Id.* at 628. The Court reasoned that the claimant could not shift the discriminatory intent from the initial salary decision to her paychecks, which were issued without discriminatory intent. *Id.* at 629. Although the Court empathized with the employee's policy arguments, it reasoned that those arguments found no support in the statute and that holding as such would be inconsistent with prior precedent. *Id.* at 642–43.

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[8] *See also Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002) (noting that "termination, failure to promote, denial of transfer, [and] refusal to hire" are examples of discrete acts of employment discrimination, and holding that a Title VII plaintiff "can only file a charge to cover discrete acts that 'occurred' within the appropriate time period"); *Lorance v. AT&T Techs., Inc.*, 490 U.S. 900, 905–06 (1989) (observing that a discriminatory act occurs at the time of the discriminatory act, not when the consequences of the act start having a discriminatory effect, and holding that complaints concerning a seniority system occurred when the system was adopted with discriminatory intent); *United Airlines v. Evans*, 431 U.S. 553, 560 (1977) (holding that a challenge to a neutral seniority system "may not be predicated on the mere fact that a past event which has no present legal significance has affected the calculation of seniority credit, even if the past event might at one time have justified a valid claim against the employer").

In response, Congress enacted the Ledbetter Act, which amended Title VII to provide in relevant part:

> [A]n unlawful employment practice occurs, with respect to discrimination in compensation in violation of this subchapter, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, *or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice*.

42 U.S.C. § 2000e-5(e)(3)(A) (emphasis added). Thus, the Ledbetter Act expanded the Title VII limitations period to allow an employee complaining of pay discrimination to file a complaint within 180 days after the receipt of any allegedly discriminatory paycheck.

The Texas Legislature has not similarly amended the TCHRA. Since the Ledbetter Act was enacted in 2009, the Legislature has twice considered but failed to enact proposed legislation conforming the TCHRA to Title VII in determining when an unlawful employment practice occurs in pay discrimination claims.[9] Thus, under the TCHRA, the term "occur" is still statutorily undefined, and the controlling authority for interpreting when an unlawful employment practice occurs remains our holding in *Speciality Retailers*.

Chatha argues that we should nonetheless interpret the TCHRA as incorporating the Ledbetter Act's amendments to Title VII. Chatha primarily relies on the general purposes provision of the TCHRA, which specifies a purpose of executing the policies of Title VII. *See* TEX. LAB. CODE § 21.001(1). Chatha contends that, relying on this provision, we have frequently looked to

[9] *See* Tex. S.B. 280, 82d Leg., R.S. (2011); Tex. S.B. 986, 81st Leg., R.S. (2009).

federal law in interpreting the TCHRA, and should do so here as well. The University counters that this Court has only looked to federal law for guidance in circumstances where Title VII and the TCHRA are analogous and that they are no longer analogous after the Ledbetter Act. We agree with the University.

B. The TCHRA Does Not Incorporate the Ledbetter Act

The general purposes provision of the TCHRA states that one of its purposes is to "provide for the execution of the policies of Title VII of the Civil Rights Act of 1964 and its subsequent amendments." *Id*. We have cited this provision when looking to federal law in interpreting the TCHRA, and have specifically stated that we should correlate the TCHRA with Title VII when possible. *See, e.g.*, *AutoZone, Inc. v. Reyes*, 272 S.W.3d 588, 592 (Tex. 2008) (per curiam). But we have never said that the general purposes provision requires the TCHRA to forever remain identical to Title VII, regardless of subsequent congressional amendments to the federal act. Rather, we consider the plain terms of the TCHRA and our precedent, and look to federal law for guidance only when the relevant provisions of Title VII are analogous. *See In re United Servs. Auto. Ass'n*, 307 S.W.3d 299, 308 (Tex. 2010). Here, although the TCHRA and Title VII were previously analogous regarding when an unlawful employment practice occurs, after the Ledbetter Act, this is no longer true where pay discrimination complaints are concerned. Although Chatha invites us to read the general purposes provision as requiring the incorporation of subsequent amendments made to Title VII into the TCHRA, we decline to do so for several reasons.

First, the TCHRA's plain language does not evidence a legislative intent that Title VII amendments should be automatically incorporated into its provisions. The plain language of a

statute is the surest guide to the Legislature's intent. *See City of DeSoto v. White*, 288 S.W.3d 389, 394 (Tex. 2009). The general purposes provision merely states that the TCHRA's purpose is to provide for the execution of policies embodied in Title VII "*and its subsequent amendments*." TEX. LAB. CODE § 21.001(1). The reference to subsequent Title VII amendments means only that one of the TCHRA's purposes is to execute policies of Title VII as it may be amended, not that those amendments should be automatically incorporated into Texas law. *See Fogle v. Sw. Bell Tel. Co.*, 800 F. Supp. 495, 499 (W.D. Tex. 1992). Indeed, in enacting the TCHRA in 1983, the Legislature could not have foreseen every possible Title VII amendment going forward, and there is no indication the Legislature intended to automatically adopt every conceivable Title VII amendment, however substantive and far-reaching, into the TCHRA.

Second, the TCHRA is not identical to Title VII and the Legislature has not indicated an intent to make it so. For example, the TCHRA requires a plaintiff to file suit within two years after a plaintiff files a charge of discrimination while Title VII lacks this requirement. *See* TEX. LAB. CODE § 21.256. Further, the TCHRA requires a plaintiff to file suit within sixty days of receiving a right-to-sue letter whereas Title VII imposes a deadline of ninety days. *Compare id.* § 21.254, *with* 42 U.S.C. § 2000e-5(f)(1). Had the Legislature intended the provisions of the TCHRA and Title VII to be identical, it could have conformed these nonanalogous provisions.

Finally, the Legislature has never treated the general purposes provision as automatically incorporating amendments made to Title VII into the TCHRA, but has instead acted legislatively when it wishes to conform the TCHRA to Title VII. One example is when, similar to the Ledbetter Act, Congress abrogated Supreme Court precedent in the context of discriminatory seniority systems.

In 1989, the Supreme Court held that complaints regarding a discriminatory seniority system must be brought within 180 days after the adoption of the system, not when employees experience the adverse effects of that system. *Lorance v. AT&T Techs., Inc.*, 490 U.S. 900, 907–08 (1989). After *Lorance*, Congress amended Title VII to allow liability from an intentionally discriminatory seniority system not only at the time of its adoption but also at the time of its application. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1072, 1078–79.[10] After Congress enacted this amendment, the Texas Legislature followed suit by amending the TCHRA to conform it to the new federal amendments concerning seniority systems.[11] TEX. LAB. CODE § 21.127. If the general purposes provision automatically incorporated amendments made to Title VII, subsequent enactments by the Legislature would have been wholly unnecessary.

Nonetheless, Chatha points to our decision in *Caballero* as support for her assertion that this Court has previously interpreted the general purposes provision to incorporate Title VII provisions into the TCHRA. But *Caballero* does not support this proposition. There, we considered whether a litigant who is authorized to proceed in court under the TCHRA is entitled to a jury trial on damages. *Caballero*, 858 S.W.2d at 359. An employee filed suit against his employer for discrimination and, after a jury trial favorable to the employee, the trial court entered judgment permitting recovery of monetary damages. *Id.* The court of appeals, however, concluded that

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[10] The Ledbetter Act parallels the language of this amendment with respect to pay discrimination claims. *Compare* 42 U.S.C. §2000e-5(e)(2), *with* 42 U.S.C. §2000e-5(e)(3)(A).

[11] Similarly, the Legislature acted in 2009 to amend the TCHRA following congressional amendments to the Americans with Disabilities Act. *Compare* ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553, 3555–58, *with* Act of May 27, 2009, 81st Leg., R.S., ch. 337, §§ 2–5, 2009 Tex. Gen. Laws 868, 869–70.

because the TCHRA is substantially an equitable statute, an employee was first required to obtain an injunction against his employer's conduct before being entitled to a jury trial. *Id.* We reversed, concluding that the court of appeals' reading of the relevant statutes erroneously turned a permissive procedure into a mandatory one, and the effect of that reading was inconsistent with the TCHRA as a whole. *Id.* at 359–60. We further observed that our construction of the relevant statutes was consistent with our precedent in injunction proceedings. *Id.* at 361. Only then did we note that one stated purpose of the TCHRA is to coordinate and conform TCHRA with Title VII, *id.*, and that Congress had recently amended Title VII to clarify that a party seeking compensatory or punitive damages may demand a jury trial, *id.* n.4. Thus, we looked to the plain terms of the TCHRA and relevant Texas case law in reaching our holding and merely observed that our holding was in line with recent amendments to Title VII.

Finally, Chatha points to two federal district court decisions that predicted Texas courts would abandon prior precedent and follow the Ledbetter Act in deciding when a discriminatory pay decision occurs under the TCHRA. *See Klebe v. Univ. of Tex. Sys.* (*Klebe II*), 649 F. Supp. 2d 568, 571 (W.D. Tex. 2009); *Lohn v. Morgan Stanley DW, Inc.*, 652 F. Supp. 2d 812, 829 (S.D. Tex. 2009). *Klebe II* stated that the Ledbetter Act simply supplied a missing definition of the term "occurred" that was absent from prior law. *See* 649 F. Supp. 2d at 571. Thus, the *Klebe II* court suggested that if the TCHRA and Title VII are expressly different, courts should follow state law, but if the TCHRA is silent—such as on the meaning of "occur"—courts should follow the now-defined meaning of "occur" in Title VII. *See id.*

We respectfully disagree that when Congress enacted the Ledbetter Act, it merely supplied a missing definition. Rather, by amendment, it carved out an exception for pay discrimination claims to the already well-settled *Ricks* test for when an unlawful employment practice occurs. And while it is true that the TCHRA—like Title VII before the Ledbetter Act—is statutorily silent as to the definition of "occur," we have previously held that an unlawful employment practice occurs when the employee is informed of the allegedly discriminatory employment decision. *See Specialty Retailers*, 933 S.W.2d at 493. But, unlike Congress, the Texas Legislature has not crafted an exception to this rule for pay discrimination claims. As we have explained, it is the province of the Legislature to determine whether to enact an exception similar to the Ledbetter Act in the context of pay discrimination claims under the TCHRA. For this Court to apply a nonanalogous federal statute like the Ledbetter Act in the absence of legislative action would require us to abdicate our role as interpreters of the law in favor of a lawmaking function. We decline to take that role.

C. The TCHRA Bars Chatha's Pay Discrimination Claims

Having concluded that the Ledbetter Act does not apply to Chatha's claims, we next determine whether Chatha's complaint was untimely filed under the TCHRA. Chatha does not argue her claims are timely if we conclude the Ledbetter Act does not apply. Nonetheless, because we have never directly addressed when a pay discrimination complaint must be filed under the TCHRA, we consider whether Chatha's complaint was untimely. Because the TCHRA and Title VII are no longer analogous as to when a discriminatory pay practice occurs, we look solely to our precedent in making this determination. In *Speciality Retailers*, we held that the 180-day limitations period in the TCHRA begins "when the employee is informed of the allegedly discriminatory employment

decision, not when that decision comes to fruition." 933 S.W.2d at 493. This is because the discriminatory employment decision is the practice made with discriminatory intent. Our rule applies with equal force in the context of pay discrimination decisions. *See Klebe v. Univ. of Tex. Sys*. (*Klebe I*), No. 03-05-00527-CV, 2007 WL 2214344 (Tex. App.—Austin 2007, no pet.) (applying our general rule in *Specialty Retailers* to pay discrimination claims); *Cooper-Day v. RME Petroleum Co.*, 121 S.W.3d 78, 85 (Tex. App.—Fort Worth 2003, pet. denied) (same).[12]

In pay discrimination cases, the setting of an alleged discriminatory pay rate is a discrete act—that is, the only act taken with a discriminatory motive is the pay-setting decision. Subsequent paychecks containing an alleged discriminatory pay amount are merely consequences of past discrimination and do not constitute an unlawful employment practice under the TCHRA. Thus, an employee must file a complaint under th e TCHRA within 180 days of the date she is informed of the alleged discriminatory pay decision.[13] Here, Chatha was informed of the alleged discriminatory pay decision when she was promoted to full professor in 2004, yet she did not file a complaint with the TWC or the EEOC until 2006.[14] Thus, Chatha's complaint was untimely filed under section 21.202. *See* TEX. LAB. CODE § 21.202.

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[12] The court of appeals here acknowledged that if the Ledbetter Act did not apply, each new paycheck would not constitute a new occurrence and Chatha's complaint would be untimely. 317 S.W.3d at 406.

[13] We note that a situation could arise where an employer has adopted a facially discriminatory payment system that would potentially constitute an act of intentional discrimination anytime the employer issued a check to a disfavored employee. *See Ledbetter*, 550 U.S. at 634; *Cooper-Day*, 121 S.W.3d at 84. However, neither party alleges that situation applies here.

[14] Chatha's complaint of discrimination states that the last day of discrimination was in September 2005. However, even accepting this as true, her complaint was still filed outside of the 180-day limitations period because she did not file her complaint until September 2006.

D. The University's Plea to the Jurisdiction

Having concluded that Chatha's complaint was untimely filed under the TCHRA, we next determine whether that failure is a jurisdictional bar to suit. At the trial court, the University filed a combined motion for summary judgment and plea to the jurisdiction, asserting that because Chatha failed to comply with section 21.202, the trial court lacked jurisdiction over the suit. The Legislature has mandated that all statutory prerequisites to suit are jurisdictional in suits against governmental entities. TEX. GOV'T CODE § 311.034. Here, it is undisputed that compliance with section 21.202 is mandatory and that the University timely raised Chatha's failure to comply at the trial court. Thus, as we will explain below, we conclude that because the University is a governmental entity, and compliance with section 21.202 is a statutory prerequisite to suit under Texas Government Code section 311.034, the University's plea should have been granted and the case dismissed.[15]

1. Statutory Prerequisite to Suit Under Section 311.034 of the Texas Government Code

Since the Legislature amended section 311.034 of the Government Code in 2005, we have not construed its reach. Because there is some confusion among the courts of appeals about section 311.034's scope, we deem it prudent to review the jurisprudential context from which the statute was amended.

For decades, Texas courts followed the rule we announced in *Mingus v. Wadley*, establishing that when a cause of action is derived from statute, strict compliance with all statutory prerequisites

[15] Because we conclude section 21.202 is a statutory prerequisite to suit under section 311.034, and is thus a jurisdictional requirement under that section, we need not decide whether section 21.202 itself is jurisdictional in nature.

is necessary to vest a trial court with jurisdiction. 285 S.W. 1084, 1087 (Tex. 1926). But in 2000, in *Dubai Petroleum Co. v. Kazi*, we quoted the Restatement (Second) of Judgments in noting that "'the modern direction of policy is to reduce the vulnerability of final judgments to attack on the ground that the tribunal lacked subject matter jurisdiction,'" 12 S.W.3d 71, 76 (Tex. 2000) (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 11 cmt. b, at 118 (1982)), and "overrule[d] *Mingus* to the extent that it characterized the plaintiff's failure to establish a statutory prerequisite as jurisdictional," *id*. Because *Dubai* involved private litigants, courts of appeals struggled with its application in cases against governmental defendants, citing the apparent dichotomy of *Dubai*'s holding with the basic tenets of sovereign immunity and our treatment of the doctrine in statutory causes of action. *See, e.g.*, *King v. Tex. Dep't of Human Servs.*, 28 S.W.3d 27, 31 (Tex. App.—Austin 2000, no pet.).

In 2004, we expanded our holding in *Dubai* to governmental entities in *Loutzenhiser*, bringing clarity to any lingering confusion in the lower courts. *Univ. of Tex. Sw. Med. Ctr. at Dallas v. Loutzenhiser*, 140 S.W.3d 351, 359 (Tex. 2004). There, we held that because the pre-suit notice requirement in section 101.106(a) of the Texas Tort Claims Act was not a condition of the statute's waiver of immunity, the failure to provide it was not a jurisdictional defect. *Id.* at 365; *see Colquitt v. Brazoria Cnty*, 324 S.W.3d 539, 542 (Tex. 2010). We reasoned that because that provision states "[a] governmental unit is *entitled* to receive notice," there was no question it was a mandatory statutory requirement; but, because it did not specify the consequences of a failure to provide notice, we concluded it was not a condition precedent to suit and the failure to give notice would not deprive the trial court of jurisdiction. *Loutzenhiser*, 140 S.W.3d at 359, 365; *see* TEX. CIV. PRAC. & REM.

CODE § 101.101(a); *see also Colquitt*, 324 S.W.3d at 543. The Legislature responded to *Loutzenhiser* in 2005, amending section 311.034 of the Government Code, entitled "Waiver of Sovereign Immunity," to make notice requirements, and all other statutory prerequisites to suit, jurisdictional as to governmental entities:

> In order to preserve the legislature's interest in managing state fiscal matters through the appropriations process, a statute shall not be construed as a waiver of sovereign immunity unless the waiver is effected by clear and unambiguous language . . . . *Statutory prerequisites to a suit, including the provision of notice, are jurisdictional requirements in all suits against a governmental entity*.

See TEX. GOV'T CODE § 311.034 (emphasis added); Act of May 25, 2005, 79th Leg., R.S., ch. 1150, § 1, 2005 Tex. Gen. Laws 3783, 3783. This amendment evinces the Legislature's intent that all statutory prerequisites are now jurisdictional requirements as to governmental entities and are properly asserted in a plea to the jurisdiction. *See Univ. of Tex. Sw. Med. Ctr. at Dallas v. Estate of Arancibia*, 324 S.W.3d 544, 546 (Tex. 2010); *Colquitt*, 324 S.W.3d at 543.

Accordingly, we must determine whether the 180-day filing deadline in the TCHRA is a statutory prerequisite to suit under section 311.034. We rely on statutory interpretation principles to ascertain and "give effect to the Legislature's intent as expressed by the statute's language." *Galbraith Eng'g Consultants, Inc. v. Pochucha*, 290 S.W.3d 863, 867 (Tex. 2009). We use definitions prescribed by the Legislature and any particular meaning the words have acquired. *City of Rockwall v. Hughes*, 246 S.W.3d 621, 625 (Tex. 2008) (citing Texas Government Code section 311.011(b)).

The term "statutory prerequisite" has three components. First, it is of obvious mention that in order to fall within the ambit of section 311.034, a prerequisite must be found in the relevant

statutory language. *See Colquitt*, 324 S.W.3d at 543 (recognizing that although the statute called for pre-suit notice, it also provided that formal notice is not required when the government has obtained timely actual notice, and thus because the government had actual notice, the failure to provide formal notice did not act as a statutory prerequisite to suit). Second, the prerequisite must be a requirement.[16] And finally, the term "pre" indicates the requirement must be met before the lawsuit is filed. *See Roccaforte v. Jefferson Cnty.*, 341 S.W.3d 919, 925 (Tex. 2011) (holding that post-suit notice requirement was not jurisdictional, even in light of section 311.034, because post-suit notice is not a "prerequisite" to suit). Thus, according to the plain language of section 311.034, the term "statutory prerequisite" refers to statutory provisions that are mandatory and must be accomplished prior to filing suit.

This interpretation is supported by the particular meaning the term "statutory prerequisite" has acquired in our precedent. In drafting section 311.034, the Legislature took special care to use the term we articulated in *Dubai*. While in *Mingus* we held that all "statutory provisions are mandatory and exclusive," 285 S.W. at 1087, in *Dubai* we "overrule[d] *Mingus* to the extent that it characterized the plaintiff's failure to establish a *statutory prerequisite* as jurisdictional," 12 S.W.3d at 76 (emphasis added). With the 2005 amendment to section 311.034—that *statutory prerequisites* are jurisdictional in all suits against a governmental entity—the Legislature effectively abrogated our holding in *Loutzenhiser* and reverted to our broader holding in *Mingus* in suits against a governmental entity. *See Mingus*, 285 S.W. at 1087 (concluding that in suits against a governmental

[16] The common meaning of the word requisite is "essential," "necessary." WEBSTER'S NEW COLLEGIATE DICTIONARY 976 (1980).

entity, "where the cause of action and remedy for its enforcement are derived not from the common law but from statute, the statutory provisions are mandatory and exclusive, and must be complied with in all respects or the action is not maintainable"). The Legislature's mandate is clear: In a statutory cause of action against a governmental entity, the failure to adhere to the statute's mandatory provisions that must be accomplished before filing suit is a jurisdictional bar to suit.[17]

Our interpretation is consistent with the doctrine of sovereign immunity. Sovereign immunity bars suits against the state and its entities, and this immunity remains intact unless surrendered in express and unequivocal terms by the statute's clear and unambiguous waiver. TEX. GOV'T CODE § 311.034; *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225–26 (Tex. 2004). In this way, the Legislature specifically carves out particular substantive claims for which the State will consent to suit and provides the procedures a litigant must follow to obtain such waiver. We have observed that in order to allow the Legislature to protect not only its policy-making function but also to preserve its interest in managing state fiscal matters, this Court consistently defers to the Legislature to waive immunity from suit. *See, e.g.*, *Harris Cnty. Hosp. Dist. v. Tomball Reg'l Hosp.*, 283 S.W.3d 838, 848 (Tex. 2009) ("'In a world with increasingly complex webs of governmental units, the Legislature is better suited to make the distinctions, exceptions, and limitations that different situations require.'") (quoting *City of Galveston v. State*, 217 S.W.3d 466,

[17] It is relevant to note that the Legislature has also made clear that statutory prerequisites are not only mandatory but also jurisdictional in the context of a statute's filing limitations period in wage claims. In *Igal v. Brightstar Information Technology Group, Inc.*, we held that a Texas Labor Code Chapter 61 filing limitations period was mandatory but not jurisdictional. 250 S.W.3d 78, 86 (Tex. 2008). In response to this holding, the Legislature amended Chapter 61 to clarify that the 180-day filing deadline for wage claims is jurisdictional and to require the dismissal of untimely wage claims for lack of jurisdiction. *See* TEX. LAB. CODE § 61.051(c) ("The 180-day deadline is a matter of jurisdiction."); *id.* § 61.052 ("If a wage claim is filed later than the date described by Section 61.051(c), the examiner shall dismiss the wage claim for lack of jurisdiction.").

469 (Tex. 2007))); *Tex. Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 857 (Tex. 2002) ("We again reaffirm that it is the Legislature's sole province to waive or abrogate sovereign immunity."). Thus, it is the Legislature's function to determine what steps a litigant must take before the state's immunity is waived. *See Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 660 (Tex. 2008) ("[T]he Legislature . . . has consented to suits brought under the TCHRA, provided the procedures outlined in the statute have been met."). Although section 311.034's scope is fairly sweeping, it is consistent with the purpose of sovereign immunity and within the Legislature's discretion to determine the procedures required before the State's immunity is waived.

Having construed the meaning of the term "statutory prerequisite," we turn to whether Chatha's failure to comply with the requirements of section 21.202 is a jurisdictional bar to her suit against the University. As mentioned, section 21.202 provides:

> (a) A complaint under this subchapter must be filed not later than the 180th day after the date the alleged unlawful employment practice occurred.
>
> (b) The [TWC] shall dismiss an untimely complaint.

TEX. LAB. CODE § 21.202.

Since the 2005 amendment to section 311.034, three courts of appeals have specifically addressed whether the 180-day filing deadline in the TCHRA is a statutory prerequisite to suit as contemplated by section 311.034. All three concluded that it is.[18] We agree.

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[18] *Comptroller v. Landsfeld*, 352 S.W.3d 171, 177–78 (Tex. App.—Fort Worth 2011, pet. denied); *Lamar Univ. v. Jordan*, No. 09-10-00292-CV, 2011 WL 550089, at *5 (Tex. App.—Beaumont Feb. 17, 2011, no pet.) (stating that "[t]he Labor Code filing deadlines are jurisdictional in cases involving statutory requirements relating to governmental entities"); *Tex. Dep't. of Health v. Neal*, No. 03-09-00574-CV, 2011 WL 1744966, at *3 (Tex. App.–Austin May 6, 2011, no pet.) (reasoning that the waiver of sovereign immunity under the TCHRA applies "only if the claimant strictly satisfies the procedural requirements outlined in Chapter 21").

We have repeatedly affirmed that any purported statutory waiver of sovereign immunity should be strictly construed in favor of retention of immunity. *See, e.g.*, *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 696 (Tex. 2003). Although our precedent establishes that the TCHRA clearly and unambiguously waives sovereign immunity, it is a *limited* waiver of immunity. *See Mission Consol. Indep. Sch. Dist.*, 253 S.W.3d at 660. The TCHRA is a statutory cause of action with no remedy at common law. As we have recently stated, it does not create subject matter jurisdiction in Texas courts; rather, a claimant can bring suit under the TCHRA against a governmental entity only after a claimant strictly satisfies the procedural requirements outlined in the TCHRA. *Id.* ("[T]he Legislature . . . has consented to suits brought under the TCHRA, provided the procedures outlined in the statute have been met."). In sum, we hold that section 21.202's administrative filing requirement is a mandatory statutory requirement that must be complied with before filing suit, and, as such, is a statutory prerequisite under section 311.034. Because Chatha failed to timely file her complaint with the TWC in accordance with the requirements of section 21.202, her suit against the University is jurisdictionally barred.

2. Response to the Dissent

Ignoring the plain language of section 311.034 and the Legislature's unequivocal abrogation of our decision in *Loutzenhiser*, the dissent posits that the failure to timely file a complaint with the TWC within 180 days is not a statutory prerequisite to suit. To support its argument, the dissent first attempts to draw a distinction based on whether the Legislature has specifically articulated that the pre-suit task must be accomplished before filing suit. This is a distinction without a difference. It is the Legislature that establishes the timeline for filing suit and the mandatory tasks that must be

completed before filing; a statutory provision that is mandatory and must be complied with before filing suit is sufficient to fall within the ambit of section 311.034. The dissent's suggestion that the Legislature must specifically articulate in every instance that the plaintiff must comply with a provision or be barred from filing suit not only inexplicably constrains the plain language of section 311.034, but also renders the 2005 amendment to that statute meaningless. *See Presidio Indep. Sch. Dist. v. Scott*, 309 S.W.3d 927, 931 (Tex. 2010).

Moreover, the dissent's argument mirrors the rationale we used in *Loutzenhiser*, where we reasoned that because the pre-suit notice provision was "not a condition of the Tort Claims Act's waiver of immunity as other provisions are," the failure to provide it did not deprive the court of jurisdiction. 140 S.W.3d at 365. But the dissent's analysis is flawed. The 2005 amendment to section 311.034 expressly rejected this reasoning, and in turn made notice, along with other statutory prerequisites, conditions of a statute's waiver of immunity. We can find no logical basis for concluding, as our dissenting colleagues do, that pre-suit notice is different from any other mandatory statutory prerequisites provided by the Legislature, such as the pre-suit administrative filing requirement at issue here. Following the 2005 amendment to section 311.034, we concluded that mandatory pre-suit notice to a governmental defendant is a statutory prerequisite, whether or not the Legislature has specifically mandated that a plaintiff may not file suit until providing notice. *See Arancibia*, 324 S.W.3d at 547. We acknowledge that some courts of appeals have carved out specific provisions, such as certain filing deadlines, as non-jurisdictional.[19] But we agree with the

[19] *See, e.g.*, *Tex. Dep't of Criminal Justice v. Guard*, No. 10-06-00065-CV, 2007 WL 1119572, at *3 (Tex. App.–Waco 2007, no pet.) ("[A] filing period is not an act that must be performed *prior* to filing suit and so is not a statutory prerequisite.").

other courts of appeals that have relied on our holdings in *In re United Services Automobile Ass'n* and *Mission Consolidated Independent School District*[20] for the proposition that a mandatory statutory provision is a statutory prerequisite under section 311.034, provided it is to be complied with prior to filing suit.[21] Under section 311.034, a statutory requirement commanding action before filing suit is a statutory prerequisite. *See, e.g.*, *In re United Servs. Auto. Ass'n*, 307 S.W.3d at 299. Thus, a statutory prerequisite to suit, whether administrative (such as filing a charge of discrimination) or procedural (such as timely filing a lawsuit) is jurisdictional when the defendant is a governmental entity. *See* TEX. CIV. PRAC. & REM. CODE § 311.034.

The dissent worries that under our holding, equitable defenses could potentially be urged against private employers but not governmental entities. However, the dissent's position invades the domain of the Legislature and cuts against the very nature of sovereign immunity. Because a governmental entity may challenge the denial of a plea to the jurisdiction in an interlocutory appeal, TEX. CIV. PRAC. & REM. CODE § 51.014, the entity may effectively avoid the time and expense of litigating the merits of a case by first raising the statutory prerequisite issue under section 311.034.

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[20] *In re United Servs. Auto. Ass'n*, 307 S.W.3d at 310 ("While the Legislature could make the Labor Code filing deadlines jurisdictional, as it has in cases involving statutory requirements relating to governmental entities, *see* TEX. GOV'T CODE § 311.034 (providing that 'statutory prerequisites to a suit, including the provision of notice, are jurisdictional requirements in all suits against a governmental entity'), it has not done so here."); *Mission Consol. Indep. Sch. Dist.*, 253 S.W.3d at 660 ("The Legislature . . . has consented to suits brought under the TCHRA, provided the procedures outlined in the statute have been met.").

[21] *See, e.g.*, *Jones v. State Bd. of Educator Certification*, 315 S.W.3d 237, 240 (Tex. App.–Austin 2010, pet. denied) (stating that, "[i]n suits against governmental entities, a timely filed petition for judicial review is a statutory prerequisite to suit, so that failure to comply deprives the trial court of jurisdiction"); *El Paso Indep. Sch. Dist. v. Alspini*, 315 S.W.3d 144, 151 (Tex. App.–El Paso 2010, no pet.) (holding that the two-year limitations deadline to file suit under the TCHRA is a statutory prerequisite contemplated by section 311.034).

The potential absence of equitable defenses against governmental entities that retain their immunity is sovereign immunity's most basic tenet.

Finally, the dissent relies on the contrast between Title VII and the TCHRA, oddly suggesting that procedural differences under the two statutes would impose an unworkable dichotomy. The dissent suggests that equitable defenses will be available under Title VII, but not under the TCHRA when a claimant files an untimely complaint against a governmental entity. But given the 2005 amendment to section 311.034, looking to federal case law for guidance in determining the jurisdictional nature of the TCHRA's 180-day filing deadline is inappropriate when a claimant files suit against a governmental entity. Although we look to federal law for guidance in situations where the TCHRA and Title VII contain analogous statutory language, *see, e.g.*, *In re United Servs. Auto. Ass'n*, 307 S.W.3d at 308, that is not the case here. Congress has not enacted a provision comparable to section 311.034. Thus, we do not look to federal case law for guidance, as it would provide none.

In sum, the dissent's approach wholly ignores the Legislature's straightforward mandate that in suits against the government, statutory prerequisites are jurisdictional. The Legislature has made clear that the failure to file an administrative complaint within 180 days of the alleged unlawful employment discrimination by a governmental entity is a jurisdictional bar because it is a statutory prerequisite to suit under section 311.034 of the Government Code. Thus, because Chatha failed to file her complaint with the TWC within 180 days after the alleged unlawful employment practice occurred, the University properly asserted a plea to the jurisdiction, and the plea should have been granted. *See* TEX. LAB. CODE § 21.202(a) ("A complaint under this subchapter must be filed not later than the 180th day after the date the alleged unlawful employment practice occurred.").

III. CONCLUSION

It does not escape our attention that it may be difficult for employees to discover discriminatory policies because of the secrecy of compensation decisions. *Ledbetter*, 550 U.S. at 645, 649–50 (Ginsberg, J., dissenting). Moreover, we recognize the potential difficulty facing employers and employees in having the 180-day limitations period for filing a pay discrimination complaint accrue at different times under Title VII and the TCHRA. But we are not the law-making body. We are called to interpret and apply the law as it is enacted by the Legislature. Our precedent establishes that the 180-day limitations period in the TCHRA begins "when the employee is informed of the allegedly discriminatory employment decision, not when that decision comes to fruition." *Specialty Retailers*, 933 S.W.2d at 493. Congress has created an exception in the Ledbetter Act for pay discrimination claims brought under Title VII; the Texas Legislature has not. We decline to adopt federal statutory language that the Legislature has failed to similarly enact into state law. We therefore reverse the court of appeals' judgment and render judgment dismissing the suit.

Eva M. Guzman
Justice

OPINION DELIVERED: August 31, 2012

IN THE SUPREME COURT OF TEXAS

NO. 10-0353

PRAIRIE VIEW A&M UNIVERSITY, PETITIONER,

v.

DILJIT K. CHATHA, RESPONDENT

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

Argued December 6, 2011

CHIEF JUSTICE JEFFERSON, joined by JUSTICE LEHRMANN, dissenting.

"Jurisdiction" is a term of profound consequence. Without it, a court lacks the power of adjudication. With it, a court may bind parties to a judgment. In the past, Texas courts have used the term casually, calling statutory mandates "jurisdictional" without thinking critically about its technical meaning. Our recent attempts to define the term with greater precision suggest an outcome at odds with the Court's disposition in this case. The Court's holding today is a step backwards and, for that reason, I respectfully dissent.

The Court holds that Chatha's complaint was untimely because the 180-day limitations period begins "when the employee is informed of the allegedly discriminatory employment decision, not when that decision comes to fruition." *Specialty Retailers*, *Inc. v. DeMoranville*, 933 S.W.2d

490, 493 (Tex. 1996) (per curiam). But before a court can announce a decision on the merits, it must have the power to decide.

According to the Court, the court of appeals can decide this interlocutory appeal because a timely administrative complaint is a statutory prerequisite to filing a civil suit. If it is truly a prerequisite to suit, then the trial court has no power to hear the case. If the trial court rejects the government's jurisdictional plea, then a statute gives the court of appeals authority to rule on this non-final trial court order.[1]

But if, as I contend, a timely administrative complaint is *not* a statutory prerequisite, then the government must win or lose the old-fashioned way—on the merits. And if I am right about that, then it is not the *trial court* that lacks jurisdiction. *We* lack jurisdiction.[2] A close reading of our cases, the statute, and U.S. Supreme Court precedent compels that we dismiss this case because we do not have authority to decide it.

I. Is the 180-day limitations period a "statutory prerequisite to suit"?

The Legislature has specified 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. We must decide whether compliance with the 180-day statute of limitations is a "statutory prerequisite to suit." The Court concludes that it is; I disagree, for the reasons outlined below.

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[1] *See* TEX. CIV. PRAC. & REM. CODE § 54.014(a)(8).

[2] *See Ogletree v. Matthews*, 262 S.W.3d 316, 319 n.1 (Tex. 2007) ("Texas appellate courts have jurisdiction only over final orders or judgment unless a statute permits an interlocutory appeal.").

But to place this discussion in the proper context, we must examine another question. Prairie View insists that regardless of whether a timely complaint is a "statutory prerequisite," compliance with the 180-day limitations period is nonetheless jurisdictional. That is, the failure to file a timely administrative complaint strips the trial court of jurisdiction over this case. Because the Court would be required to confront that assertion if it accepted my analysis of the prerequisite issue, I turn to it first.

A. *Schroeder*'s statement about the Texas Commission on Human Rights Act's 180-day limitations period, inessential to the holding, cannot survive *Dubai* and other cases.

We have previously addressed whether the Act requires exhaustion of administrative remedies before filing suit. *See Schroeder v. Texas Iron Works, Inc.*, 813 S.W.2d 483 (Tex. 1991). Without first filing a complaint with the Texas Commission on Human Rights, Schroeder sued his former employer for age discrimination. We held that "exhaustion of administrative remedies is a mandatory prerequisite to filing a civil action alleging violations of [the Act]." *Id*. at 488. Even though the Act did not explicitly require exhaustion, we thought a fair reading of various statutory provisions implicitly required claimants to present their complaints to the Commission before filing suit. We held that because our statute does not provide an unconditional private right of action, Schroeder's failure to file a complaint with the Commission created a jurisdictional bar to his age discrimination claim. *Id*. Earlier in the opinion, when outlining the statutory scheme, we noted that discrimination complaints had to be filed with the Commission within 180 days after the alleged practice occurred. Citing only a 1988 no writ decision, we stated that "[t]his time limit has been held to be mandatory and jurisdictional." *Id*. at 486 (citing *Green v. Aluminum Co. of Am.*, 760 S.W.2d

378, 380 (Tex. App.—Austin 1988, no writ)). We did not mention a United States Supreme Court case decided nine years earlier, which held that Title VII's corresponding 180-day time limit was "not a jurisdictional prerequisite to suit" but a statute of limitations—that is, mandatory but not jurisdictional. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) (holding that "[t]he structure of Title VII, the congressional policy underlying it, and the reasoning of our cases all lead to this conclusion").[3] We then commented, again citing only *Green*, that the one-year limitation period for filing suit was "also mandatory and jurisdictional." *Schroeder*, 813 S.W.2d at 487 n.10. Neither of these time limits was at issue in the case, as Schroeder had not filed a complaint with the Commission.

Five years later, in a per curiam opinion, we held that the plaintiff's claim was time-barred because she filed it more than 180 days after the purported discrimination occurred. *Specialty Retailers, Inc. v. DeMoranville*, 933 S.W.2d 490 (Tex. 1996) (per curiam). Perhaps reflecting our own "less than meticulous"[4] approach to jurisdiction, we rendered judgment in the petitioners' favor, rather than dismissing the case, despite our reiteration that the 180-day time limit was "mandatory and jurisdictional." *Id*. at 492 (citing *Schroeder*, 813 S.W.2d at 485-86).

The new millennium brought a sea change. *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71 (Tex. 2000), overhauled our approach to jurisdiction, reversing a number of decisions touting the old regime. It identified the problems with classifying a statutory mandate as "jurisdictional" and

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[3] *Zipes* settled the confusion caused in part by the Supreme Court's previous characterization of the 180-day time limit as "jurisdictional." *See, e.g., Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974).

[4] *Kontrick v. Ryan*, 540 U.S. 443, 454 (2004).

held that, although our older cases represented the dominant approach when they were decided, "'the modern direction of policy is to reduce the vulnerability of final judgments to attack on the ground that the tribunal lacked subject matter jurisdiction.'" *Id.* at 76 (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 11 cmt. e at 113 (1982)). We overruled *Mingus v. Wadley*, 285 S.W. 1084 (Tex. 1926), "to the extent that it characterized the plaintiff's failure to establish a statutory prerequisite as jurisdictional." *Id*. Instead, we held that "'[t]he right of a plaintiff to maintain a suit, while frequently treated as going to the question of jurisdiction, has been said to go in reality to the right of the plaintiff to relief rather than to the jurisdiction of the court to afford it.'" *Id*. at 76-77 (quoting 21 C.J.S. *Courts* § 16, at 23 (1990)).

After *Dubai*, we held that the Payday Law's 180-day time limit for filing an administrative complaint is mandatory but not jurisdictional. *Igal v. Brightstar Info. Tech. Grp., Inc.*, 250 S.W.3d 78 (Tex. 2008), *superseded by statute*, TEX. LAB. CODE § 61.051(c). We relied on the statute's text, which "establishe[d] a procedural bar similar to a statute of limitations and does not prescribe the boundaries of jurisdiction," and reviewed our evolution of thought about the contours of jurisdiction. *Id*. at 83-84 (citing *Dubai*, 12 S.W.3d at 76). We also looked to *Zipes* and discussed the U.S. Supreme Court's distinction between "'a rule governing subject matter jurisdiction and an inflexible claim-processing rule.'" *Id*. at 85 (quoting *Kontrick v. Ryan*, 540 U.S. 443, 456 (2004)). Ultimately, we concluded that "the Legislature . . . created the 180-day filing limitations period as a mandatory

condition to pursuing the administrative causes of action and not as a bar to . . . jurisdiction." *Id*. at 86. We observed:

> Although in the past we have described a statutory time limitation in the Commission on Human Rights Act as 'mandatory and jurisdictional,' those cases predate *Dubai* and dealt with a different statutory scheme than presented here. *See Johnson & Johnson Med., Inc. v. Sanchez*, 924 S.W.2d 925, 929 (Tex. 1996); *Specialty Retailers v. DeMoranville*, 933 S.W.2d 490, 492 (Tex. 1996); *Schroeder v. Tex. Iron Works*, 813 S.W.2d 483, 486 (Tex. 1991).

Id. at 83-84 n.5.

We recently overruled *Schroeder* to the extent it held that the Act's two-year deadline[5] for filing suit was jurisdictional. *In re United Servs. Auto. Ass'n*, 307 S.W.3d 299, 310 (Tex. 2010). Commenting on our "sometimes intemperate" use of the term, we observed that our courts of appeals have questioned whether *Schroeder* remained the law after *Dubai*. *Id.* at 306.[6] We also noted that *Green*, the only authority cited in *Schroeder*, in turn relied on *Mingus v. Wadley*, 285 S.W. 1084 (Tex. 1926), which *Dubai* overruled. *Id*.

We then examined *Schroeder*'s statement about the two-year deadline for filing suit. The provision that we considered, Labor Code section 21.256, was titled "Statute of Limitations," which gave some indication of the Legislature's intent. *Id*. at 307-08. Although the statute stated that an action "may not be brought" after two years, that language made the provision mandatory but not necessarily jurisdictional. Moreover, our procedural rules and our cases classify limitations as an

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[5] In 1993, the Legislature changed the limitations period from one to two years. Act of May 14, 1993, 73rd Leg. R.S., ch. 276, § 7, 1993 Tex. Gen. Laws 1285, 1291 (amending TEX. REV. CIV. STAT. art. 5221k, § 7.01(a)) (now codified at TEX. LAB. CODE § 21.256).

[6] *See also Ramirez v. DRC Distribs, Ltd.*, 216 S.W.3d 917, 921 n. 8 (Tex. App.—Corpus Christi 2007, pet. denied) (collecting cases).

affirmative defense. *Id*. The statute was enacted to "'provide for the execution of the policies of Title VII.'" *Id*. at 308 (quoting TEX. LAB. CODE § 21.001(1)). Thus, "'analogous federal statutes and the cases interpreting them guide our reading of the [Act].'" *Id*. (quoting *Quantum Chem. Corp. v. Toennies*, 47 S.W.3d 473, 476 (Tex. 2001)). The U.S. Supreme Court has consistently construed Title VII's requirements as mandatory but not jurisdictional, and although that Court had not considered whether the two-year deadline for filing suit under Title VII was jurisdictional, every federal circuit to have considered the issue held that it was. *Id*. at 308-09 (collecting cases).

We then considered the consequences that resulted from each interpretation. Because a judgment is void if rendered by a court without subject matter jurisdiction, a trial court's denial of a summary judgment based on the failure to satisfy the Act's requirements would forever be open to reconsideration. "Conversely, those courts that granted such motions would have had no power to do so, nor would appellate courts have had the power to affirm [them]. *Id*. at 309-10 (collecting cases). We concluded:

> In keeping with the statute's language, *Dubai* and subsequent cases, as well as the purposes behind TCHRA and federal interpretations of Title VII, we conclude that the two-year period for filing suit is mandatory but not jurisdictional, and we overrule *Schroeder* to the extent it held otherwise.

Id. at 310. Because the precise question was not before us, we did not consider whether *Schroeder*'s statement that the 180-day time limit is jurisdictional survived *Dubai*.

Today, I would put the final nail in *Schroeder*'s statute-of-limitations coffin. *Schroeder* requires exhaustion of administrative remedies before filing suit, but its stray statements regarding filing deadlines are without basis in the statute's text, and are inconsistent with *Dubai* and U.S.

Supreme Court precedent. We have already overruled one of those statements. It is time to dispense with the second.

The case for doing so is even stronger today than it was when we decided *In re USAA*. First, there is U.S. Supreme Court precedent squarely on point. *See Zipes*, 455 U.S. at 393 (holding that filing a complaint within Title VII's 180-day time limit is "not a jurisdictional prerequisite to suit"). As that Court recently recognized, "[f]iling deadlines . . . are quintessential claim-processing rules" that should not be described as jurisdictional. *Henderson v. Shinseki*, 131 S.Ct. 1197, 1203 (2011). Our Act was modeled on Title VII and enacted to provide for the execution of its policies,[7] and the two statutes are virtually identical on this point.[8] Although *Zipes* interepreted the federal act and does not control the outcome here, its analysis is sound.

Second, the Act itself supports such a reading. We presume the Legislature did not intend to make the provision jurisdictional, and its text does not command the contrary. *City of DeSoto v. White*, 288 S.W.3d 389, 394 (Tex. 2009). The applicable provision is titled "Statute of Limitations." TEX. LAB. CODE § 21.202. The statute's penalty for noncompliance—the *Commission* must dismiss an untimely complaint—does not speak to a *court*'s jurisdiction over a discrimination claim based on that complaint. *See Henderson*, 131 S.Ct. at 1202 (holding that "a rule should not be referred to as jurisdictional unless it governs a *court's* adjudicatory capacity, that is, its subject-matter or

[7] TEX. LAB. CODE § 21.001(1) (stating that its purpose is to "provide for the execution of the policies of Title VII of the Civil Rights Act of 1964 and its subsequent amendments").

[8] *Compare* 42 U.S.C. 2000e-5(e) (2010)("A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred.") *with* TEX. LAB. CODE § 21.202(a) ("A complaint under this subchapter must be filed not later than the 180th day after the alleged unlawful employment practice occurred.").

personal jurisdiction") (emphasis added); *cf. Zipes*, 455 U.S. at 394 (noting that the limitations provision "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the *district courts*") (emphasis added); *State v. Lueck*, 290 S.W.3d 876, 883 n.1 (Tex. 2009) (distinguishing between an administrative agency's jurisdiction and a court's "jurisdiction in a case where the State asserts a plea to the jurisdiction, claiming that its sovereign immunity is not waived"). The same is true under federal law, as the EEOC must dismiss untimely charges under Title VII.[9] *Compare* 29 C.F.R. 1601.18(a) ("Where a charge . . . is not timely filed . . . the Commission shall dismiss the charge."), *with* TEX. LAB. CODE § 21.202(b) ("The commission shall dismiss an untimely complaint."); *see also, e.g., Bradshaw v. City of Gulfport*, 427 F. App'x 386 (5th Cir. 2011) ("The EEOC dismissed the charge as untimely and issued a right to sue letter . . .."); *Simotas v. Kelsey-Seybold*, 211 F. App'x 273, 274 (5th Cir. 2006) ("The EEOC dismissed the charge as untimely and issued a notice of right to sue."); *Hamilton v. Komatsu Dresser Indus., Inc.*, 964 F.2d 600, 603 (7th Cir. 1992) (same); *Christopher v. Mobil Oil Corp*., 950 F.2d 1209, 1213 (5th Cir. 1992) (same). This requirement did not lead the U.S. Supreme Court to conclude that Title VII's time limit was jurisdictional, and it should not drive our analysis.

Third, *Green*, the only authority we relied on in *Schroeder*, was effectively overruled in *Dubai*, prompting us to overrule *Schroeder* to that extent. Now that the question is directly before

[9] Federal regulations "have the force and effect of law" and are probative of Congressional intent. *Century Marine, Inc. v. United States*, 153 F.3d 225 (5th Cir. 1998); *see also Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 712-713 (1985) ("We have held repeatedly that state laws can be pre-empted by federal regulations as well as by federal statutes.").

us, it would be incongruous to affirm *Schroeder's* now-antiquated conception of the 180-day period as jurisdictional.

Finally, as we previously recognized, judgments issued by courts without jurisdiction are void, meaning that long dormant cases could now be subject to attack. *In re United Servs. Auto. Ass'n*, 307 S.W.3d at 310. If the Act's administrative limitations period were jurisdictional, Texas would diverge starkly from federal law (and the decisions of many states)[10] on this essential issue. For example, the continuing violation doctrine—an equitable exception to the limitations period[11] (and one Chatha relies on in this case)—would no longer be applicable under Texas law, while it would remain viable under Title VII. *See, e.g., Zipes*, 455 U.S. at 393 (holding that "a timely charge of discrimination . . . is not a jurisdictional prerequisite to suit, . . . but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling).

We need not revisit *Schroeder*'s holding that the failure to exhaust administrative remedies deprives a court of jurisdiction over a subsequent suit. That question is not before us, and there is no Supreme Court precedent on point. Although every federal circuit court of appeals follows

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[10] *See, e.g., Kyles v. Contractors/Eng'rs Supply, Inc.*, 949 P.2d 63 (Ariz. Ct. App. 1997) (holding that timely administrative filing requirement was not jurisdictional but a statute of limitations subject to waiver and equitable tolling); *Williams v. Comm'n on Human Rights & Opportunities*, 777 A.2d 645 (Conn. 2001) (same); *Green v. Burger King Corp.*, 728 So.2d 369, 371-72 (Fla. Dist. Ct. App. 1999) (same); *Bryant v. City of Blackfoot*, 48 P.3d 636 (Idaho 2001) (same); *Christo v. Edward G. Boyle Ins. Agency, Inc.*, 525 N.E.2d 643 (Mass. 1988) (same); *BNSF Ry. Co. v. Cringle*, 247 P.3d 706 (Mont. 2010) (same); *City of N. Las Vegas v. Nev. Local Gov't Emp-Mgmt. Relations Bd.*, 261 P.3d 1071 (Nev. 2011) (same); *Ocana v. Am. Furniture Co.*, 91 P.3d 58 (N.M. 2004) (same); *Johnson v. Newport Cnty. Chapter for Retarded Citizens, Inc.*, 799 A.2d 289 (R.I. 2002) (same); *Douchette v. Bethel Sch. Dist. No. 403*, 818 P.2d 1362 (Wash. 1991) (same); *Indep. Fire Co. No. 1 v. W. Va. Human Rights Comm'n*, 376 S.E.2d 612 (W. Va. 1988) (same).

[11] *See, e.g., Glass v. Petro-Tex. Chem. Corp.*, 757 F.2d 1554, 1560-61 (5th Cir. 1985) ("The core idea [of the continuing violations theory] . . . is that '[e]quitable considerations may very well require that the filing periods not begin to run until facts supportive of a Title VII charge . . . are or should be apparent to a reasonably prudent person similarly situated.'") (citation omitted).

Zipes,[12] there is a split (even among panels of the Fifth Circuit) about whether the total failure to file an administrative complaint is a jurisdictional defect.[13] But the answer in today's case is clear. Based on the statute's text, *Dubai* and U.S. Supreme Court caselaw, as well as chapter 21's explicit goal to execute Title VII's policies, I would hold that the 180-day statute of limitations is mandatory but not jurisdictional, and I would overrule *Schroeder* to the extent it holds otherwise. In the relatively near future, a case will arrive in which one side will urge that we apply the *Schroeder* language characterizing the 180-day statute of limitations period as jurisdictional. I hope the Court will take that opportunity to reject that invitation. *See* Charles Evan Hughes, Lecture delivered as

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[12] *See, e.g., Vera v. McHugh*, 622 F.3d 17, 29-30 (1st Cir. 2010); *Hutson v. Wells Dairy, Inc.*, 578 F.3d 823, 826 (8th Cir. 2009); *Farzana K. v. Ind. Dep't of Educ.*, 473 F.3d 703, 705 (7th Cir. 2007) ("Timely filing may be a condition to success, but it is not a jurisdictional requirement in federal court."); *Fernandez v. Chertoff*, 471 F.3d 45, 58 (2d Cir. 2006); *Steiner v. Henderson*, 354 F.3d 432, 435 (6th Cir. 2003); *Sizova v. Nat'l Inst. of Stds. & Tech.*, 282 F.3d 1320, 1325 (10th Cir. 2002); *Draper v. Coeur Rochester*, 147 F.3d 1104, 1107 (9th Cir. 1998); *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1103 n.32 (11th Cir. 1996); *Schafer v. Bd. of Public Educ.*, 903 F.2d 243, 251 (3d Cir. 1990); *Henderson v. U.S. Veterans Admin.*, 790 F.2d 436, 440 (5th Cir. 1986); *Greene v. Whirlpool Corp.*, 708 F.2d 128, 130 (4th Cir. 1983). Although *Zipes* involved two private parties, every federal circuit court of appeals has also held that the administrative time limits are not jurisdictional prerequisites in Title VII actions brought by federal employees. JOHN L. SOBIESKI, JR. & JOSEPH G. COOK, CIVIL RIGHTS ACTIONS ¶ 21.18[B][1][a] (2012); *see also, e.g., Henderson v. U.S. Veterans Admin.*, 790 F.2d 436, 439-40 (5th Cir. 1986) (holding that filing deadlines "are in the nature of statutes of limitations which are subject to waiver, estoppel, and equitable tolling," and "[l]ack of timely notification [to the appropriate administrative authority]. . . does not deprive the court of subject matter jurisdiction.").

[13] *See, e.g., Jones v. Calvert Group, Ltd.*, 551 F.3d 297, 300 (4th Cir. 2009) (holding that "a failure by the plaintiff to exhaust administrative remedies concerning a Title VII claim deprives the federal courts of subject matter jurisdiction over the claim."); *Pacheco v. Mineta*, 448 F.3d 783, 788 n.7 (5th Cir. 2006) (noting that under *Zipes*, filing deadlines are not jurisdictional, but "[t]here is a disagreement in this circuit on whether a Title VII prerequisite, such as exhaustion, is merely a prerequisite to suit . . . or whether it is a requirement that implicates subject matter jurisdiction"); *Terry v. Ashcroft*, 336 F.3d 128, 150 (2d Cir. 2003) ("The requirement that a claim be first raised with the EEO office, however, is not a jurisdictional one."); *Sommatino v. United States*, 255 F.3d 704, 708 (9th Cir. 2001) ("In cases where a plaintiff has never presented a discrimination complaint to the appropriate administrative authority, we have held that the district court does not have subject matter jurisdiction."); *Jones v. Runyon*, 91 F.3d 1398, 1399-1400 n.1 (10th Cir. 1996)("[E]ven after *Zipes* our court has referred to the requirement of an EEOC filing (as opposed to a mere requirement of a *timely* filing) as a jurisdictional requirement."); *Bullard v. Sercon Corp.*, 846 F.2d 463, 468 (7th Cir. 1988) (noting that "Title VII's requirement that the plaintiff exhaust the administrative remedies provided by the statute is jurisdictional" and distinguishing between a plaintiff who files an untimely charge and one who files no charge); *Jackson v. Seaboard Coast Line R. Co.*, 678 F.2d 992, 1005 (11th Cir. 1982) ("[T]he filing of an EEOC charge is not a jurisdictional prerequisite" to a Title VII suit in federal court.).

part of the Columbia Lecture Series (1927), *in* THE SUPREME COURT OF THE UNITED STATES: ITS FOUNDATIONS, METHODS, AND ACHIEVEMENTS 68 (1928) (noting that a dissenting opinion is "an appeal . . . to the intelligence of a future day").

B. The 180-day administrative limitations period is not a "statutory prerequisite to suit."

The opportunity to correct *Schroeder* exists today, but for the Court's inclination to conclude that the 180-day time limit is a "statutory prerequisite to suit," which the Legislature has made jurisdictional in cases involving governmental entities. TEX. GOV'T CODE § 311.034. In defining that term, the Court holds that it applies to "a statutory requirement commanding action before filing suit." ___ S.W.3d at ___. The Court reaches this conclusion by relying heavily on the Legislature's reaction to our prior decisions. But we do not construe statutes to avoid a future legislature's potential disagreement with the outcome; we interpret the statute as it currently exists. *See Massachusetts v. EPA*, 549 U.S. 497, 530 (2007); *Rowan Oil Co. v. Tex. Employment Comm'n*, 263 S.W.2d 140, 144 (Tex. 1953) (observing that "neither does one session of the Legislature have the power to construe the Acts or declare the intent of a past session").

Our presumption that a provision is not jurisdictional is overcome only by clear legislative intent to the contrary. *City of DeSoto v. White*, 288 S.W.3d 389, 394 (Tex. 2009). Thus, if a requirement is not "*specifically mandate[d] . . . as a prerequisite to suit or appeal*," it is not jurisdictional. *Id*. at 396 (emphasis added). We held in *Schroeder* that a party must file a complaint with the Commission before filing suit, but we did not conclude that only a *timely* filing satisfied that requirement. The complainant in that case failed to file *any* administrative complaint, and we determined that his suit was thus jurisdictionally barred. *Schroeder*, 813 S.W.2d at 488.

By contrast, this case involves a statute of limitations, which our procedural rules and cases classify as an affirmative defense—not a prerequisite to suit.[14] A prerequisite is something *required* beforehand,[15] and complying with the limitations period does not qualify. A claimant may sue even if her claims are barred by limitations. *Cf. City of DeSoto v. White*, 288 S.W.3d 389 (Tex. 2009) (holding that notice requirement was "not a statutory prerequisite to suit" because although "the statute requires notice, . . . it does not specifically mandate it as a prerequisite to suit or appeal").

If an administrative complaint is late, the Commission must dismiss it. TEX. LAB. CODE § 21.202(b). The complainant may then request a "right to sue" letter, and within sixty days of receiving that letter, the complainant "may bring a civil action against the respondent." *Id.* §§ 21.252, .254;[16] 40 TEX. ADMIN. CODE §§ 819.46(b), (c), 819.50. So while filing *a* complaint with

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[14] TEX. R. CIV. P. 94; *In re United Servs. Auto. Ass'n*, 307 S.W.3d 299, 308 (Tex. 2010) (recognizing that limitations is an affirmative defense); *In re City of Georgetown*, 53 S.W.3d 328, 332 (Tex. 2001) (noting that our procedural rules have the force and effect of statutes); *see also*, *e.g.*, *Hitchcock Indep. Sch. Dist. v. Walker*, No. 01-10-00669-CV, 2010 Tex. App. LEXIS 9941, at *18 (Tex. App.—Houston Dec. 16, 2010, no pet.) (holding that Whistleblower Act's 90-day limitations period for suing governmental entity was mandatory but not jurisdictional); *Dallas County v. Hughes*, 189 S.W.3d 886, 888 (Tex. App.–Dallas 2006, pet. denied) (observing that prerequisite is something required beforehand and holding that limitations period is not a "prerequisite" for purposes of Government Code section 311.034).

[15] WEBSTER'S THIRD NEW INT'L DICTIONARY 1791.

[16] In the codification of section 21.252(a), the word "not," which, in the section's source law originally appeared before the word "resolved," was moved to precede the word "dismissed." The final iteration of the source law was repealed in 1993. Article 5221k, section 7.01(a) of the law stated that "[i]f the complaint . . is dismissed . . . or is *not* resolved . . . the commission shall so inform the complainant." (emphasis added) (derived from Commission on Human Rights Act, 68th Leg., 1 C.S., ch. 7,§ 7.01, 52-53(1983)). Without reference to the repealed law, section 7.01(a) was amended and is now codified in section 21.252(a), which states that if "the complaint is *not* dismissed or resolved" then the complainant is entitled to a written notice of the right to file a civil action. TEX. LAB. CODE § 21.252(a) (emphasis added). Because this codification intended no substantive change, the rearrangement appears unintentional, and the Administrative Code confirms this. 40 TEX. ADMIN. CODE § 819.46(a), (c) (providing that the CRD director may dismiss an untimely complaint and shall notify the complainant of the right to file a civil action). In any event, the right-to-sue letter is not a mandatory prerequisite to suit. *See* TEX. LAB. CODE § 21.252 (d) ("Failure to issue the notice of a complainant's right to file a civil action does not affect the complainant's right under this subchapter to bring a civil action against the respondent."); 40 TEX. ADMIN. CODE § 819.51 (same).

the Commission is a statutory prerequisite to suit,[17] meeting the 180-day statute of limitations is not. As the U.S. Supreme Court recently concluded, Title VII's 180-day time limit makes no reference to the concept of exhaustion and is not "in any sense an exhaustion provision." *Woodford v. Ngo*, 548 U.S. 81, 98-99 (2006).

We also consider the consequences of a particular construction. *In re USAA*, 307 S.W.3d at 309. There are procedural implications to calling something jurisdictional. In Texas state court, governmental entities may immediately appeal the denial of a jurisdictional plea. TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8). This may reduce time and money spent in litigation, furthering immunity's goal of protecting the public fisc. *See City of El Paso v. Heinrich*, 284 S.W.3d 366, 375 (Tex. 2009). That may have been the Legislature's motivation in classifying statutory prerequisites to suit as jurisdictional. But there are "drastic" substantive ramifications too, and those are the most troubling. *Henderson*, 131 S.Ct. at 1202. Courts are stripped of the power to adjudicate the claim, and equitable defenses to limitations are no longer available. *Cf. Zipes*, 455 U.S. at 393 (holding that "filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit, . . . but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling).

This is particularly concerning because our statute is based on Title VII. Under the Texas Act, equitable defenses may now be urged against private employers but not governmental ones. *See Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 495 (Tex. 2001) (holding that, in determining

[17] *See Schroeder*, 813 S.W.2d at 488 (concluding that "exhaustion of administrative remedies is a mandatory prerequisite to filing a civil action alleging violations of the [Act]").

jurisdiction bars, a court must consider the consequences that result from each interpretation). By contrast, under Title VII, equitable defenses would apply regardless of the defendant's identity.[18] Because the Legislature intended the Act to execute Title VII's policies,[19] and because there is no "clear legislative intent"[20] that the provision is a statutory prerequisite to suit, I would not impose such a dichotomy. I would hold that the 180-day limitations period is not a statutory prerequisite to suit but an affirmative defense that may be urged after suit is filed. Accordingly, it is not jurisdictional in cases involving governmental entities.

II. Conclusion

Zipes held that the 180-day administrative limitations period was not jurisdictional. Today, the Court holds that, at least for government employers, it is. This creates innumerable problems, not the least of which are the elimination of equitable defenses and a divergence between the Act and the statute it was enacted to promote. This conflict is unnecessary, compelled neither by our statutes nor our cases. Because we presume a statute is not jurisdictional, because suit may be filed even if

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[18] Section 311.034 is part of the Code Construction Act, which does not apply to federal statutes. *See* TEX. GOV'T CODE § 311.002.

[19] TEX. LAB. CODE § 21.001(1).

[20] *City of DeSoto v. White*, 288 S.W.3d 389, 394 (Tex. 2009).

an administrative complaint was untimely, and because we construe the Act to effectuate Title VII's policies, I would hold that the 180-day period, while mandatory, is not a statutory prerequisite to suit. Because the Court concludes otherwise, I respectfully dissent.

Wallace B. Jefferson,
Chief Justice

OPINION DELIVERED: August 31, 2012

IN THE SUPREME COURT OF TEXAS

NO. 10-0374

TEXAS DEPARTMENT OF INSURANCE, HONORABLE MIKE GEESLIN, COMMISSIONER OF INSURANCE AND HONORABLE DANNY SAENZ, SENIOR ASSOCIATE COMMISSIONER, PETITIONERS,

v.

AMERICAN NATIONAL INSURANCE COMPANY AND AMERICAN NATIONAL LIFE INSURANCE COMPANY OF TEXAS, RESPONDENTS

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

Argued September 14, 2011

JUSTICE MEDINA delivered the opinion of the Court.

JUSTICE HECHT did not participate in the decision.

The issue in this appeal is whether stop-loss insurance sold to self-funded employee health-benefit plans is "direct health insurance" or "reinsurance." The distinction is significant because direct insurance is subject to state insurance regulation, while reinsurance is not. Reinsurance is not regulated because it typically involves the reallocation of risk between two insurance companies rather than a consumer-insurance transaction. The parties to this appeal disagree about whether an

employer who self funds a health-benefit plan for its employees is an "insurer" under the Texas Insurance Code, and therefore should be treated as a reinsurer when purchasing stop-loss insurance.

The court of appeals concluded that an employer's self-funded plan was clearly an insurer under the Texas Insurance Code and that a plan's purchase of stop-loss insurance was also clearly reinsurance beyond the regulatory scope of the Texas Department of Insurance. ___ S.W.3d ___, ___ (Tex. App.—Austin 2010) (mem. op.). The court accordingly reversed the trial court's judgment, which had sustained the agency's regulation of the stop-loss policies at issue as direct insurance. Because the regulatory agency did not clearly err in its regulation of these stop-loss policies, however, we reverse the court of appeals' judgment and render judgment for the agency.

I

American National Insurance Company and American National Life Insurance Company of Texas (collectively American) are licensed to sell insurance in Texas. American sells stop-loss insurance to self-funded employee health-benefit plans, among other types of policies. Under a self-funded benefit plan, an employer assumes the risk of providing health insurance to its employees, instead of ceding the risk to a third-party insurance company. The employer then either sets aside funds for its employees' covered medical expenses or pays for such expenses out of its general accounts. Self-funded plans typically hire third parties to administer the plan and often purchase stop-loss insurance to limit financial exposure to catastrophic losses.

During a routine audit, the Texas Department of Insurance discovered that American had sold stop-loss policies between January 1998 and December 2002 without paying taxes or complying with other regulatory requirements applicable to insurers. The Department later formally found that

American had violated article 3.10(a) of the Insurance Code by "improperly recording the direct stop-loss policy premiums obtained from the self-insured employers as 'assumed reinsurance,'" rather than as "direct written premium."[1] The Department reasoned that, because self-funded employers to which American sold its stop-loss policies were not themselves "insurers authorized to do the business of insurance," stop-loss coverage was not "assumed reinsurance." The Department further found that American had failed to pay assessments due the Texas Health Insurance Risk Pool on these stop-loss policies in violation of article 3.77.[2] Finally, the Department found that American had failed to submit these policy forms to the Department for approval or to request an exemption as required by the Administrative and Insurance Codes. *See* 28 Tex. Admin. Code §§ 3.4002, 3.4004(e)(2)(J), and TEX. INS. CODE art. 3.42 (repealed).[3]

After exhausting its administrative remedies, American sued the Department, seeking declaratory and injunctive relief. American contended that its stop-loss policies were reinsurance over which the Department lacked regulatory authority. It asked the trial court to declare the Department's actions invalid and to enjoin the Department from enforcing its findings. The Department, on the other hand, argued that American's stop-loss policies were direct insurance subject to the Texas Insurance Code and its regulatory authority. Both American and the Department

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[1] *See* Act of June 14, 1995, 74th Leg., R.S., ch. 614, § 2, 1995 Tex. Gen. Laws 3468, 3468–69, *repealed by* Act of June 16, 2005, 79th Leg., R.S., ch. 727, § 18(a)(3), 2005 Tex. Gen. Laws 1752, 2186-87.

[2] *See* Act of June 16, 1989, 71st Leg., R.S., ch. 1094, § 2, 1989 Tex. Gen. Laws 4484, 4484–91, *repealed by* Act of June 21, 2003, 78th Leg., R.S., ch. 1274, § 26(a)(1), 2003 Tex. Gen. Laws 3611, 4138.

[3] *See* Act of May 23, 1995, 74th Leg., R.S., ch. 176, § 1, 1995 Tex. Gen. Laws 1889, 1889–92, *repealed by* Act of June 21, 2003, 78th Leg., R.S., ch. 1274, § 26(a)(1), 2003 Tex. Gen. Laws 3611, 4138.

filed motions for summary judgment. The trial court granted the Department's motion and denied American's, causing American to appeal.

In a memorandum opinion, the court of appeals concluded that self-funded employee health-benefit plans were insurers under Texas law and that the stop-loss policies sold to the plans by American were therefore reinsurance rather than direct insurance. ___ S.W.3d at ___. Moreover, the court concluded that the Department's contrary view was entitled to no deference because such view was plainly inconsistent with the Insurance Code. *Id*. at ___. The court of appeals accordingly reversed the trial court's judgment, holding the Department's findings of Insurance Code violations to be invalid because American's stop-loss policies, as reinsurance, were not subject to the Department's regulation. *Id*. at ___.

II

American contends that an employer who self funds a health-benefit plan for its employees is an "insurer" in the "business of insurance" under the Insurance Code and therefore a reinsurer when purchasing stop-loss insurance. According to American, the plan's purchase of stop-loss insurance is a redistribution of the risk assumed by the plan in the same sense as a reinsurance contract is a redistribution of risk from one insurance company to another. Because reinsurance contracts are not subject to regulation under the Insurance Code, American concludes that the Department erred in categorizing its stop-loss policies as direct health insurance and requiring it to comply with those provisions applicable to the sale of that kind of insurance.

The Department responds that reinsurance is the redistribution of risk between sophisticated insurers in the business of insurance and that an employee health-benefit plan is neither as a matter

of law. Although an employee health-benefit plan may in some ways act like an insurer with respect to the plan's participants, the Insurance Code does not regulate it as one. Insurance purchased by the plan is therefore not reinsurance, according to the Department. It is instead direct insurance in the nature of health insurance because the stop-loss policies are purchased by the plans to cover ultimate claims associated with their health-care expenses.

As the court of appeals acknowledged, the term "reinsurance" is not defined in the Insurance Code. Moreover, the term's common meaning has become confused over time by indiscriminate use. As one authority has commented:

> The term "reinsurance" has been used by courts, attorneys, and writers with so little discrimination that much confusion has arisen as to what that term actually connotes. Thus, it has so often been used in connection with transferred risks, assumed risks, consolidations and mergers, excess insurance, and in so many other connections that it now lacks a clean-cut field of operation.

1 ERIC MILLS HOLMES & MARK S. RHODES, HOLMES' APPLEMAN ON INSURANCE § 2.15, at 317 (2d ed. 1996). The Insurance Code also does not define stop-loss insurance. Stop-loss insurance, however, has similarities with both excess insurance and reinsurance. *See* KENNETH THOMPSON, REINSURANCE 8 (4th ed. 1966) ("The self-insurer for economic stability and soundness will obtain coverage which some may call 'reinsurance' but which is really of a type of 'specific' excess insurance.").

Under a stop-loss policy, the insurer agrees to reimburse a self-funded plan for healthcare costs that exceed a contractually predetermined amount. The obligation generally takes one of two forms: specific or aggregate. Specific stop-loss policies cover claims over a certain dollar amount

per employee, while aggregate stop-loss policies provide a cap for an employer's overall liability for all covered persons.

Similarly, excess insurance is an agreement to indemnify against any loss that exceeds the amount of primary or other coverage. *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Ins. Co. of N. Am.*, 955 S.W.2d 120, 138 (Tex. App.—Houston [14th Dist.] 1997), *aff'd sub nom. Keck, Mahin & Cate v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 20 S.W.3d 692 (Tex. 2000). Reinsurance, on the other hand, has been described as the transfer of all or part of one insurer's risk to another insurer, which accepts the risk in exchange for a percentage of the original premium. *Stark v. Geeslin*, 213 S.W.3d 406, 410 n.2 (Tex. App.—Austin 2006, no pet.) (citing BLACK'S LAW DICTIONARY 1290 (7th ed. 1999)). "The true reinsurer is merely an insurance company or underwriter which deals only with other insurance companies as its policyholders." *Great Atl. Life Ins. Co. v. Harris*, 723 S.W.2d 329, 330 (Tex. App.—Austin 1987, writ dism'd) (quoting APPLEMAN, INSURANCE LAW AND PRACTICE § 7681, at 480 (1976)). Both direct insurance and reinsurance reallocate risk with the principal distinction being the nature of the purchaser. Insurance consumers reallocate their risk by purchasing direct insurance, both primary and excess, while insurance companies reallocate the risks they assume by purchasing reinsurance.

Employers who self fund their employee health-benefit plans are clearly not insurance companies, but they perform a similar service. This was enough for the court of appeals to conclude that the self-insured employer is an insurer. The court observed that self-funded plans are insurers under Texas law because they meet the broad definition of "insurer" found in the Insurance Code chapter prohibiting the unauthorized business of insurance, and because much of what the plans do

comports with that same chapter's definition of conduct constituting the "business of insurance." *See* ___ S.W.3d at ___ (quoting TEX. INS. CODE §§ 101.002(1)(A), 101.051).

The definitions used by the court of appeals are from Chapter 101 of the Insurance Code.[4] The chapter's stated purpose is to "subject certain insurers and persons to the jurisdiction of the [insurance] commissioner and proceedings before the commissioner" and "the courts of this state in suits by or on behalf of the state or an insured or beneficiary under an insurance contract." TEX. INS. CODE §§ 101.001(c)(1), (2). The legislative concern was that insurers were operating in this state without authorization and, therefore, were evading the Code's regulatory framework. *Id.* §§ 101.001(a), (b)(4). The Legislature therefore broadly defined the terms "insurer" and "business of insurance" to capture all unauthorized activity. The court of appeals use of the chapter's definitions here is somewhat ironic because it removes American's stop-loss insurance from the state's regulatory authority.

Without question, self-funded employee health-benefit plans operate much like insurers. Their activities not surprisingly then fit the definitions of "insurer" and "business of insurance" found in the chapter designed to prohibit the unauthorized business of insurance. But that chapter's purpose is to extend the state's regulatory authority to those conducting the business of insurance in the state without authorization. That purpose does not include self-funded employee health-benefit plans because they are not regulated like insurance companies.

[4] During part of the relevant period these definitions were located in article 1.14-1 of the Code. *See* TEX. INS. CODE art. 1.14-1, § 2(a) (repealed).

Most private self-funded plans qualify as "employee welfare benefit plans" under the federal Employee Retirement Income Security Act (ERISA). 29 U.S.C. § 1002(1). ERISA prohibits states from deeming these self-funded plans "insurance compan[ies] or other insurer[s]" or "to be engaged in the business of insurance" for purposes of state insurance regulation. *Id.* § 1144(b)(2)(B). Simply put, states cannot regulate private self-funded insurance plans.[5] *Id.*

While Chapter 101 defines insurer and the business of insurance, it does so only for purposes of that particular chapter. *Id.* § 101.002. These definitions are not comprehensive or for all purposes as the Insurance Code provides variations in different contexts. For example, the article that governs insurance carrier licensing defines "insurer" as "the issuer of an insurance policy that is issued to another in consideration of a premium and that insures against a loss that may be insured against under the law." TEX. INS. CODE § 801.001(2) (formerly TEX. INS. CODE art. 1.14, § 2).[6] This definition excludes self-funded employers, who do not issue policies for a premium. Although the Department contends that the Legislature has left it to define the difference between stop-loss insurance and reinsurance, it submits that this would have been a more sensible definition for the court of appeals to have used in its analysis.

As we have previously observed, the "Insurance Code is somewhat different from Texas's other statutory codifications in that it is not a formal, unified Code containing uniform definitions."

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[5] ERISA does not apply to self-funded plans of governmental entities and churches, but state law exempts those entities from regulation as well. *See* 29 U.S.C. §§ 1003(b)(1), (2); TEX. BUS. ORGS. CODE § 22.409 (exempting church plans); TEX. GOV'T CODE § 2259.037 (exempting governmental plans).

[6] *See* Act of June 7, 1951, 52nd Leg., R.S., ch. 491, § 1, art. 1.14, 1951 Tex. Gen. Laws 868, 872, *repealed by* Act of May 22, 2001, 77th Leg., ch. 1419,§ 31(a), 2001 Tex. Gen. Laws 3658, 3662.

Dallas Fire Ins. Co. v. Tex. Contractors Sur. & Cas. Agency, 159 S.W.3d 895, 896 (Tex. 2004) (per curiam) (citing *Great Am. Ins. Co. v. N. Austin Mun. Util. Dist. No. 1*, 908 S.W.2d 415, 424 (Tex. 1995)). In *Dallas Fire*, we considered a similar question regarding the contextual application of Insurance Code definitions. There, the issue was whether former article 1.14-1's definition of "business of insurance" applied equally to article 21.21, which provides a private cause of action for unfair or deceptive acts in the "business of insurance." *Dallas Fire Ins. Co.*, 159 S.W.3d at 895. A surety company argued that it was not in the business of insurance as used in article 21.21, despite the fact that former article 1.14-1 defined the business of insurance to include the business of suretyship. *Id.* at 896.

Former article 1.14-1 was the predecessor to the unauthorized insurance provisions now found in Chapter 101 and contained essentially the same "business of insurance" definition. Indeed, the language of the specified conduct constituting the business of insurance at issue in *Dallas Fire Insurance* has not changed. *Compare* TEX. INS. CODE art. 1.14-1, § 2(a) (repealed),[7] *with* TEX. INS. CODE § 101.051. Former article 1.14-1, like Chapter 101, provided that, among other conduct, "[t]he making of or proposing to make, as guarantor or surety, any contract of guaranty or suretyship as a vocation and not merely incidental to any other legitimate business or activity of the guarantor or surety" constituted the insurance business. TEX. INS. CODE art. 1.14-1, § 2(a)(2). In concluding that the business of insurance for purposes of article 21.21 did not include suretyship, we relied on *Great American Insurance Company v. North Austin Utility District No. 1*, where we said:

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[7] Act of May 28, 1987, 70th Leg., R.S., ch. 254, § 1, 1987 Tex. Gen. Laws 1573, 1573, *repealed by* Act of May 17, 1999, 76th Leg., R.S., ch. 101, § 1, 1999 Tex. Gen. Laws 486, 525–26.

> Nowhere in the "purpose" clause of article 1.14-1 did the Legislature indicate that the list of acts contained therein which constitute "doing an insurance business" was to apply throughout the Code. Rather, the purpose clause of article 1.14-1 points out that in defining "what constitutes doing an insurance business," the Legislature was exercising its power to address its explicitly listed concerns. *The expressed concerns do not evidence an intention to promulgate a uniform definition of the acts which constitute doing an insurance business*; rather, they indicate concern that particular parties may escape the jurisdiction of the State Board of Insurance and evade suit by contractual beneficiaries.

Great Am., 908 S.W.2d at 423 (emphasis added). Applicable here is our observation that "'the business of insurance' has meant different things in different sections of the Code." *Dallas Fire Ins. Co.*, 159 S.W.3d at 896. Thus, unlike the court of appeals, we do not find Chapter 101's definitions to be determinative in this case, and we must look elsewhere for guidance. The Department submits that we should look to the statutes at issue in this case for the answer.

III

For more than a decade, the Department has categorized stop-loss coverage as direct insurance (not reinsurance) subject to assessment by the Texas Health Insurance Risk Pool[8] under article 3.77 and subject to the reporting requirements of article 3.42. From 1998 to 2002, former article 3.77 authorized the Pool to "assess insurers . . . for the [Pool's] organizational and interim operating expenses." TEX. INS. CODE art. 3.77, § 13(a). For purposes of this assessment, the Code defines "insurer" as:

> [A]ny entity that provides health insurance in this state, *including stop-loss or excess loss insurance*. For the purposes of this article, "insurer" includes but is not limited

[8] The "Risk Pool is a quasi-governmental entity [created by the Legislature] to provide affordable insurance to Texans who have pre-existing conditions or other high-risk conditions that might prevent them from obtaining insurance otherwise." *Tex. Health Ins. Risk Pool v. Sigmundik*, 315 S.W.3d 12, 13 n.1 (Tex. 2010).

> to an insurance company; . . . an insurer providing *stop-loss or excess loss insurance* to . . . any benefit arrangements to the extent permitted by [federal law] . . . .

Id. art. 3.77, § 2(11) (emphasis added). The Department argues that by including stop-loss insurance in the above definition the Legislature intended to include it as a type of health insurance subject to assessment by the Pool.[9]

The Department further submits that article 3.77's definition of "health insurance" is to the same effect. Health insurance is defined to include "any hospital and medical expense incurred policy . . . or any other health care plan or arrangement that pays for or furnishes medical or health care services whether by insurance or otherwise." *Id.* art. 3.77, § 2(7). Because stop-loss policies are designed to cover claims for hospital or medical expenses that exceed a predetermined attachment point, either individually or in the aggregate, the Department maintains that the policies qualify as a "hospital and medical expense incurred policy" subject to assessment.[10]

Soon after the passage of article 3.77, the Department proposed a regulation instructing that stop-loss and excess policies like American's were subject to assessment. *See* 28 Tex. Admin. Code § 3.13001 (1999) (Tex. Dep't of Ins.). The rule was open for public comment for 30 days before adoption but no one questioned the rule's explicit inclusion of stop-loss and excess-loss policies. *See* 23 TEX. REG. 1309, 1311 (1998). Because this regulation is reasonable and consistent with

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[9] The Department similarly argues that stop-loss coverage as a form of health insurance was also subject to the reporting requirements of Texas Insurance Code article 3.42.

[10] The Department further submits that its interpretation has been subsequently confirmed by the Legislature's 2003 clarification that the term health insurance includes "stop-loss insurance or excess loss insurance or reinsurance." *See* Act of May 29, 2003, 78th Leg. R.S., ch. 840, § 1, 2003 Tex. Gen. Laws 2627, 2627.

article 3.77, the Department argues that it was entitled to deference. *First Am. Title Ins. Co. v. Combs*, 258 S.W.3d 627, 632 (Tex. 2008).

American argues, however, that the Fifth Circuit has already determined under Texas law that stop-loss insurance sold to self-insured employee health-benefit plans is not direct health insurance. *See Brown v. Granatelli*, 897 F.2d 1351, 1354 (5th Cir. 1990) (concluding "that under Texas law stop-loss insurance is not accident and sickness insurance"). *Brown* involved former article 3.70-2(E), which required that accident-and-sickness insurance cover newborns from birth. TEX. INS. CODE art. 3.70-2(E) (repealed). The underlying plan was an employee welfare-benefit plan within the meaning of ERISA. *Brown*, 897 F.2d at 1352. The plan excluded coverage for all newborns during the child's first 31 days and thereafter for any child who was disabled, hospitalized, or sick on the 31st day. *Id*. at 1353. The employer, however, also purchased stop-loss insurance to reimburse the plan for claims paid that exceeded $30,000 for anyone covered during the policy year. *Id*.

The plan refused to pay for medical costs associated with two premature births, and the parents sued the employer and the plan, who joined the stop-loss insurer as a third-party defendant. The parents admitted that ERISA prohibited the direct application of article 3.70-2(E) to the plan, but argued that under *Metropolitan Life Insurance Co. v. Massachusetts,* 471 U.S. 724 (1985), the provision could be applied to the plan indirectly through the stop-loss policy. The stop-loss insurer argued that an insurance policy purchased by an employee-benefit plan to protect the plan from catastrophic loss was not accident-and-sickness insurance even though it indirectly covered accident

and sickness losses. Neither argument attracted a majority of the court, although a majority did agree that the stop-loss insurer was not liable. The court's decision produced three separate opinions.

The lead opinion reasoned that the stop-loss policy was primary coverage for the plan's catastrophic losses rather than the individual losses of the group's participants and therefore not accident-and-sickness insurance to which the statute applied. *Brown*, 897 F.2d at 1354 (Higginbotham, J.). The lead opinion cautioned in dicta, however, that a stop-loss policy might be an accident-and-sickness policy if coverage were to trigger at an unreasonably low amount: "If, for example, a plan paid only the first $500 of a beneficiaries' health claim, leaving all else to the insurer, labeling its coverage stop-loss or catastrophic coverage would not mask the reality that it is close to a simple purchase of group accident and sickness coverage." *Id*. at 1355.

The dissenting justice complained that this distinction was "contrary to the substance of the Texas Insurance Code, and unworkable as a standard for future cases." *Id*. at 1356 (Brown, J., dissenting). The dissent agreed that ERISA preempted state law from regulating the group plan's content but did not agree that it also preempted regulation of the insurance company that sold the stop-loss insurance to the plan. *Id*. at 1357. The dissent concluded that ERISA's "insurance savings clause" left the stop-loss insurer subject to state insurance law, despite the preemption of that law as to the plan, under the Supreme Court's reasoning in *Metropolitan*. *Id*. (citing *Metropolitan*, 471 U.S. at 740–41).

The third and final justice in *Brown* agreed with both of his colleagues that ERISA preempted state law from requiring the benefit plan to cover newborns, and therefore the plan could not incur losses for such claims. *Id*. at 1355 (Reavley, J., concurring). Because the stop-loss insurer had

agreed to reimburse the plan only for losses exceeding $30,000 and that trigger had apparently not been reached, the third justice concurred in the judgment affirming the summary judgment for the plan and its stop-loss insurer.

ERISA's broad preemption provision provides that:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

29 U.S.C. § 1144(a), ERISA § 514(a). This preemption provision, however, is modified by section 514(b), the "insurance savings clause," which provides in pertinent part:

> Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

29 U.S.C. § 1144(b)(2)(A). Subparagraph (B) is the "deemer clause" that exempts plans from the operation of state laws regulating insurance.

In *Metropolitan*, the Supreme Court concluded ERISA preempted the direct application of mandated-benefit laws to employee-benefit plans, but it did not necessarily preempt their indirect application to the insurance policies purchased by such plans. 471 U.S. at 736 & n.14, 747 & n.25. In the context of that case, the Court observed that ERISA would cause insured and uninsured plans to receive different treatment. *Id*. at 747. This distinction subsequently led courts to struggle with the question of whether an employee health-benefit plan that self insures its members but also purchases stop-loss insurance is functionally insured or self-insured. Such plans would appear to be a bit of both. Some courts, like the lead opinion in *Brown*, have suggested that the answer lies

in whether the plan is predominantly insured or self-insured, but that approach has been criticized as fundamentally misguided. *See* Russell Korobkin, *The Battle Over Self-Insured Health Plans, or "One Good Loophole Deserves Another,"* 5 YALE J. HEALTH POL'Y L. & ETHICS 89, 115 (2005).[11]

Unlike *Brown*, the question in this case does not involve the extent of coverage under the group health-benefit plan, either directly or indirectly, or the contractual relationship between a plan and its stop-loss insurer. Instead, the questions are (1) whether the state can regulate stop-loss insurers who contract with such plans, as it does other direct health-care insurers by requiring them to contribute to the Pool and to submit their policies for approval, and (2) whether it has chosen to do so. The answer to the first question is clearly yes under ERISA's "insurance savings clause" and the Supreme Court's decision in *Metropolitan*. The answer to the second question is less clear, but the Department's longstanding interpretation of the statute is entitled to serious consideration.

IV

Our primary objective when construing a statute is to determine and give effect to the Legislature's intent. *McIntyre v. Ramirez*, 109 S.W.3d 741, 745 (Tex. 2003). We begin with the words the Legislature used because the surest guide to what lawmakers intended is what they enacted. *First Am. Title Ins. Co.*, 258 S.W.3d at 631. "'If the statute is clear and unambiguous, we

[11] "[W]hether an EHBP maintains the actual insurance risk associated with employee illness bears no direct relevance to the question of whether the deemer clause, according to its text, prohibits state regulation of its members' health insurance contracts. Courts need only ask which entity promises to pay the health care costs incurred by plan members. If the EHBP must pay these costs, and thus acts as an insurer of its employee's health care, the state may not regulate the provisions of the employee-EHBP contract, and the plan is therefore 'self-insured' according to the *Metropolitan Life* dichotomy. If a third-party insurance company bears the insurance risk of the employee's health care, the state may regulate the insurance contract, and the plan is therefore 'insured' under *Metropolitan Life*. Whether a self-insured plan does or does not purchase stop-loss insurance, or whether that stop-loss insurance has a low or high attachment point, is simply irrelevant, at least under a close reading of ERISA's text."

must apply its words according to their common meaning' in a way that gives effect to every word, clause, and sentence." *Id.* (quoting *State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006)). But when a statute's meaning is ambiguous, we frequently defer to administrative agencies' statutory interpretations. "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." *Tarrant Appraisal Dist. v. Moore*, 845 S.W.2d 820, 823 (Tex. 1993). This is particularly true where the agency's interpretation has been sanctioned by long acquiescence. *Stanford v. Butler*, 181 S.W.2d 269, 273 (Tex. 1944).

If a statute is vague or ambiguous, we defer to the agency's interpretation unless it is plainly erroneous or inconsistent with the language of the statute. *TGS–NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 438 (Tex. 2011). Our deference, however, is "tempered by several considerations." *R.R. Comm'n of Tex. v. Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 625 (Tex. 2011). An administrative agency's construction of a statute it implements ordinarily warrants deference when: (1) the agency's interpretation has been formally adopted; (2) the statutory language at issue is ambiguous; and (3) the agency's construction is reasonable. *Id.* (quoting *Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 747–48 (Tex. 2006)).[12]

[12] The court of appeals here remarked that a court would be bound by an agency's reading of a statute, if reasonable and in harmony with the rest of the statute. ___ S.W.3d at ___ (quoting *City of Plano v. Pub. Util. Comm'n,* 953 S.W.2d 416, 421 (Tex. App.—Austin 1997, no writ). Although we have never referred to an agency's reasonable and harmonious reading of a statute as binding on the Court, we have acknowledged the agency's interpretation to be worthy of "serious consideration" and "great weight." *See, e.g., Mid-Century Ins. Co. of Tex. v. Ademaj,* 243 S.W.3d 618, 623 (Tex. 2007); *Osterberg v. Peca*, 12 S.W.3d 31, 51 (Tex. 2000).

The Legislature has chosen not to define the terms "stop-loss insurance" and "reinsurance" in the Insurance Code. American, however, identifies provisions in the Code where the term "reinsurance" is used in connection with self-funded plans in support of its argument that stop-loss insurance is reinsurance. *See, e.g.*, TEX. GOV'T CODE § 845.406(f) (to protect against adverse claim experience, a self-funded state employee benefit arrangement may secure reinsurance); TEX. INS. CODE § 1551.208 (under Texas Employees Group Benefits Act, the board of trustees may reinsure any coverage the board decides to self-insure out of its life, accident, and health insurance fund). American contends these statutes express the Legislature's view of stop-loss insurance as reinsurance, which is beyond the Department's regulatory authority. *See id*. § 101.053(b)(2).

The Department responds that the Legislature has used the terms reinsurance and stop-loss insurance generally as shorthand for the redistribution of risk without defining them in any specific or technical sense. *See, e.g.*, TEX. INS. CODE § 846.053(h) (requiring multiple employer welfare arrangements to purchase specific and aggregate stop-loss insurance); *id.* § 1506.107 (authorizing pool to "contract for stop-loss insurance for risks incurred by the pool"); *id.* § 1508.261 (providing the fund "may purchase stop-loss insurance or reinsurance from an insurance company licensed to write that coverage in this state"); *id.* § 1506.002(a)(3) (defining a health care plan or arrangement as "including stop-loss insurance or excess loss insurance or reinsurance for individual or group health insurance or for any other health care plan or arrangement").

Because the Insurance Code does not define these terms or use them consistently, the parties are left to emphasize the provisions most favorable to their respective interpretations. Those

provisions yield competing plausible interpretations but no definitive answer under the Code. We conclude then that the Insurance Code is ambiguous on how stop-loss insurance should be treated.

To fill the void, the Department submits that it has promulgated a rule instructing that stop-loss and excess loss policies like American's are in the nature of direct health insurance, not reinsurance, and subject to assessment under former article 3.77. The Department reasons that reinsurance is the redistribution of risk between sophisticated insurers in the business of insurance and that an employee health-benefit plan is neither as a matter of law. Although an employee health-benefit plan may in some respects act like an insurer with respect to the plan's participants, the Insurance Code does not regulate it as one, and ERISA generally precludes the Code from deeming these plans to be insurers or in the business of insurance. 29 U.S.C. § 1144(a); *FMC Corp. v. Holliday*, 498 U.S. 52, 61 (1990). The Department has therefore concluded that stop-loss insurance purchased by a plan does not involve two insurers and is therefore not reinsurance. It is instead direct insurance in the nature of health insurance because the stop-loss policies are purchased by the plans ultimately to cover claims associated with their health-care expenses. The Department's construction is reasonable, was formally promulgated, and is not expressly contradicted by the Insurance Code. We accordingly agree with the Department's construction and hold that stop-loss insurance sold to a self-funded employee health-benefit plan is not reinsurance, but rather direct insurance subject to regulation under the Insurance Code.

* * * * *

The court of appeals' judgment is reversed, and judgment is rendered for the Department.

_____

David M. Medina
Justice

Opinion delivered: May 18, 2012

IN THE SUPREME COURT OF TEXAS

NO. 10-0375

ATMOS ENERGY CORPORATION, CENTERPOINT ENERGY RESOURCES CORPORATION, AND TEXAS GAS SERVICE COMPANY, PETITIONERS,

v.

THE CITIES OF ALLEN, ET AL., AND RAILROAD COMMISSION OF TEXAS, RESPONDENTS

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

Argued September 15, 2011

JUSTICE WAINWRIGHT delivered the opinion of the Court.

In 2003, the Texas Legislature amended the Gas Utility Regulatory Act (GURA) to allow gas utilities (Utilities) an opportunity to recover capital investments in Texas' gas pipeline infrastructure made during the interim period between rate cases filed pursuant to Chapter 104, Subchapter C, of the Utilities Code. Act of May 16, 2003, 78th Leg., R.S., ch. 938, § 1, 2003 Tex. Gen. Laws 2801 (codified as TEX. UTIL. CODE § 104.301). This legislation is referred to as the "GRIP statute" or "GRIP amendment."[1]

[1] The terms "Gas Reliability Infrastructure Program" and "GRIP" do not appear in the applicable statutes or administrative rules. However, we adopt the terminology used by the trial and appellate courts as well as the parties and refer to section 104.301(a) as the "GRIP statute" or "GRIP amendment."

The GRIP statute permits a gas utility to file a new tariff adjusting its base rates to recover the costs of new capital investment made in the preceding calendar year, without the necessity of filing a rate case. *See* House Comm. on Regulated Industries, Bill Analysis, Tex. C.S.S.B. 1271, 78th Leg., R.S. (2003). Only a utility that has had a rate case within the preceding two years may utilize the GRIP statute. TEX. UTIL. CODE § 104.301(a). The adjustment is based upon the utility's investment subsequent to that recent rate case, the return on investment, depreciation and federal income tax factors established in the rate case, and the ad valorem and revenue-related taxes in effect at the time of the adjustment. TEX. UTIL. CODE § 104.301 (a), (b), (d). The GRIP statute provides, in relevant part:

> A gas utility that has filed a rate case under Subchapter C within the preceding two years may file with the regulatory authority a tariff or rate schedule that provides for an interim adjustment in the utility's monthly customer charge or initial block rate to recover the cost of changes in the investment in service for gas utility service.

TEX. UTIL. CODE § 104.301(a). The Legislature passed the GRIP statute to exempt utilities from having to file a rate case for the five-year period during which GRIP filings are permitted, while allowing the utilities to recover their interim costs related to invested capital. House Comm. on Regulated Industries, Bill Analysis, Tex. C.S.S.B. 1271, 78th Leg., R.S. (2003). The GRIP statute allowed utilities to begin recovering capital investment costs more quickly, rather than waiting, on occasion, years for that recovery. *See id.* The statute thus created an incentive for investment in Texas' gas pipeline infrastructure to meet continuing growth in the state and to enhance safety by replacing aging facilities. *See id.* If a subsequent contested rate proceeding determines that the prior interim rate adjustments are disallowed, those amounts may be recovered in the subsequent

contested rate case. TEX. UTIL. CODE § 104.301(a); 16 TEX. ADMIN. CODE § 7.7101(I). Prior to GRIP, a gas utility could not begin recovering the costs of new investment not already covered by a final rate until its next rate case. House Comm. on Regulated Industries, Bill Analysis, Tex. C.S.S.B. 1271, 78th Leg., R.S. (2003); *see also* TEX. UTIL. CODE § 104.301(a). Completing a rate case can be a lengthy and expensive process, requiring months or years of litigation and preparation of detailed technical documentation and expert testimony. Due in part to these constraints, utilities were facing challenges in obtaining necessary capital for new investments in gas pipeline infrastructure. House Comm. on Regulated Industries, Bill Analysis, Tex. C.S.S.B. 1271, 78th Leg., R.S. (2003); *see also* TEX. UTIL. CODE § 104.301(a).

To give effect to the administrative rate change process envisioned by the GRIP statute, the Railroad Commission (Commission) promulgated Rule 7.7101, titled "Interim Rate Adjustments" and known as the "GRIP rule." 16 TEX. ADMIN. CODE § 7.7101. The GRIP rule lists the requirements for processing a utility's application to amend its tariff or rate schedule under the GRIP statute. *Id.*

When several Utilities filed interim rate adjustments under GRIP, fifty-one cities (Cities) denied those filings for non-ministerial reasons. The dispute before us concerns the appellate jurisdiction of the Commission to review the Cities' decisions on the Utilities' interim rate adjustments and the breadth of that jurisdiction.

I. Background

A gas utility makes its GRIP filing with the applicable "regulatory authority." The Legislature, through GURA, has charged both the Commission and Texas municipalities with the

responsibility of serving as the regulatory authorities of the state's gas utilities. TEX. UTIL. CODE §§ 102.001(a), 103.001. A municipality has original jurisdiction over a rate filing if the utility's customers are within municipal boundaries, or the Commission has original jurisdiction over the filing if the utility's customers are outside municipal boundaries. *Id.*

After passage of the GRIP statute, Atmos Energy Corporation ("Atmos") filed interim rate adjustments, or GRIP filings, with the Commission and several municipalities to charge adjusted rates. The Commission approved Atmos' GRIP filings, but numerous municipalities denied Atmos' filings. The Cities found the proposed rate increases to be unjust and unreasonable.[2] Atmos appealed the Cities' denials to the Commission, which exercised appellate authority under section 102.001(b). The Cities then sought to intervene in the appeals to the Commission and to require the Commission to hold contested case proceedings in the appeals. The Commission denied their interventions and requests for evidentiary hearings on the ground that neither the GRIP statute nor the GRIP rule authorizes contested case proceedings in connection with GRIP filings. The Commission issued final orders denying all pending motions, including the Cities' pleas to intervene, and approving Atmos' application for the interim rate increases. Because 102.001(b) purports to give the Commission "exclusive appellate jurisdiction" to review the matter and the Cities could not appeal the Commission's rulings because they were not parties, the Cities did not believe they had a way to appeal the Commission's rulings.

[2] Municipalities are required to set rates at a level that is "just and reasonable." TEX. UTIL. CODE § 104.003(a).

Fifty-one Texas cities[3] then pursued a declaratory judgment action in district court against the Commission, challenging the validity of Commission Rule 7.7101, the GRIP rule. 16 TEX. ADMIN CODE § 7.7101; TEX. GOV'T CODE § 2001.038 (allowing parties to challenge validity of agency rule by declaratory judgment action). The Cities argued that the GRIP rule was void because it does not provide for an adjudicatory hearing in a utility's appeal of a municipality's denial of the utility's GRIP filing. The Cities argued that the Commission created a rule that allows the Commission to issue a final order approving interim rate adjustments without providing the municipality an opportunity to respond and present evidence, exceeding the statutory authority delegated to it by the GRIP amendment. Atmos, CenterPoint Energy Resources Corporation ("CenterPoint"), and Texas Gas Service Company ("Texas Gas") intervened in support of the validity of the Commission's rule.

The trial court issued a final judgment denying the Cities' request for declaratory relief, but issued findings of fact and conclusions of law stating that subsections 7.7101(g)(2)(B) and (g)(2)(C) of the Commission's GRIP rule were void.[4] The trial court held that the Legislature did not intend to authorize municipalities to conduct a substantive review of GRIP filings, only a "ministerial

[3] The fifty-one Texas cities are Allen, Argyle, Arlington, Bedford, Brownwood, Burkburnett, Burleson, Caddo Mills, Canyon, Carrollton, Cedar Hill, Clyde, College Station, Corral City, Crandall, Dimmitt, Eastland, Everman, Farmers Branch, Fate, Friona, Frisco, Grapevine, Haltom City, Harker Heights, Hereford, Highland Park, Honey Grove, Hurst, Irving, Kaufman, Keene, Keller, Killeen, Lake Worth, Lancaster, Lewisville, Longview, Mansfield, Midlothian, Parker, Ponder, Red Oak, Snyder, Stamford, Sulphur Springs, The Colony, Tyler, Wellman, Westlake and Wylie. The Cities, other than the City of Longview, participated in the litigation as a coalition of cities, referring to themselves as "the Cities of Allen, et al." The City of Longview acted as a separate party before the trial court and filed a separate notice of appeal. Because the City of Longview did not file a petition for review in this Court, its claims were apparently resolved at the court of appeals.

[4] Subsections 7.7101(g)(2)(B) and (g)(2)(C) allow the Commission's director to recommend approval of some elements of the GRIP filing to allow only those elements of the interim rate adjustment to take effect without further Commission action, or to reject the application, respectively.

review of the compliance with basic requirements." Accordingly, the trial court held that the Cities have no authority to deny utilities' interim filings under section 104.301(a). They may challenge such a filing by initiating a rate case, but the Cities do not have a right to an adjudicative or contested hearing on GRIP filings with the Railroad Commission. However, the trial court also held that a utility does not have the authority to appeal an improper denial to the Railroad Commission because the Legislature did not provide an appellate mechanism in the GRIP Amendment (section 104.301(a)), and the Railroad Commission does not have the authority to apply its Rule 7.7101 to the action of a city. Because the Commission was not aggrieved by the district court's take-nothing judgment against the Cities, the Commission did not appeal the conclusion of law that the Commission lacked jurisdiction over the municipalities' decisions denying GRIP filings. Based on its stated deference to the district court's conclusions of law, the Commission began to decline jurisdiction over appeals brought by the utilities after municipalities denied their GRIP filings. The Commission did not appeal the trial court ruling that certain subsections of the rule were void.

The court of appeals affirmed the judgment of the trial court, holding that a ministerial review for compliance "is all that is required." 309 S.W.3d 563, 574. The court of appeals also affirmed that GRIP rule subsections 7.7101(g)(2)(B) and (g)(2)(C) are only void to the extent the Commission attempts to reject a GRIP filing over which it holds regulatory authority for any reason other than failure to comply with the statutory requirements. *Id.* at 576.

Additionally, the court of appeals held that appellate review by the Commission is "not available when a municipality denies a GRIP filing after conducting a ministerial review for compliance with the statute" because there is "no indication that a municipality's denial of a GRIP

filing for failure to comply with the statutory requirements is considered 'an order or ordinance of a municipality' as contemplated by section 102.001." *Id.* at 575. For other reasons, we affirm the judgment of the court of appeals, affirming the trial court and denying the Cities' request for declaratory relief.

II. Discussion

This case turns on statutory construction of GURA, the GRIP statute and the GRIP rule. The construction of a statute is a question of law that we review de novo. *R.R. Comm'n of Tex. v. Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 624 (Tex. 2011). In construing a statute, the court's task is to give effect to the Legislature's expressed intent. *Iliff v. Iliff*, 339 S.W.3d 74, 79 (Tex. 2011). A court may consider the object sought to be obtained, circumstances under which the statute was enacted, and the consequences of a particular construction when construing statutes, whether or not the statute is ambiguous. TEX. GOV'T CODE § 311.023 (1), (2), (5); *McIntyre v. Ramirez*, 109 S.W.3d 741, 745 (Tex. 2003).

A. The Commission's Appellate Jurisdiction

The first issue presented to this Court is whether the Commission has appellate jurisdiction to review the Cities' denials. Section 102.001(b) of the Texas Utilities Code provides, in relevant part: "The railroad commission has exclusive appellate jurisdiction to review an order or ordinance of a municipality exercising exclusive original jurisdiction as provided by this subtitle." TEX. UTIL. CODE § 102.001(b). This grant of appellate authority clearly gives the Commission jurisdiction to review the Cities' denials of the interim rate increases.

Section 102.001(b) falls under Subtitle A of the Utilities Code and is titled "General Powers of the Railroad Commission." TEX. UTIL. CODE § 102.001(b). The relationship of section 102.001(b) and GURA confirms the Commission's appellate jurisdiction over municipal denials, since both GURA and the GRIP statute are in Subtitle A of the Texas Utilities Code. Section 102.001(b) grants the Commission appellate jurisdiction over the appeal from an "order or ordinance of a municipality exercising exclusive original jurisdiction *as provided by this subtitle*." *Id.* (emphasis added).

The Commission's exclusive appellate jurisdiction is over a municipality's applicable "order or ordinance." *Id.* The parties themselves agree that the Cities' denials were promulgated by ordinance.

The Commission argues that there is no need for utilities to appeal a municipality's action since municipalities are not entitled to deny a GRIP filing, except for a failure to comply with the statute.[5] However, the Commission recognizes that 102.001(b) literally applies when a city denies a GRIP filing by order or ordinance and therefore grants the Commission appellate jurisdiction.

Furthermore, the view that the Legislature had withheld appellate jurisdiction in this case from the Commission could frustrate GRIP's purpose. The Legislature designed GRIP to incentivize gas utilities to expand infrastructure and empowered them to file interim rate adjustments in between rate cases. House Comm. on Regulated Industries, Bill Analysis, Tex. C.S.S.B. 1271, 78th Leg., R.S. (2003). Without the Commission's appellate jurisdiction, a city could deny these filings for

[5] The Commission also argues that because a municipality is not entitled to deny a GRIP filing that complies with the statute, the denial should be subject to mandamus. Since we hold that the Commission has appellate jurisdiction under section 102.001(b) over a GRIP denial, mandamus review by a district court is not necessary.

non-ministerial reasons, leaving a lengthy and expensive contested rate case as the only recourse to effect a rate adjustment to recoup infrastructure investment. The Cities' construction is rebutted by the language of section 102.001(b) and is inconsistent with the Legislature's objective of expediting recovery of such investments as a means of encouraging infrastructure investment. We conclude, reversing the court of appeals on this point, that the Commission has appellate jurisdiction over interim rate adjustments under 102.001(b).

B. Scope of Commission's Jurisdiction

The second issue presented to this Court is the breadth of the Commission's appellate jurisdiction under section 102.001(b). The Commission and the Utilities argue that GRIP does not provide for evidentiary hearings, and that a substantive review of the interim rate adjustment is reserved instead for the next rate case. The Cities argue three reasons why municipalities are entitled to an evidentiary hearing.

First, the Cities argue that they are entitled to an evidentiary hearing under 102.001(b) because GRIP filings are rate proceedings. Although the Cities attempt to limit this evidentiary hearing to the discrete issues contained in the GRIP filing, it is unclear how this would be different from a compliance review with the statutory requirements. The Cities argue that they are entitled to an evidentiary review of the GRIP filings before the Commission, since ratemaking proceedings are by definition contested cases.

A GRIP filing does not constitute a contested case. A "contested case" is defined as a "proceeding, including a ratemaking or licensing proceeding in which the legal rights, duties or privileges of a party are to be determined by a state agency after an opportunity for adjudicative

hearing." TEX. GOV'T CODE § 2001.003(1). It is in the rate case that the legal rights, duties and privileges of the affected parties will be determined, and not in the GRIP filing. Municipalities challenging a GRIP filing are not entitled to an adjudicatory hearing because the Commission's compliance review is not a contested case.

Second, the Cities claim to be entitled to a hearing to review the interim rate adjustment filings for reasonableness and prudence, under 104.301(a), at any time. The Utilities and the Commission agree that the Cities may file a rate case at any time after the interim rate filing, but that review is different from the Commission's compliance review under 102.001(b). The asserted review for reasonableness and prudence is also a proper subject of a rate case. To insert that review at the stage the Commission exercises appellate jurisdiction over a city's denial of an interim rate adjustment would undermine the streamlined process for implementing these interim rates for gas utilities. *See* House Comm. on Regulated Industries, Bill Analysis, Tex. C.S.S.B. 1271, 78th Leg., R.S. (2003). Instead, subsections 104.301(a) and (h) provide for a substantive review and hearing in the next rate case the utility files after a GRIP filing. TEX. UTIL. CODE § 104.301(a), (h).

Third, the Cities also argue that they are entitled to a reasonableness and prudence review in an adjudicatory hearing, limited to the GRIP filing.

Section 104.301(a) provides, in relevant part:

> A gas utility that has filed a rate case...may file with the regulatory authority a tariff or rate schedule that provides for an interim adjustment.... After the issuance of a final order...any change in investment that has been included in an interim adjustment...shall no longer be subject to subsequent review for reasonableness or prudence.

TEX. UTIL. CODE § 104.301(a). The Cities argue that 104.301(a) implies that they are entitled to a reasonableness and prudence review in a limited evidentiary hearing with the Commission to review interim rate adjustments. However, there is no positive grant by the Legislature for this review in GRIP and any evidentiary hearing would frustrate the objective of a streamlined process. Neither GURA nor GRIP provide for this middle ground of a limited evidentiary hearing; rather, GURA only provides for a rate case. We presume that every word of a statute has been included or excluded for a reason. *City of Marshall v. City of Uncertain*, 206 S.W.3d 97, 105 (Tex. 2006). The Legislature intended a streamlined process, and an evidentiary review beyond a compliance check could frustrate that purpose. It is difficult to imagine a distinction between an evidentiary hearing to challenge a GRIP filing and a contested case proceeding. We would invade the Legislature's province if we were to take the Cities' invitation to create an evidentiary hearing supported by neither the text nor the purpose of the GRIP statute.

Importantly, the Legislature implemented protections for the ratepayers when a utility makes a GRIP filing. A utility may not avail itself of the interim rate adjustment unless that utility brought a rate case pursuant to Chapter 104, Subchapter C, within the two years prior to its GRIP filing. TEX. UTIL. CODE § 104.301(a). The Legislature specified this time as the minimum requirement for implementing an adjustment. House Comm. on Regulated Industries, Bill Analysis, Tex. H.B. 1942, 78th Leg., R.S. (2003). A utility that makes interim rate adjustments is also required to undergo another rate case within five years and six months after implementing its first amended tariff or rate schedule. TEX. UTIL. CODE § 104.301(h). If a utility does avail itself of an interim rate adjustment filing, GURA requires an annual recalculation of any interim adjustments. TEX. UTIL. CODE

§ 104.301(c). Further, a gas utility seeking to implement an interim rate adjustment must electronically file with the Commission an annual earnings monitoring report as part of the application describing the investment projects completed and placed in service. TEX. UTIL. CODE § 104.301(e). This report includes a statement of the reasons the rates are not unreasonable or in violation of law. *Id.*

Further, any amounts collected as interim rate adjustments are subject to a full refund to the extent the interim recovery of infrastructure investments are later disallowed at the next rate case. TEX. UTIL. CODE § 104.301(I). The GRIP statute does not, by its terms, limit a regulatory authority's power to instigate a rate case at any time to establish just and reasonable rates. TEX. UTIL. CODE § 104.301(I). Under GURA the Commission or a municipality retains authority to institute a proceeding, either on its own or at the complaint of a party, to determine if a utility's rates are unreasonable or in violation of the law. TEX. UTIL. CODE §§ 104.301(I), 104.151. Therefore, a municipality could file a rate case on its own motion whenever it perceives the need after a GRIP filing. TEX. UTIL. CODE § 104.151. These protections further reinforce our view that the interim GRIP filings are subject only to a ministerial review of the statutory requirements by the Commission.

III. Conclusion

We conclude that the Railroad Commission has appellate jurisdiction under section 102.001(b) of the Texas Utilities Code over municipalities' orders or ordinances concerning interim rate adjustments, but that jurisdiction is limited to review of the Utilities' filings for compliance with the GRIP statute, section 104.301, and the GRIP rule, section 7.7101 of 16 Texas

Administrative Code. This review involves examination of the statutory requirements for processing a utility's application to amend its tariff or rate schedule under the GRIP statute and rule, and whether the GRIP filing satisfies those requirements. This construction effectuates the statutory language and furthers the purpose of the GRIP statute to create a streamlined procedure for recovery of capital as an incentive for gas utilities to invest in pipeline infrastructure. Therefore, we affirm the judgment of the court of appeals.[6]

Dale Wainwright
Justice

OPINION DELIVERED: November 18, 2011

[6] The court of appeals held that the GRIP rule subsections 7.7101(g)(2)(B) and (g)(2)(C) are only void to the extent the Commission attempts to reject a GRIP filing over which it holds regulatory authority for any reason other than failure to comply with the statutory requirements. 309 S.W.3d 563, 576. Because the regulatory authorities in this appeal are municipalities, we do not address the validity of these provisions in the GRIP rule that apply when the Commission acts as the regulatory authority.

IN THE SUPREME COURT OF TEXAS

NO. 10-0389

KOUROSH HEMYARI AND UNION VALLEY RANCH, L.P., PETITIONERS,

v.

GARY BEN STEPHENS, STEPHENS GROUP, L.P., AND STEPHENS GROUP II, L.P., RESPONDENTS

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

PER CURIAM

In this case we are called upon to decide whether a foreclosure sale violated the automatic stay attendant to all bankruptcy proceedings. James Murphy, pursuant to a bankruptcy court order authorizing the sale of property owned by the Stephens Groups on August 1, 2000, foreclosed on a deed of trust and posted the property for sale on September 5, 2000. Some five years later, the Stephens Groups challenged the sale on the grounds that it violated the automatic stay. The court of appeals agreed, concluding that the violation made the foreclosure void. Because we conclude that the order permitted a sale on or after August 1, 2000, we reverse the court of appeals' judgment without hearing oral argument, pursuant to Texas Rule of Appellate Procedure 59.1.

In the 1990s, Stephens Group, L.P. and Stephens Group II, L.P. (collectively "Stephens Groups") purchased three tracts of land in Dallas County. Gary Ben Stephens was the general

partner, and James Murphy was the limited partner. In 1997, Murphy agreed to sell his interest in the property to the Stephens Groups. The agreement called for the Stephens Groups to provide Murphy with the initial sum of $50,000, then an additional sum of $700,000 within 120 days. The Stephens Groups' obligation to pay $700,000 was secured by a deed of trust and a deed in lieu of foreclosure. The Stephens Groups satisfied the initial payment required, but failed to make the $700,000 payment.

When Murphy threatened to foreclose on the deed of trust, the Stephens Groups sought bankruptcy protection. The bankruptcy court entered an order in which it established a procedure for the Stephens Groups to fulfill its original obligations. The order provided that the Stephens Groups were to make payment of $50,000 to Murphy by June 12, 2000, which they did. The order further provided that, after the initial payment, a conditional lift of the automatic stay would "allow [Murphy] to post the property for foreclosure in July, 2000, for a sale on August 1, 2000." Finally, the order provided that if the Stephens Groups did not pay the remaining $650,000 on or before August 1, Murphy could "proceed with the foreclosure sale on August 1, 2000." Murphy did not schedule the foreclosure sale in July, as allowed by the order, but waited until after the Stephens Groups missed the second payment to schedule the sale for September 5, 2000.

Kourosh Hemyari purchased the property at the foreclosure sale, and Philip and David Huffines, through a limited partnership named Union Valley Ranch, L.P., later purchased two-thirds of the property from Hemyari. Following the foreclosure sale, the proceeds were used to complete the payment to Murphy, and the Stephens Groups moved to dismiss their bankruptcy case, having discharged their debts. Four years later, the Stephens Groups filed this suit in state court. The

Stephens Groups asserted violations of the Texas Property Code's foreclosure requirements, such as the trustee's deed's alleged misidentification of the grantor. One year later, the Stephens Groups amended their petition to allege that the foreclosure sale, which took place on September 5, 2000, was void because it violated the express terms of the bankruptcy court's order temporarily lifting the stay. Hemyari subsequently moved for, and was granted, summary judgment.

The court of appeals, based on its conclusion that Hemyari failed to conclusively show the validity of the foreclosure sale, reversed and remanded. *Stephens v. Hemyari*, 216 S.W.3d 526, 529 (Tex. App.—Dallas 2007, pet. denied). But that court did not address whether the foreclosure sale was, as the Stephens Groups contend, void as a matter of law. On remand, the trial court again granted Hemyari's and now intervenor Union Valley's motions for summary judgment, and this time denied a cross motion by the Stephens Groups for summary judgment on the ground that the sale was void as a matter of law. The court of appeals again reversed the trial court's summary judgment, based on its interpretation of the bankruptcy court's order: "[W]e believe the clear language of the order unambiguously modified the stay to allow for a sale only on August 1, 2000." ___ S.W.3d at ___. The court rendered judgment for the Stephens Groups. *Id.* at ___. Hemyari and Union Valley Ranch raise a number of arguments challenging the court of appeals' decision, including judicial estoppel and other equitable principles. Because we conclude that the foreclosure sale did not violate the automatic stay, we do not reach those arguments.

The basis for the Stephens Groups' challenge to the foreclosure sale is the language contained in the bankruptcy court's order conditionally terminating the automatic stay. Just as with an unambiguous contract, we enforce unambiguous orders literally. *Reiss v. Reiss*, 118 S.W.3d 439,

441–42 (Tex. 2003). Only where an order's terms are ambiguous—that is, susceptible of more than one reasonable interpretation—do we look to the surrounding circumstances to discern their meaning. *Lone Star Cement Corp. v. Fair*, 467 S.W.2d 402, 404–05 (Tex. 1971). The Stephens Groups argue, and the court of appeals concluded, that the bankruptcy court's order was not ambiguous because it expressly provided for a sale "on August 1, 2000." *See Stephens*, ___ S.W.3d at ___. The Stephens Groups contend that, because it is unambiguous, we may give no meaning to the words "on August 1, 2000" other than that the foreclosure sale could occur *only* on August 1st. But even a "literal" interpretation of an unambiguous order requires us to look at the order as a whole. *See Reiss*, 118 S.W.3d at 441. If possible, we construe an order in a way that gives each provision meaning. *Gulf Ins. Co. v. Burns Motors, Inc.*, 22 S.W.3d 417, 422 (Tex. 2000). Furthermore, under general rules of construction we avoid strictly construing an instrument's language if it would lead to absurd results. *See Transcon. Ins. Co. v. Crump*, 330 S.W.3d 211, 227 (Tex. 2010) (stating the rule in the context of statutory interpretation).

In this case, the order's terms provided for a sale "on August 1, 2000," but as Hemyari and Union Valley point out, that may have been impossible. The Stephens Groups' first scheduled payment was due by noon on June 12, 2000. The $650,000 payment was due "on or before August 1, 2000," but the order did not specify any particular time. Thus, the presumption is that payment could be made at any point before or throughout August 1st. Reading the order as a whole, we conclude that the Stephens Groups' proposed interpretation would render the entire foreclosure sale provision in the order meaningless. If the foreclosure could not occur until after a failure to pay, but the Stephens Groups could forestall payment until the end of the only day foreclosure was allowed,

the Stephens Groups could avoid foreclosure altogether by simply doing nothing.[1] The only way the foreclosure sale could have occurred on August 1st is if the Stephens Groups notified Hemyari ahead of time that payment would not be made. Furthermore, had Murphy actually conducted the foreclosure sale on August 1st as supposedly required by the order, the Stephens Groups could still have brought this suit challenging the sale, though on grounds that they were not given adequate time to make payment under the "unambiguous" terms of the order. The court of appeals recognized the incongruities in the order, but nevertheless concluded the order "unambiguously modified the stay to allow for a sale only on August 1, 2000." *See Stephens*, ___ S.W.3d at ___. This Court construes the order in a way that avoids such a contradiction.

Because the order's strict, uncontextualized terms made it essentially impossible to hold a valid foreclosure on August 1, 2000, we construe the order in a manner that gives effect to all its provisions and prevents absurdity. We hold that, viewing the instrument as a whole, the plain meaning of the order allowed for a foreclosure sale on or after August 1, 2000. Accordingly, the September 5, 2000 foreclosure sale did not violate the automatic stay.

Finally, the court of appeals did not reach the Stephens Groups' arguments concerning defects in the deeds and foreclosure sale process, which pose alternative grounds for affirming the court of appeals' judgment. Because we review the trial court's summary judgment de novo, *Tittizer v. Union Gas Corp.*, 171 S.W.3d 857, 860 (Tex. 2005), we reach those grounds ourselves. The

[1] We note that the Property Code brings this absurdity into further relief. The Property Code sets forth a variety of requirements for foreclosure and foreclosure sales. *See* TEX. PROP. CODE §§ 51.0001–.015. One particular provision requires that all public foreclosure sales take place between 10 a.m. and 4 p.m. of the first Tuesday of a month. TEX. PROP. CODE § 51.002(a). Thus, under the Stephens Groups' interpretation, they had until midnight to pay even though Murphy only had until 4 p.m. to foreclose.

Stephens Groups complain that the omissions of Stephens Groups I and II from the signature line of the deed of trust and from the substitute trustee's deed (both only listed Gary Ben Stephens) render the sale defective and void. It cannot be disputed that Gary Ben Stephens, as the general partner of both groups (and the sole remaining partner in both following Murphy's sale of his interests) had the authority to sell the property and was the sole person to whom notice of the sale had to be given.[2] At bottom, the Stephens Groups ask the Court to void the sale not because notice or authority was lacking, but merely because Stephens's capacity as general partner was omitted from the face of the signature line on the deed of trust.

The Stephens Groups properly note that terms of a deed of trust must be strictly followed. *Univ. Sav. Ass'n v. Springwoods Shopping Ctr.*, 644 S.W.2d 705, 706 (Tex. 1982). But this Court acknowledged, even in the case the Stephens Groups rely on, that minor defects in an otherwise valid foreclosure sale do not void it. *Id.* Furthermore, the Stephens Groups do not truly complain of a failure to comply with the deed of trust's terms, but rather of inconsistencies in the deed of trust itself. Citing *Kimberly Development Corp. v. First State Bank of Greens Bayou*, 404 S.W.2d 631, 636 (Tex. Civ. App.—Houston 1966, writ ref'd n.r.e.), they suggest that failure to indicate Stephens's capacity as general partner in *both* the grantor line and signature line of the deed of trust means no partnership property was ever conveyed to the trustee. But in *Kimberly*, a portion of the trustee's name was omitted from the deed of trust altogether, leaving no way of discovering the mistake from the face of the document. *Id.* That court, like this Court in *Maupin v. Chaney*, 163

[2] The partnership agreements for both groups stated that "[a]ny decision to sell, encumber or convey all or any portion of the Property shall rest solely with the General Partner [Stephens]."

S.W.2d 380, 383 (Tex. 1942), acknowledged that a deed and sale are invalid only where the deed of trust requires *extrinsic evidence* for clarification. *See* 404 S.W.2d at 636 ("*Unless there was a mistake so palpable that we could say conclusively as a matter of law from the face of the instrument itself that it had been made* . . . then . . . the power [of sale] could not properly be exercised." (emphasis added) (quoting *Hart v. Estelle*, 34 S.W.2d 665, 669 (Tex. Civ. App.—Austin 1930), *aff'd*, 55 S.W.2d 510 (Tex. Comm'n App. 1932, judgm't adopted))). By contrast, in this case the mistake was so obvious from the face of the deed as to be harmless. Anyone looking at the deed of trust, and noting that the grantor was "Gary Ben Stephens, General Partner of Stephens Group, L.P., and Stephens Group II, L.P.," would readily assume that Stephens likewise signed that same document in that same capacity, and that the omission of the partnership designation from the signature line was a harmless mistake. No reasonable bidder would have been turned away from the foreclosure sale on that basis. *Cf. id.* at 637 (considering the deterrence of bidders a primary concern in invalidating a foreclosure sale). Indeed, Hemyari was not deterred, and his bid satisfied the entire debt owed by the Stephens Groups.

These deed errors, like the alleged violation of the automatic stay, did not affect the validity of the deed of trust or the sale pursuant to it, and the trial court below was correct to grant summary judgment for Hemyari and Union Valley on both grounds. Without hearing argument pursuant to Texas Rule of Appellate Procedure 59.1, we reverse the court of appeals' judgment and render judgment for Hemyari and Union Valley.

OPINION DELIVERED: October 21, 2011

IN THE SUPREME COURT OF TEXAS

NO. 10-0426

SAFESHRED, INC., PETITIONER,

v.

LOUIS MARTINEZ, III, RESPONDENT

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

Argued October 24, 2011

JUSTICE LEHRMANN delivered the opinion of the Court.

This case requires us to clarify the nature and scope of the cause of action for wrongful termination of an employee for refusing to perform an illegal act that we recognized in *Sabine Pilot Service, Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1985). In particular, we must determine whether a plaintiff in a *Sabine Pilot* action may recover punitive damages, and if so, what must be shown as a prerequisite for those damages. We agree with the court of appeals' conclusion that a *Sabine Pilot* cause of action sounds in tort and allows punitive damages upon proper proof. However, because we hold that Martinez failed to present legally sufficient evidence of malice relating to his firing, we reverse the court of appeals' judgment insofar as it affirms the award of exemplary damages.

I. Facts

Martinez worked for Safeshred in October of 2007 as a commercial truck driver, hauling loads of cargo between Dallas, San Antonio, Houston, and Austin. Prior to each haul, he was required to perform a pre-trip inspection of the truck to confirm its compliance with relevant safety regulations. Martinez repeatedly discovered safety violations in the vehicle he was asked to drive throughout the beginning of October, but was consistently ordered to drive the truck anyway. The first incident occurred on October 1st, when Martinez was asked to drive a truck despite his pointing out a missing Texas Department of Transportation identification number and expired dealer's tag (both violations of relevant regulations). The same defects remained in the truck he was ordered to drive on October 8th, and on that trip Martinez was pulled over and cited by a Department of Public Safety officer for numerous violations of state and federal regulations. Among the citations was one for improperly secured cargo, due in part to substantial cuts in straps used to secure the load to the truck bed. *See* 49 C.F.R. § 393.106(b) (2011) (requiring proper cargo placement and restraint to protect against shifting and falling cargo). Martinez testified that he showed the citation and described the problems to Safeshred management. Having been told by the DPS officer not to drive the truck again until the defects had been remedied, Martinez refused to drive the truck when asked by Safeshred to do so again on October 9th.

After a week of administrative duties during which time Safeshred supposedly sought to bring the truck into compliance with state and federal regulations, Martinez was again asked to drive the truck on October 15th. But while Safeshred had apparently corrected some of the defects on the truck (like the missing and expired tags), Martinez's concerns about the load's legality persisted.

The cut straps that had prompted a citation by the DPS officer on October 8th remained, the load was unsafely stacked higher than the top of the truck's cab, and there was no dunnage[1] between the two main rows of the steel shelving. For a third time, Martinez complied with Safeshred's order to drive the truck anyway. Finally, on October 17th Safeshred again asked Martinez to drive an improperly secured load. In addition to the cut straps, highly stacked load, and lack of dunnage, the steel shelving extended off the back of the trailer. This time, Safeshred managers called DPS and confirmed the legality of the shelving extending off the back. But Martinez continued to warn Safeshred about the other safety hazards (straps, height, and dunnage) despite conceding the legality of the overhang. Martinez began to drive the truck, but turned around after a few miles when he felt the cargo shifting and feared for his safety. After again urging his concerns over the legality of the load all the way up Safeshred's chain of command, he was told to either drive the truck or go home. He went home and was fired.

In December, Martinez brought a wrongful termination claim against Safeshred under *Sabine Pilot*, seeking lost wages, mental anguish damages, and exemplary damages. The jury awarded $7,569.18 in lost wages, $10,000 in mental anguish damages, and $250,000 in exemplary damages, which the trial judge reduced to $200,000 to comply with the statutory cap in section 41.008 of the Texas Civil Practice and Remedies Code. The court of appeals found the evidence factually insufficient to support the mental anguish damages, but affirmed the other two awards.

[1] Martinez described dunnage as any material placed in between two rows of equipment, to fill in any empty space and prevent the rows from shifting and becoming off balance. A driver may use sacks—blown up with air to fill the space—or empty pallets shoved in the gap to accomplish this purpose.

II. Discussion

In *Sabine Pilot*, we recognized a narrow exception to the at-will employment doctrine allowing employees to sue their employers if they are discharged "for the sole reason that the employee refused to perform an illegal act." 687 S.W.2d at 735. The at-will employment doctrine generally holds that employment for an indefinite term may be terminated at will and for any reason. *Id.* at 734 (citing *East Line & R.R.R. Co. v. Scott*, 10 S.W. 99, 102 (Tex. 1888)). However, we recognized a narrow exception in *Sabine Pilot* because of the public policies expressed in our criminal laws, *id.* at 735, and to prevent employers from forcing employees to choose between illegal activity and their livelihoods, *see Winters v. Hous. Chron. Pub. Co.*, 795 S.W.2d 723, 724 (Tex. 1990). We have yet to elaborate on the fundamental nature of a *Sabine Pilot* claim or determine the types of damages available under it.

A. The Availability of Punitive Damages

1. Tort or contract

The first question we must answer is whether a *Sabine Pilot* claim sounds in tort or contract, because the answer to that question will decide whether exemplary damages are recoverable. While exemplary or punitive damages may generally be awarded for torts involving malicious or grossly negligent conduct, they are not available for breach of contract claims. *Amoco Prod. Co. v. Alexander*, 622 S.W.2d 563, 571 (Tex. 1981). Safeshred argues that the employment relationship is inherently contractual, and that *Sabine Pilot* essentially supplements that relationship with an implied contractual provision preventing discharge for refusal to perform an illegal act. Martinez,

on the other hand, notes that every Texas case to categorize a *Sabine Pilot* claim has labeled it a tort,[2] and that comparisons to other statutory wrongful termination causes of action support that characterization. Courts outside of Texas are split on whether a public policy exception to the employment-at-will doctrine, like a *Sabine Pilot* claim, sounds in tort or contract. *Compare Brockmeyer v. Dun & Bradstreet*, 335 N.W.2d 834, 841 (Wis. 1983) (contract), *and Monge v. Beebe Rubber Co.*, 316 A.2d 549, 551 (N.H. 1974) (same), *with Thompson v. St. Regis Paper Co.*, 685 P.2d 1081, 1089 (Wash. 1984) (en banc) (tort), *and Parnar v. Americana Hotels, Inc.*, 652 P.2d 625, 631 (Haw. 1982) (same). We conclude that such claims sound in tort.

Apart from *Sabine Pilot*, this Court has steadfastly adhered to the employment-at-will doctrine. *See, e.g.*, *Ed Rachal Found. v. D'Unger*, 207 S.W.3d 330, 332 (Tex. 2006). In that vein, we have consistently refused to expand *Sabine Pilot* beyond the "narrow exception" we recognized in that case. *See id.* at 332–33 (refusing to expand *Sabine Pilot* liability to cover whistleblower actions not already authorized by statute); *Winters*, 795 S.W.2d at 725 (same). Safeshred argues that, in order to maintain that narrow interpretation, we must call a *Sabine Pilot* claim a contract claim. But, in fact, the opposite is true. To say the cause of action sounds in contract, we would need to drastically alter our view of the at-will employment relationship in general, rather than merely recognize a narrow exception to the at-will doctrine.

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[2] *E.g.*, *Physio GP, Inc. v. Naifeh*, 306 S.W.3d 886, 887-888 (Tex. App.—Houston [14 Dist.] 2010, no pet.); *Draker v. Schreiber*, 271 S.W.3d 318, 323 (Tex. App.—San Antonio 2008, no pet.) (citing *Louis v. Mobil Chem. Co.*, 254 S.W.3d 602, 610 (Tex. App.—Beaumont 2008, pet. denied)); *Miller v. Raytheon Aircraft Co.*, 229 S.W.3d 358, 373 (Tex. App.—Houston [1st Dist.] 2007, no pet.); *see also Garcia v. Sun Belt Rentals, Inc.*, 310 F.3d 403, 404 (5th Cir. 2002); *Hanold v. Raytheon Co.*, 662 F. Supp. 2d 793, 803 (S.D. Tex. 2009).

This is so because, to say that *Sabine Pilot* created an implied contractual provision would presume, in the first place, that there is a contract between at-will employees and their employers in which to place an implied provision. We have never recognized such a proposition. *See, e.g.*, *Montgomery Cnty. Hosp. Dist. v. Brown*, 965 S.W.2d 501, 502–03 (Tex. 1998) (treating the implied employment contract urged by petitioners as a significant departure from at-will employment); *Garcia v. Sunbelt Rentals, Inc.*, 310 F.3d 403, 404 (5th Cir. 2002) ("[N]o Texas court has held that an at-will employment relationship constitutes an oral contract . . . ."). On the contrary, we have long held firm to the principle that, in Texas, an at-will employee may be fired for a good reason, a bad reason, or no reason at all. *Brown*, 965 S.W.2d at 502. And where the promise of continued employment is illusory, it cannot form the basis of an enforceable contract. *Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson*, 209 S.W.3d 644, 660–61 (Tex. 2006) (citing RESTATEMENT (SECOND) OF CONTRACTS § 77 cmt. a (1981); 3 WILLISTON ON CONTRACTS § 7.7 (4th ed. 1992)). It would be inconsistent to call *Sabine Pilot* an implied contractual restriction on a relationship that is not even contractual. *Cf. City of Midland v. O'Bryant*, 18 S.W.3d 209, 216 (Tex. 2000) ("[A] contractual limitation [like a duty of good faith and fair dealing] would afford more rights to the plaintiffs than at-will employees possess.").

Instead, we conclude that *Sabine Pilot* claims are not contractual in nature, but sound in tort, providing a remedy when an employee refuses to comply with an employer's directive to violate the law and is subsequently fired for that refusal. This approach is consistent with our treatment of a statutory workers' compensation retaliation claim (another narrow exception to employment-at-will), which we have labeled an intentional tort. *See Cont'l Coffee Prods. Co. v. Cazarez*, 937 S.W.2d

444, 453 (Tex. 1996) (discussing TEX. LAB. CODE § 451.001). It also gives due attention to the fact that *Sabine Pilot* liability stems not from an agreement between employer and employee (the subject of contract), but from legislatively expressed public policies embodied in the criminal law. For these reasons, we hold that a *Sabine Pilot* claim sounds in tort, not in contract.

2. Punitive Damages for This Tort

Safeshred contends that, even if we recognize a *Sabine Pilot* claim as a tort, allowing exemplary or punitive damages would constitute an expansion of the claim that we did not intend in *Sabine Pilot*, and one better left to the Legislature. But punitive damages are generally available for common law torts so long as the traditional prerequisites are met: a finding of actual damages, *Doubleday & Co. v. Rogers*, 674 S.W.2d 751, 754 (Tex. 1984); and outrageous, malicious, or otherwise reprehensible conduct, *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 16 (Tex. 1994). Rather than expanding the claim, allowing punitive damages would merely avoid arbitrarily excluding a category of damages that is otherwise presumptively available. In a similar situation, where the Legislature only specified the availability of "reasonable damages" for workers' compensation retaliation claims, we interpreted that term to include punitive damages, which "have long been seen as an important policy tool and a valid measure of damages." *Azar Nut Co. v. Caille*, 734 S.W.2d 667, 669 (Tex. 1987) (citing *Hofer v. Lavender*, 679 S.W.2d 470, 474–75 (Tex. 1984)). Here, we face similar policy concerns to those presented by the statute at issue in *Azar Nut* (deterring employers from wrongfully terminating employees), as well as the additional objective of deterring violations of the criminal law. We hold that, in the proper case, *Sabine Pilot* plaintiffs may recover any reasonable tort damages, including punitive damages.

B. Legal Sufficiency of Malice Evidence

Following a liability question (which asked whether Safeshred fired Martinez for the sole reason that he refused to perform an illegal act), the trial court instructed the jury on malice, a prerequisite to an award of punitive damages according to this charge[3]:

> Do you find by clear and convincing evidence that the harm to Louis Martinez, III resulted from malice attributable to Safeshred, Inc.?
> . . .
> "Malice" means:
> a. a specific intent by [Safeshred] to cause substantial injury to Louis Martinez, III; or
> b. an act or omission by [Safeshred],
>
> > (i) which when viewed objectively from the standpoint of [Safeshred] at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and
> > (ii) of which [Safeshred] has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.

Safeshred argues that the "harm to Louis Martinez" referenced in this instruction was the firing itself, and that Martinez presented no evidence at trial that the act of firing involved any extremely reprehensible conduct. Martinez contends that there was legally sufficient evidence under Safeshred's formulation, and also argues that malice could be shown through Safeshred's indifference to the potential harm to Martinez (and to the public at large) had he gone through with

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[3] Chapter 41 of the Civil Practice and Remedies Code requires that, unless otherwise specified by the statute creating the cause of action, a jury must find fraud, malice (specific intent to cause substantial harm), or gross negligence as a prerequisite to an award of exemplary damages. TEX. CIV. PRAC. & REM. CODE § 41.003. An earlier version of this statute defined malice as embodying either specific intent or gross negligence. Act of Apr. 6, 1995, 74th Leg., R.S., ch. 19, § 1, sec. 41.001, 1995 Tex. Gen. Laws 108, 109 (amended 2003) (current version at TEX. CIV. PRAC. & REM. CODE § 41.001). The trial court used this older version for its instruction. Because the adequacy of the jury charge is not before us on appeal, we review the evidence in light of the charge as given. *City of Ft. Worth v. Zimlich*, 29 S.W.3d 62, 71 (Tex. 2000).

the illegal acts. We agree with Safeshred, and conclude that the evidence of malice in this case was not legally sufficient because it did not relate to the firing itself.

1. What is "malice" in a *Sabine Pilot* Claim?

"The type of malice necessary to support punitive damages varies with the nature of the wrongful act at issue in any given category or particular type of case." *Cazarez*, 937 S.W.2d at 453. Even when using the statutory malice definition that was used in this case (intent to cause or conscious indifference to serious potential harm), the application of that definition will depend on the nature of the underlying tort. In a typical negligence case like medical malpractice, to recover exemplary damages a plaintiff must simply prove that the defendant was not merely negligent, but was grossly negligent or acted intentionally in causing the serious harm that is the subject of the cause of action. *See Columbia Med. Ctr. of Las Colinas, Inc. v. Hogue*, 271 S.W.3d 238, 248 (Tex. 2008). But when a tort requires willful harm as a necessary element of liability, that willfulness alone cannot also justify a punitive damages award. *See Ware v. Paxton*, 359 S.W.2d 897, 899 (Tex. 1962) ("The fact that an act is [tortious] is not itself ground for an award of exemplary or punitive damages."). More is required. *Cf. Cazarez*, 937 S.W.2d at 454 (requiring "actual malice" where the cause of action itself required intentional wrongdoing).

A *Sabine Pilot* claim falls into the latter category, since plaintiffs will always have to prove that an employer intentionally fired them for the sole reason that they refused to perform an illegal act. *Sabine Pilot*, 687 S.W.2d at 735; *see also Sw. Bell Tel. Co. v. Garza*, 164 S.W.3d 607, 636 (Tex. 2004) (O'Neill, J., concurring) ("Every act of retaliation . . . is inherently willful—the act is motivated by the employer's conscious desire to 'get back' at the employee for exercising her

protected rights." (quoting *Snapp v. Unlimited Concepts, Inc.*, 208 F.3d 928, 936 (11th Cir. 2000))). A malice finding must require more than Safeshred's mere intent to fire Martinez, or else every Sabine Pilot claim would warrant punitive damages. *See Cazarez*, 937 S.W.2d at 454 (noting that punitive damages are only appropriate in the most egregious cases).

Therefore, in evaluating whether Safeshred officials specifically intended or were consciously indifferent to the prospect of substantial injury to Louis Martinez,[4] the "substantial injury" referred to in the charge must be something "independent and qualitatively different from the . . . compensable harms associated with [the cause of action]." *Moriel*, 879 S.W.2d at 19. For example, this type of malice might exist "'where the employer circulates false or malicious rumors about the employee before or after the discharge . . . or actively interferes with the employee's ability to find other employment.'" *Garza*, 164 S.W.3d at 636 (O'Neill, J., concurring) (quoting *Harless v. First Nat'l Bank*, 289 S.E.2d 692, 703 n.19 (W. Va. 1982));[5] *see also Town Hall Estates-Whitney, Inc. v. Winters*, 220 S.W.3d 71, 89 (Tex. App.—Waco 2007, no pet.) (finding sufficient evidence of malice where nursing home made employee's conduct look worse than it was before state nursing board,

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[4] The jury charge included, in part (b) of the malice definition, "the potential harm to *others*" (emphasis added). But our cases hold, and Martinez concedes, that, while potential harm to the public at large may be relevant to the reprehensibility of Safeshred's conduct for purposes of evaluating the constitutionality of the amount of punitive damages awarded, only potential harm to Martinez himself is relevant to the availability of punitive damages in the first place. *See Bennett v. Reynolds*, 315 S.W.3d 867, 876 (Tex. 2010) (citing *Philip Morris USA v. Williams*, 549 U.S. 346, 355 (2007)).

[5] The jury charge in *Garza* used the "actual malice" definition of malice, rather than the definition used here. 164 S.W.3d at 618 ("'Actual malice' means ill will, spite, evil motive, or purpose to injure another." (citing *Cazarez*, 937 S.W.2d at 452–54)). Nevertheless, the example is still applicable here because "purpose to injure another" in the *Garza* charge tracks the "specific intent . . . to cause substantial injury" language in part (a) of the malice definition in this case. The only difference between the evidentiary analysis in *Garza* and here is that, because of the jury charge we are bound by in this case, we may consider not just intentional actions by Safeshred, but also grossly negligent ones (per part (b) of the definition).

resulting in plaintiff's two-year probation). Damage to the employee's reputation or future employment prospects is a qualitatively different injury from the firing itself, and conscious indifference to a risk of that injury might warrant punitive damages.

Courts have also recognized malice where an employer engages in harassment in connection with a wrongful firing. *See Whole Foods Mkt. Sw., L.P. v. Tijerina*, 979 S.W.2d 768, 779 (Tex. App.—Houston [14th Dist.] 1998, pet. denied) (forcing an employee to sign a false confession); *Lubbock Cnty. v. Strube*, 953 S.W.2d 847, 859–60 (Tex. App.—Austin 1997, pet. denied) (singling an employee out for unfavorable work assignments and conducting an unfair disciplinary hearing prior to the firing). And malice might also exist when an employer knows the retaliatory firing is unlawful and does it anyway. *See Ancira Enters., Inc. v. Fischer*, 178 S.W.3d 82, 94 (Tex. App.—Austin 2005, no pet.) (asking, in a Texas Commission on Human Rights Act case, whether an employer "retaliated against [the plaintiff] with specific intent . . . or gross negligence regarding [the plaintiff]'s right to be free from such practices"); TEX. LAB. CODE § 21.2585(b) ("A complainant may recover punitive damages against a respondent . . . if the complainant demonstrates that the respondent engaged in a discriminatory practice with malice or reckless indifference to the state-protected rights of an aggrieved individual."). In keeping with these examples, we hold that malice could be shown in this *Sabine Pilot* case by evidence that Safeshred, in firing Martinez, consciously ignored a risk of some additional serious harm, such as interference with his future employment, harassment, or terminating his employment knowing the reason for doing so is unlawful.

But while both parties agree that malicious circumstances surrounding the firing, like those described above, would constitute malice in this case, Martinez suggests that we must also consider

the dangerousness of the illegal acts he was asked to perform. We disagree. "The legal justification for punitive damages is similar to that for criminal punishment, and like criminal punishment, punitive damages require appropriate substantive and procedural safeguards to minimize the risk of unjust punishment." *Moriel*, 879 S.W.2d at 16–17. One of those safeguards is that the conduct that is the basis for a punitive damages award must have a "nexus to the specific harm suffered by the plaintiff" in that case. *See Bennett v. Reynolds*, 315 S.W.3d 867, 875 (Tex. 2010) (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003)). The Supreme Court in *State Farm* explained:

> A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant . . . . Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct . . . .

538 U.S. at 423.

Applying these principles to a *Sabine Pilot* claim, we hold that the employer's illegal directive to the employee (and any malice that might have accompanied that directive) cannot form the basis for a punitive damages award. Although the encouraged illegal activity has a connection to the cause of action in a general sense, it does not have a sufficient nexus to the harm actually caused to a *Sabine Pilot* plaintiff, for several reasons. First, we recognized the *Sabine Pilot* cause of action based on our limited authority to "judicially amend [the] judicially created [employment-at-will] doctrine." *Sabine Pilot*, 687 S.W.2d at 735. The only conduct made actionable (or punishable) by that decision is conduct which would otherwise have been governed by the employment-at-will doctrine—that is, a firing. A plaintiff may not bring a *Sabine Pilot* claim immediately after being

asked to perform an illegal activity, but must first refuse and be fired. Allowing punitive damages premised not on the actionable firing itself, but on the illegal conduct that might have occurred while the employment relationship was still ongoing, would be an improper expansion of the cause of action.

Moreover, it would be inconsistent with the way this Court and others have evaluated malice in other exceptions to the employment-at-will doctrine. In workers' compensation retaliation cases like *Garza*, the underlying accident or occurrence that motivated the plaintiff's workers' compensation claim in the first place is generally connected to the retaliation claim (because it initiated the series of events that gave rise to the cause of action). But when evaluating an employer's actual malice in those cases, we have never looked to the employer's conduct surrounding the workplace accident as proof of malice in the retaliation claim. *See Garza*, 164 S.W.3d at 628 (analyzing evidence surrounding the plaintiff's allegedly retaliatory demotion, but not the workplace accident, in finding legally insufficient evidence of malice); *Cazarez*, 937 S.W.2d at 454–55 (same). The same is true in the context of a whistleblower suit. A whistleblower action involves both illegal conduct by the employer (which the employee reports), and a retaliatory employment action for blowing the whistle, yet we only look to malice surrounding the employment action. *See City of Ft. Worth v. Zimlich*, 29 S.W.3d 62, 71–72 (Tex. 2000) (evaluating the City's malicious behavior in the retaliation against an employee, but not in the underlying illegal act, in a whistleblower action under TEX. GOV'T CODE § 554.001); *Town Hall Estates*, 220 S.W.3d at 88–89 (same, in a whistleblower action under the Health and Safety Code); *Strube*, 953 S.W.2d at 859–60.

All of these cases confirm that in retaliatory termination cases, the only malice relevant to allowing punitive damages is that surrounding the actual termination itself.

Furthermore, the nature of a *Sabine Pilot* claim means that the illegal activity an employee is asked to do never actually occurs (because the employee will have refused to do it and been fired). Thus, allowing punitive damages based on the unrealized consequences of the illegal directive would amount to impermissibly punishing the employer for harm the plaintiff never actually endures. *See State Farm*, 538 U.S. at 423 ("A defendant should be punished for the conduct that *harmed the plaintiff* . . . ." (emphasis added)). It would amount to impermissible punishment for "other parties' hypothetical claims," and "create[] the possibility of multiple punitive damages awards for the same conduct." *See id.* If an employee actually chooses to perform the illegal act and is harmed, that employee might have a remedy through a tort action against the employer, and the employer's malicious intent in ordering the illegal act may warrant punitive damages in that case. Criminal sanctions may also be warranted against the employer for issuing the illegal directive, whether it is followed or not, providing further punishment for that conduct. With those deterrent mechanisms already in place, allowing a *Sabine Pilot* plaintiff to recover punitive damages based on the dangerousness of the employer's hypothetical illegal activities could lead to the employer's being punished multiple times for the same conduct.

Accordingly, even if there was legally sufficient evidence that Safeshred was grossly negligent in ordering Martinez to drive the illegal truck loads, that gross negligence would not support punitive damages in this action because it was not relevant to the actionable firing itself. Malice in this case could only be shown by clear and convincing evidence that Safeshred, in firing

Martinez, intended or ignored an extreme risk of some additional harm (like interference with his future employment, harassment, or terminating him knowing it was unlawful to do so).

2. Evidence of Malice in This Case

Based on the formulation delineated above, Martinez did not present legally sufficient evidence for a reasonable trier of fact to form a firm belief or conviction that Safeshred acted with malice in firing him. *See Garza*, 164 S.W.3d at 627 (setting forth the standard for evaluating the legal sufficiency of evidence of a finding that requires clear and convincing evidence at trial). The only evidence relevant to this inquiry was that (1) Safeshred designated Martinez as "ineligible for rehire" in its internal employment records, and (2) the reason given on an internal report for Martinez's firing was that he "abandoned his job," with no mention of the dispute over the safety regulations.[6] This evidence is insufficient to support a firm conviction that Safeshred was consciously indifferent to a risk of interfering with Martinez's future employment prospects or causing some other serious harm stemming from the firing itself.

Designating Martinez as "ineligible for rehire" could not have caused any harm that is qualitatively different from the firing itself. Having chosen to terminate Martinez, rightfully or wrongfully, Safeshred was fully entitled to choose not to rehire him. *See Cazarez*, 937 S.W.2d at 451, 455 (noting that "legally justified conduct" "was simply not probative to either establish a

[6] No evidence in this case showed harassment in connection with the firing, or Safeshred's knowledge that firing Martinez was unlawful. The court of appeals, in finding legally sufficient evidence of malice, relied primarily on evidence that Safeshred managers knew that driving the unsafe truck loads was illegal. But that is not the sort of conscious indifference that alone supports a finding of malice in a case like this. A malice finding based on Safeshred's knowledge of illegality would require a showing that the company knew the loads were illegal and was aware that the law did not permit it to fire an employee for refusing to perform an illegal act, but fired Martinez anyway. Martinez presented no such evidence.

violation or malice"). In fact, had Safeshred merely reassigned Martinez to another position rather than fired him, Martinez may not have even had a valid *Sabine Pilot* claim, which only prohibits "the discharge of an employee." *Sabine Pilot*, 687 S.W.2d at 735. Conduct which was necessary merely for liability cannot serve as a basis for punitive damages.

Secondly, evidence of the objective risk[7] of a disruption of Martinez's employment prospects was tenuous at best. The allegedly damaging remarks were made on an internal record, and there was no evidence that Safeshred ever communicated those sentiments to other companies in the industry. In fact, Martinez obtained a new job just two months after being fired by Safeshred, and a new job in the trucking industry a few months after that. Moreover, Martinez points to no evidence of the subjective component of gross negligence. Even assuming the remarks were potentially damaging, there was no evidence that Safeshred knew or intended that those remarks would interfere with Martinez's future employment or otherwise cause him harm. Under the formulation of malice appropriate for this case, no reasonable juror could have formed a firm conviction that Safeshred acted with malice. And without the prerequisite finding of malice, Martinez was not entitled to exemplary damages.

[7] Gross negligence (a type of "malice" according to the charge here) has two components: objective dangerousness or risk, and subjective knowledge of and disregard for that risk. *Moriel*, 879 S.W.2d at 23.

III. Conclusion

In summary, we hold that (1) a *Sabine Pilot* claim sounds in tort; and (2) punitive or exemplary damages are available under such a claim with a showing of malice surrounding the plaintiff's firing. Because there was legally insufficient evidence of malice in this case, the exemplary damages award must be reversed. Accordingly, the judgment of the court of appeals is reversed insofar as it affirms the award of exemplary damages, and in all other respects is affirmed.

_____
Debra H. Lehrmann
Justice

OPINION DELIVERED: April 20, 2012

IN THE SUPREME COURT OF TEXAS

NO. 10-0429

SHELL OIL COMPANY, SWEPI LP D/B/A SHELL WESTERN E&P, SUCCESSOR IN INTEREST TO SHELL WESTERN E&P, INC., PETITIONERS,

v.

RALPH ROSS, RESPONDENT

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

Argued October 4, 2011

JUSTICE LEHRMANN delivered the opinion of the Court.

This case involves a dispute concerning alleged underpayments of gas royalty. We must decide whether limitations barred a royalty owner's claims against the operator of the field. We hold that the fraudulent concealment doctrine does not apply to extend limitations as a matter of law when the royalty underpayments could have been discovered from readily accessible and publicly available information before the limitations period expired. When, as in this case, the information was publicly available and readily accessible to the royalty owner during the applicable time period, a royalty owner who fails to take action does not use reasonable diligence as a matter of law. It has long been the law that the discovery rule does not apply to defer the accrual of royalty owners' claims for underpayments when the injury could have been discovered through the exercise of due

diligence. Accordingly, because the parties do not dispute that the pertinent information was readily accessible and publicly available, the royalty owner's claims are time-barred as a matter of law.

Ralph Lee Ross sued Shell Oil Company and Shell Western E&P (collectively "Shell") for breach of contract, unjust enrichment, and fraud, based on claims that Shell underpaid royalty due under a mineral lease to Ross's grandmother, Gertrude T. Reuss (the family is collectively referred to as "the Rosses"). We are asked to determine whether limitations barred the Rosses' claims.

Based on jury findings that Shell fraudulently concealed its underpayments, the trial court rendered judgment for the Rosses. A divided court of appeals affirmed the trial court's judgment. ___ S.W. 3d ___. We reverse the court of appeals' judgment and render judgment for Shell.

I. Factual and Procedural History

In 1961, Shell entered into a mineral lease with Gertrude T. Reuss and her husband, G.T. Reuss ("Reuss Lease"). Several years later, Shell contributed parts of the land covered by the Reuss Lease to two pooled units—the Houston Unit and the Lasater Unit. In addition to the two wells Shell drilled on land covered by the Reuss Lease ("Lease Wells"), both the Houston Unit and the Lasater Unit contained a producing well located on land not covered by the Reuss Lease ("Unit Wells"). Shell paid royalty to the Rosses on both the Lease Wells and the Unit Wells. The Reusses' son, Ralph Louis Ross, administered the Reuss Lease and became trustee of the trust that held the lease when Gertrude Reuss died in 1998. Ralph Louis Ross was a lawyer who had done oil and gas work, and thus understood the oil and gas industry. In 2002, Ralph Louis Ross assigned all rights in the Reuss Lease to his son, Ralph Lee Ross.

Under the Reuss Lease, Shell was required to pay the Rosses "one-eighth of the amount realized" by Shell for any gas or casinghead gas produced from the land. The pooling and unitization agreement split the one-eighth royalty with the State, with both the State and the Rosses receiving a one-sixteenth royalty. However, Shell did not pay the Rosses based on third-party sale prices as required by the Reuss Lease. From 1994 to 1997, Shell paid royalty based on a so-called "arbitrary price" for the Lease Wells. At trial, Shell could not explain how or why it used this price instead of the third-party sales price, and admits that it "made a mistake."[1] From 1988 to 1994, Shell used a weighted-average method calculation for the Unit Wells, averaging the third-party sales prices of Shell and other operators for sales from the Lasater and Houston Units.[2]

In 2002, the Rosses sued Shell for breach of contract, unjust enrichment, and fraud. They alleged that the fraudulent concealment doctrine tolled the statute of limitations because Shell "set up an elaborate scheme to allow it to [underpay] royalties, and then made multiple misrepresentations to cover up this scheme, [including] making false representations in the monthly [royalty] statements," which the Rosses reasonably relied on. Before the case was submitted to the jury, Shell stipulated that unless it prevailed on its statute of limitations defense, the Rosses were entitled to recover damages on their claim that Shell underpaid royalty on the Lease Wells by using the so-called arbitrary price to calculate royalty. Additionally, the trial court ruled, as a matter of law, that Shell had breached the lease by using the weighted-average method to calculate royalty for

[1] Shell suggests that the "arbitrary price" may have been a computer glitch or an accounting error.

[2] Shell contests that its use of the weighted-average method for the Unit Wells was a breach of the Reuss Lease, but does not contest that its use of the "arbitrary price" for the Lease Wells was a breach.

the Unit Wells. The only issues sent to the jury were (1) whether Shell fraudulently concealed its failure to pay royalty in accordance with the terms of Reuss Lease and (2) the dates on which the Rosses, exercising reasonable diligence, could have discovered that Shell failed to pay royalties in accordance with the Reuss Lease. The jury found for the Rosses on the fraudulent concealment issue for both the Lease Wells and the Unit Wells.[3] The Rosses were awarded actual damages of $72,532.09 plus prejudgment interest, attorney's fees, and court costs.

The court of appeals affirmed, holding that Shell knowingly underpaid royalty and that the fraudulent concealment doctrine tolled the statute of limitations. ___ S.W.3d at ___. The majority reasoned that "the evidence presented . . . support[ed] the jury's findings as to Shell's fraudulent concealment of its wrongful conduct and as to when the Rosses, with the exercise of reasonable diligence, could have discovered the wrongful conduct and their claims." *Id.* at ___.

II. Limitations

Shell challenges the court of appeals' ruling that the Rosses' claims were not barred by limitations. Shell asserts that the court of appeals erred in holding that the fraudulent concealment doctrine tolled the limitations period. We agree that the fraudulent concealment doctrine did not toll the limitations period, but this does not end our analysis. We must also consider whether the discovery rule exception to limitations applied to defer accrual of the cause of action. We consider each doctrine in turn.

[3] Specifically, the jury found that the Rosses could have, with the exercise of reasonable diligence, discovered the underpayments on the Lease Wells in 2006 and the Unit Wells in 2002.

A. Fraudulent Concealment

We have recognized two doctrines that may apply to extend the statute of limitations. *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 918 S.W.2d 453, 455–56 (Tex. 1994). The first, fraudulent concealment, is an equitable doctrine that is fact-specific. *BP Am. Prod. Co. v. Marshall*, 342 S.W.3d 59, 67 (Tex. 2011). Fraudulent concealment tolls limitations "because a person cannot be permitted to avoid liability for his actions by deceitfully concealing wrongdoing until limitations has run." *S.V. v. R.V.*, 933 S.W.2d 1, 6 (Tex. 1996).

In this case, the jury found that Shell fraudulently concealed its failure to pay royalty in accordance with the Reuss Lease for the Lease Wells and the Unit Wells. The jury also found that the Rosses, exercising reasonable diligence, could not have discovered that Shell failed to pay royalty in accordance with the Reuss Lease until 2002 for the Lease Wells and until 2006 for the Unit Wells. A defendant's concealment of wrongdoing may toll the running of limitations. *Shah v. Moss*, 67 S.W.3d 836, 841 (Tex. 2001). The fraudulent concealment doctrine requires that the Rosses prove Shell "actually knew a wrong occurred, had a fixed purpose to conceal the wrong, and did conceal the wrong." *Id.* However, fraudulent concealment only tolls the statute of limitations until "the fraud is discovered or could have been discovered with reasonable diligence." *BP Am.*, 342 S.W.3d at 67.

The Rosses argue that reasonable reliance on fraudulent representations negates any duty to investigate unless and until further information comes to light which re-triggers that duty, and that they reasonably relied on the prices listed on check stubs that Shell enclosed with its monthly royalty statements since misrepresenting the price would be a violation of the Natural Resources Code. *See*

TEX. NAT. RES. CODE § 91.502(4) (requiring each check stub to include "the price per barrel or per MCF of oil or gas sold"). We disagree. Reasonable diligence requires that owners of property interests make themselves aware of relevant information available in the public record. For example, in *BP America*, we held that the limitations period was not tolled as a matter of law because BP's fraudulent misrepresentations about its good faith efforts to develop a well could have been discovered from publicly available information within the limitations period. 342 S.W.3d at 68–69. In *Kerlin v. Sauceda*, we held that a deed holder's descendants who had been given notice that deeds executed by their predecessors contained royalty reservations, but had not received any royalty payments for minerals on their property, could have discovered the existence of their claims for unpaid royalties by investigating public records of case settlements and conveyances. 263 S.W.3d 920, 926 (Tex. 2008).

The Rosses did not exercise reasonable diligence and their claims are barred by limitations if readily accessible and publicly available information could have revealed Shell's wrongdoing before the limitations period expired. They argue that additional investigation would not have led to discovery of Shell's breach since the only way the Rosses could have discovered what Shell actually was paid for the gas was by obtaining Shell's internal records or a confidential contract with a third-party, El Paso Natural Gas. The Rosses claim Shell would not have been forthcoming with the information and that there were no publicly-available records that would have put them on notice of their claims. Shell responds that the Rosses could have discovered Shell's breach if they had conducted additional investigation, including asking Shell about the prices, asking the companies Shell sold the gas to the price they paid, consulting publicly available records at the Texas General

Land Office (GLO), and researching the prices listed in the publicly-available El Paso Permian Basin Index.

The record in this case indicates that Shell underpaid royalty to the Rosses for years. Although the Reuss Lease required Shell to pay the Rosses "one-eighth of the amount realized" by Shell for any gas or casinghead gas produced from the land, Shell did not pay the Rosses based on the third-party sales price and instead used an arbitrary price it cannot explain for the Lease Wells and a weighted-average calculation for the Unit Wells. The prices listed on the check stubs enclosed with the monthly royalty payments were not the same as the prices Shell was being paid for the gas, which the Rosses argue is fraudulent. The Rosses claim they reasonably relied on the information provided by Shell.

However, "reliance is not reasonable when information revealing the truth could have been discovered within the limitations period." *BP Am.*, 342 S.W.3d at 68. Diligence is required when claimants have been "put on notice of the alleged harm of injury-causing actions." *Exxon Corp. v. Emerald Oil & Gas Co.*, 348 S.W.3d 194, 207 (Tex. 2011); *see also 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). Here, the Rosses were put on notice that Shell was underpaying royalty. The large difference in the prices paid to the Rosses on the Unit Wells and on the Lease Wells triggered the Rosses' duty to investigate the royalty payments. The Rosses received these royalty payments on the Unit Wells and the Lease Wells every month. During most months, the price paid on the Lease Wells was fifty to sixty percent higher than the price paid on the Unit

Wells.[4] Since the payments were based upon wells located in a common reservoir, the significant discrepancy in prices should have alerted the Rosses to potential royalty underpayments. The Rosses argue, and the court of appeals reasoned, that since different heating values could explain the differences between the royalty paid for the Unit Wells and the Lease Wells, the Rosses were under no duty to investigate the discrepancy. ___ S.W.3d at ___. But, a royalty owner cannot avoid making a diligent investigation just because there might be a legitimate explanation for a suspicious royalty payment. *See Wagner & Brown, Ltd. v. Horwood,* 58 S.W.3d 732, 737 (Tex. 2001) (stating "those who receive statements listing fees charged should be alerted to the need to perform additional investigation to protect their interests" even though such fees might have a legitimate explanation).

Readily accessible and publicly available information could have led the Rosses to discover that Shell was underpaying royalty before the limitations period expired. The prices listed in the El Paso Permian Basin Index ("Index Price"), which is readily accessible to the public, would have informed the Rosses that Shell was underpaying royalty. The Index Price varies greatly from the prices Shell used to calculate and pay royalty on the wells from 1991 to 1995.[5] The Index Price represents an average price, and the prices on which Shell based the Rosses' royalty payments were routinely below that. Furthermore, researching the GLO records would have revealed the prices

[4] In one month, the price paid on the Lease Wells was ninety-three percent greater than the price paid on the Houston Unit Well.

[5] Although the prices listed in the El Paso Permian Basin Index are stated on a heat-adjusted, MMBTU Basis, and the royalty statement prices are stated on a volumetric, MCF basis, the difference between the prices is too large to be explained by heat prices alone, as the index prices were often between seventy-five and one hundred percent higher than the prices Shell paid the Rosses.

Shell paid to the State. Under the pooling and unitization agreement, Shell was required to pay both the State and the Rosses a one-sixteenth royalty. However, the royalty payments to the State were routinely higher than the prices paid to the Rosses. Even though the GLO records did not list the price Shell actually received for the gas, the information about the price it paid the State would have revealed that Shell was underpaying royalty to the Rosses since the Rosses were consistently paid a lower royalty than the State was. These readily accessible, publicly available documents, the GLO records and the prices listed in the El Paso Permian Basin Index, together could have led the Rosses to discover that Shell was underpaying royalty. It is undisputed that the information in the El Paso Permian Basin Index and the prices received by the State were readily accessible to the public. As a matter of law, the Rosses did not use reasonable diligence since readily accessible and publicly available information could have led to the discovery of Shell's underpayments. Because the Rosses could have discovered Shell's alleged fraud through the use of reasonable diligence, we hold that, as a matter of law, the doctrine of fraudulent concealment cannot apply to toll the statute of limitations.

B. Discovery Rule

The second doctrine that may apply to extend the statute of limitations in this case is the discovery rule, a "very limited exception to statutes of limitations," which defers the accrual of the cause of action until the injury was or could have reasonably been discovered. *Computer Assocs. Int'l*, 918 S.W.2d at 455. The discovery rule applies "only when the nature of the plaintiff's injury is both inherently undiscoverable and objectively verifiable." *Wagner & Brown, Ltd.*, 58 S.W.3d at 734. An injury is inherently undiscoverable if by its nature, it is "unlikely to be discovered within

the prescribed limitations period despite due diligence." *S.V. v. R.V.*, 933 S.W.2d at 7. The legal question of whether an injury is inherently undiscoverable is determined on a categorical basis. *Via Net v. TIG Ins. Co.*, 211 S.W.3d 310, 314 (Tex. 2006); *Wagner & Brown, Ltd.*, 58 S.W.3d at 735.

In *Wagner & Brown*, we held that the discovery rule did not apply to defer the accrual of royalty owners' claims for underpayments since the injury was not inherently undiscoverable because the royalty owners could have timely discovered the underpayments through the exercise of due diligence. *Id.* at 737. Similarly, in this case, the Rosses could have timely discovered the underpayments through the exercise of due diligence. We therefore hold that the Rosses' claims are barred by the statute of limitations, and reverse and render judgment for Shell.

III. Conclusion

We hold that evidence conclusively established that Shell's alleged fraud could have been discovered by the Rosses through the exercise of reasonable diligence. Accordingly, we reverse the court of appeals' judgment and render judgment for Shell.

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Debra H. Lehrmann
Justice

OPINION DELIVERED: December 16, 2011

IN THE SUPREME COURT OF TEXAS

NO. 10-0435

WEEKS MARINE, INC., PETITIONER,

v.

MAXIMINO GARZA, RESPONDENT

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

Argued October 4, 2011

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

JUSTICE GUZMAN delivered a dissenting opinion, joined by JUSTICE MEDINA and JUSTICE LEHRMANN.

Justice Story's term for seamen, "wards of the admiralty," describes the law's belief that workers in the industry are susceptible to unique perils for which special accommodation is required. The common law has long compelled a seaman's employer to provide maintenance (food and lodging) and cure (necessary medical services) when a seaman is hurt while working on his employer's vessel. An employer that does not provide these essentials is liable not only for maintenance and cure, but also compensatory damages.

The worker in this case was injured while on board his employer's anchor barge. A jury found that he was harmed as a result of the employer's negligence, determined that the employer

owed $35,000 for maintenance and cure, and awarded $1.12 million as compensation for injuries the accident caused. The employer contests none of these findings.

An employer's failure to provide maintenance and cure may itself cause injury, or it may aggravate an injury the worker sustained on the ship. The jury awarded $2.5 million under this category. We must decide whether the evidence is legally sufficient to support that finding, which the trial court awarded and the court of appeals affirmed. We can find no evidence that the employer's breach of its maintenance-and-cure obligation injured the seaman. For that reason and others we explain below, we affirm in part and reverse in part the court of appeals' judgment.

I. Background

For twenty-eight years, Maximino Garza worked aboard the *Tom James*, a dredge owned and operated by Weeks Marine. A dredge is a vessel engaged in maintenance work on canals, rivers, and ports, carving deep channels so that large ships can navigate the waterways. Garza worked primarily in the engine room as a watch engineer. But on February 15, 2006, Garza was on board an anchor barge, also owned and operated by Weeks Marine, that was adjacent to the *Tom James*. Garza's supervisor, John LaGrange, was teaching Garza how to adjust the friction on the barge. As LaGrange held a 2 1/2 inch wide steel friction bar, he told Garza to retrieve tools from the *Tom James*. Just as Garza set out for the tools, LaGrange released the bar, which sprang forward and struck Garza in the head. Although Garza was wearing a hard hat, the force of the blow nearly knocked him unconscious.

The next day, LaGrange took Garza to see Dr. Glenn Montet, who diagnosed Garza with a contused cranium, a mild concussion, and a cervical sprain. Dr. Montet returned Garza to work with

no restrictions. Garza's head and neck pain continued. He returned to Dr. Montet, who again released him with no restrictions. Weeks Marine paid for both visits.

Eventually the pain became severe, and Garza asked his supervisor for permission to seek additional medical attention. Garza began seeing his own doctor, Dr. Fred Perez, in May. Dr. Perez advised Garza not to work and recommended a conservative treatment of therapy, exercise, and medication. The pain did not subside. Dr. Perez next prescribed facet injections. When those did not work, Dr. Perez recommended surgery, which occurred in October 2007, twenty months after the accident. Weeks Marine did not pay for any of this medical care.

Garza sued Weeks Marine, asserting four claims: (1) a Jones Act[1] negligence claim, (2) a claim that the anchor barge was unseaworthy, (3) a claim for unpaid maintenance and cure,[2] and (4) a claim for compensatory damages caused by Weeks Marine's unreasonable failure to pay maintenance and cure. The jury found for Garza on all but the unseaworthiness claim. It found Weeks Marine 80% negligent, Garza 20%, and assessed $1,121,000 in compensatory damages.[3] For maintenance and cure, the jury found that Weeks Marine unreasonably failed to pay Garza's

[1] 46 U.S.C. § 30104.

[2] Maintenance is the right of a seaman to food and lodging if he is injured while in the service of a ship. Cure is the right to necessary medical services. *Morel v. Sabine Towing & Transp. Co.*, 669 F.2d 345, 346 (5th Cir. 1982).

[3] This award included the following:

a. Past physical pain and suffering: $100,000
b. Future physical pain and suffering: $75,000
c. Past mental anguish: $100,000
d. Future mental anguish: $75,000
e. Income loss in the past: $105,000
f. Impairment of future earning capacity: $350,000
g. Past medical expenses: $116,000
h. Future medical expenses: $200,000.

maintenance and cure and that Garza would reach maximum cure on April 7, 2008.[4] The jury awarded Garza $35,000 for the unpaid maintenance and cure[5] and $2,500,000 for the injuries caused by Weeks Marine's unreasonable failure to pay.[6] The trial court rendered judgment on the maintenance award[7] and both the negligence and unreasonable-failure-to-pay awards. The court did not reduce Garza's award by his percentage of fault because the jury determined that Garza was acting under specific orders at the time of the accident. *See Williams v. Brasea, Inc.*, 497 F.2d 67, 73 (5th Cir. 1974) ("[A] seaman may not be contributorily negligent for carrying out orders that result in his own injury . . . ."). The trial court also awarded Garza attorney's fees, expert witness fees, and court costs. *See* TEX. CIV. PRAC. & REM. CODE § 42.004.

The court of appeals affirmed. ___ S.W.3d ___, ___. It held that allowing Garza to recover for physical pain and mental anguish under both the negligence claim and the unreasonable-failure-to-pay claim did not constitute a double recovery. *Id.* at ___. Because each award was based on a

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[4] Maximum cure is the point at which no further improvement in the seaman's medical condition may reasonably be expected. A shipowner has to provide maintenance and cure up to the maximum cure date. *Springborn v. Am. Commercial Barge Lines, Inc.*, 767 F.2d 89, 95 (5th Cir. 1985).

[5] This award included the following:

a. Maintenance: $15,000
b. Cure: $20,000.

[6] This award included the following:

a. Past physical pain and suffering: $500,000
b. Future physical pain and suffering: $750,000
c. Past mental anguish: $400,000
d. Future mental anguish: $850,000.

[7] Garza did not elect to receive his cure award but instead chose the higher award for medical expenses under the negligence claim.

different theory of liability and because each theory depended on separate and distinct injuries, the court held that the trial court did not err in submitting a damage question for the unreasonable-failure-to-pay claim. The court did not decide whether evidence supported the jury finding that Garza suffered injuries as a result of Weeks Marine's failure to pay and instead held that Weeks Marine waived the issue by failing to adequately brief it. *Id.* at ___ n.1. Finally, the court held that there was sufficient evidence to support the jury's findings that Weeks Marine was unreasonable in failing to pay Garza's maintenance and cure and that Garza was acting under specific orders at the time of the accident. *Id.* at ___. We granted Weeks Marine's petition for review. 54 Tex. Sup. Ct. J. 1494 (July 22, 2011).

Weeks Marine does not challenge the Jones Act negligence award or the award for unpaid maintenance and cure. Instead, it argues that Garza received a double recovery because there is no evidence that its failure to pay maintenance and cure separately injured Garza. Additionally, Weeks Marine argues that no evidence supports the jury finding that Garza was acting under specific orders at the time of the accident. Because the court of appeals held that Weeks Marine waived its challenge to the unreasonable-failure-to-pay award, we address that issue first.

II. Weeks Marine preserved its no evidence challenge.

At the court of appeals, Weeks Marine argued that Garza received a double recovery for his pain and suffering and mental anguish because the jury awarded those damages for both the unreasonable-failure-to-pay claim and the negligence claim. Garza disagreed, contending that noneconomic damages are recoverable under both claims and that he presented evidence to support both awards. When Weeks Marine responded that there was no evidence that its unreasonable

failure to pay caused Garza a distinct injury to support the award under that claim, the court of appeals held that Weeks Marine had waived the issue. Weeks Marine made "this argument in relation to the complaint that Garza received a double recovery for the same injury." ___ S.W.3d at ___ n.1. But because Weeks Marine "did not raise or brief a complaint that there [was] legally insufficient evidence to support the jury's damage award," the court considered the issue waived. *Id.*

"[D]isposing of appeals for harmless procedural defects is disfavored." *Perry v. Cohen*, 272 S.W.3d 585, 587 (Tex. 2008) (per curiam) (citing *Verburgt v. Dorner*, 959 S.W.2d 615, 616 (Tex. 1997)). Instead, "[a]ppellate briefs are to be construed reasonably, yet liberally, so that the right to appellate review is not lost by waiver." *Id.* Appellate courts must treat the statement of an issue "as covering every subsidiary question that is fairly included." TEX. R. APP. P. 38.1(f). An appellant can preserve error "in the body of their appellate brief," even if it is not separately listed in the notice of appeal or presented as an issue in the brief. *Perry*, 272 S.W.3d at 586. Weeks Marine did not separately and specifically present its no evidence challenge in the issues listed in its appellate brief. But a fair reading shows it argued that there was no evidence of a separate injury to support the unreasonable-failure-to-pay award.[8] The basis of a double recovery challenge is that a party recovered twice for one injury. *See, e.g.*, *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 303 (Tex. 2006) ("'There can be but one recovery for one injury, and the fact that . . . there may be more

[8] Weeks Marine had also urged this argument in the trial court and objected to the trial court's submission of the damage question for the unreasonable-failure-to-pay claim on that basis. *Cf. Minn. Mining & Mfg. Co. v. Nishika Ltd.*, 953 S.W.2d 733, 738 (Tex. 1997) (noting that the defendant repeatedly stated its no evidence objection to a damage question in the trial court and in this Court).

than one theory of liability[] does not modify this rule.'" (alterations in original) (quoting *Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1, 8 (Tex. 1991))). Fairly included in that challenge is the argument that there is no independent evidence of a second injury. Weeks Marine presented this subsidiary question in its second issue.

Within the second issue, Weeks Marine argued that "there was no evidence presented to show Mr. Garza's injuries were aggravated by Weeks' denial to pay maintenance and cure." Weeks Marine then briefed this argument with appropriate citations to authorities and to the record under the subheading, "Mr. Garza Did Not Suffer An Aggravated Injury." Weeks Marine met its briefing obligations. *See* TEX. R. APP. P. 38.1(i) ("The brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record."). For that reason, and because "appellate courts should reach the merits of an appeal whenever reasonably possible," *Perry*, 272 S.W.3d at 587, the court of appeals erred in determining that Weeks Marine waived its no evidence challenge.

III. No evidence supports the unreasonable-failure-to-pay award.

Under maritime law, an injured seaman has a trilogy of potential claims against his employer: (1) a Jones Act negligence claim, (2) a claim that the ship was unseaworthy, and (3) a claim for maintenance and cure. *Chandris, Inc. v. Latsis*, 515 U.S. 347, 354 (1995). The unseaworthiness claim and the maintenance-and-cure claim arise under general maritime law, while the negligence claim is statutory. *Id.* "Historically, conceptually, and functionally, the unseaworthiness and Jones Act tort actions are 'Siamese twins.'" David W. Robertson, *Punitive Damages in U.S. Maritime Law:* Miles*,* Baker*, and* Townsend, 70 LA. L. REV. 463, 464 (2010). Both compensate a seaman for

injuries suffered. "The much older maintenance and cure action does not derive from tort principles and is something like a first cousin to the other two." *Id.* It does not compensate for injuries but instead serves a curative function. *See, e.g.*, *Johnston v. Tidewater Marine Serv.*, No. 96-30595, 1997 WL 256881, at *2 (5th Cir. Apr. 23, 1997) (per curiam) ("A claim for unseaworthiness is compensatory in nature . . . while a claim for maintenance and cure is curative in nature."). A maintenance-and-cure claim "concerns the vessel owner's obligation to provide food, lodging, and medical services to a seaman injured while serving the ship." *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 441 (2001). A shipowner is required "not only to pay for the seaman's maintenance and cure but to take all reasonable steps to make sure that the seaman, when he is injured or becomes sick, receives proper care and treatment." GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY § 6-13, at 310 (2d ed. 1975). The maintenance-and-cure obligation "dates back centuries as an aspect of general maritime law" and is "justified on humanitarian and economic grounds." *Atl. Sounding Co. v. Townsend*, 129 S. Ct. 2561, 2568 (2009). A claim for maintenance and cure is considered contractual in nature and arises from the relationship between seaman and employer.

Though the traditional claim for unpaid maintenance and cure does not derive from tort principles, a breach of the maintenance-and-cure duty may result in full tort damages if the breach causes the seaman a personal injury. For example, if the shipowner breaches the duty by failing to provide proper care and causes the seaman personal injury, "the shipowner is liable not only for the increased medical expenses and maintenance that may become necessary but also for resulting damages." GILMORE & BLACK § 6-13, at 311; *see also Gaspard v. Taylor Diving & Salvage Co.*,

649 F.2d 372, 376 (5th Cir. 1981) (noting that tort damages under a maintenance-and-cure claim would be appropriate if the jury determined that the employer's failure to provide the diver with proper recompression treatment caused or contributed to the diver's developing bone necrosis). Or if the shipowner breached the duty by unreasonably failing to pay for the maintenance and cure, the seaman can be compensated for injuries that the unreasonable failure to pay caused. *See, e.g.*, *Morales v. Garijak, Inc.*, 829 F.2d 1355, 1358 (5th Cir. 1987) (recognizing that a shipowner's unreasonable withholding of maintenance and cure makes the shipowner liable for "the damages that have resulted from the failure to pay, such as the aggravation of the seaman's condition, determined by the usual principles applied in tort cases to measure compensatory damages"), *abrogated on other grounds by Guevara v. Mar. Overseas Corp.*, 59 F.3d 1496 (5th Cir. 1995).[9]

When it results in personal injury, the failure to provide maintenance and cure can give rise to a Jones Act claim, *see De Zon v. Am. President Lines, Ltd.*, 318 U.S. 660, 668–69 (1943) (holding that a shipowner could be liable under the Jones Act "for harm suffered as the result of any negligence on the part of the ship's doctor"), or a stand-alone action for maintenance and cure, *see Atl. Sounding Co.*, 129 S. Ct. at 2573–74 (recognizing a "seaman's right to choose among overlapping statutory and common-law remedies for injuries sustained by the denial of maintenance and cure"). Thus, a seaman's trilogy of potential claims can become a trilogy plus one: (1) a Jones

[9] There are narrow circumstances, not present here, in which a shipowner will not be liable for denying a seaman maintenance and cure. *See, e.g.*, 2 ROBERT FORCE & MARTIN J. NORRIS, THE LAW OF SEAMEN § 26:21, at 26-46 (5th ed. 2003) (explaining that a seaman will not be entitled to maintenance and cure if, before joining the vessel, the seaman "knows that he is afflicted with a disabling disease and conceals the fact and holds himself out as fit"). A shipowner is therefore entitled to investigate a seaman's claim for maintenance and cure and require corroboration. *Morales v. Garijak, Inc.*, 829 F.2d 1355, 1358 (5th Cir. 1987), *abrogated on other grounds by Guevara v. Mar. Overseas Corp.*, 59 F.3d 1496 (5th Cir. 1995). But if, after investigating, the shipowner unreasonably rejects the claim, the shipowner can be liable if the failure to pay results in a personal injury. *Id.*

Act negligence claim, (2) an unseaworthiness claim, (3) a claim for unpaid maintenance and cure, and (4) a claim for personal injuries caused by the failure to provide maintenance and cure. If any of the claims seek to recover damages for the same injury—for example, a Jones Act claim and a failure-to-provide claim seeking to recover damages for injuries caused by the negligent provision of care—the seaman can recover under either claim but not both. *See, e.g.*, *Gaspard*, 649 F.2d at 376 ("The jury was thus entitled to award Gaspard full tort damages under either the Jones Act count, the maintenance and cure count, or both, as long as it did not award a double recovery for any element of damages."); *cf.* 1 THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 6-25, at 494 (5th ed. 2011) ("Of course, a plaintiff is not entitled to independent recoveries for his unseaworthiness and Jones Act negligence claims."). But when the claims are based on separate injuries, the seaman is entitled to recover under both.

Garza brought all four of the above claims and based his fourth claim on Weeks Marine's unreasonable failure to pay his maintenance and cure. Weeks Marine challenges Garza's award under this claim only. Specifically, Weeks Marine disputes that Garza was injured by its failure to pay. In response, Garza argues that his pain and suffering and mental anguish were prolonged by Weeks Marine's unreasonable failure to pay and that these injuries support his damage award. *See, e.g.*, *Stevens v. Seacoast Co.*, 414 F.2d 1032, 1040 (5th Cir. 1969) (noting that a shipowner would be liable for the resulting damages if the seaman could establish that the shipowner's failure to pay maintenance and cure "contributed in any degree to additional pain or disability or prolonged the recovery period"). He says he was injured in February 2006 but did not receive surgery until October 2007. Because the surgery ultimately decreased Garza's neck pain, Garza contends that this

evidence shows he suffered twenty months of pain that would have been alleviated but for the shipowner's recalcitrance.

Garza correctly notes that prolonged pain and suffering and mental anguish can support an unreasonable-failure-to-pay award. But the injury is insufficient, without more, to recover damages. Garza must show that Weeks Marine's unreasonable failure to pay *caused* the injury. Here, no evidence establishes a causal connection between Weeks Marine's failure to pay and Garza's injuries. The failure to pay did not force Garza to go without necessary medical care. Weeks Marine paid for medical care for three months after the accident. It ceased paying for treatment afterwards, but treatment itself did not cease. Dr. Perez testified that he saw Garza sixteen to seventeen times between May 2006 and May 2007. On none of those occasions does the evidence show that Garza's treatment was compromised because Weeks Marine did not pay associated medical bills. And there is no evidence that Garza's treatment or recovery would have proceeded differently had Weeks Marine paid for it nor that Garza would have had surgery sooner. The length of the recovery period was a result of Dr. Perez's conservative treatment plan, not Weeks Marine's failure to pay.

Garza argues that accepting Weeks Marine's argument would encourage employers to avoid paying maintenance and cure because they could simply rely on other sources to provide the seaman with medical care. This argument, however, ignores remedies the law affords seamen for delay. In addition to compensatory damages for injuries caused by an employer's failure to provide maintenance and cure, a seaman can also recover punitive damages when the employer's failure to

pay is willful and wanton. *See Atl. Sounding Co.*, 129 S. Ct. at 2575.[10] Thus, concerns about an employer's conscious disregard of its maintenance-and-cure duty are addressed through the remedies available to a seaman.[11]

Weeks Marine breached its duty to provide maintenance and cure, and Garza is entitled to recover his expenses. But there is no evidence that Weeks Marine's failure to pay caused Garza additional injury. *See, e.g.*, *Cortes v. Balt. Insular Lines*, 287 U.S. 367, 373–74 (1932) ("The failure to provide maintenance or cure may be a personal injury or something else according to the consequences. If the seaman has been able to procure his maintenance and cure out of his own or his friends' money, his remedy is for the outlay, but personal injury there is none."), *superseded on other grounds by statute as recognized in Miles v. Apex Marine Corp.*, 498 U.S. 19, 33 (1990). Accordingly, we reverse that portion of the court of appeals' judgment and render judgment that Garza take nothing as to that portion of his claim.

IV. Response to the dissent

We cannot agree that Weeks Marine "failed to treat [Garza's] condition," ___ S.W.3d at ___, because doing so would require us to disregard the undisputed medical care Garza received from Dr. Montet. Weeks Marine paid for Garza's medical visits and examinations until Garza sought

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[10] We recognize that this statement is inconsistent with our decision in *Maritime Overseas Corp. v. Waiters*, 917 S.W.2d 17 (Tex. 1996), in which we held that punitive damages are not recoverable under general maritime law for the willful and arbitrary failure to pay maintenance and cure. *Id.* at 17. Based on the Supreme Court's decision in *Atlantic Sounding*, however, *Waiters* may no longer be considered binding precedent. *See Penrod Drilling Corp. v. Williams*, 868 S.W.2d 294, 296 (Tex. 1993) (explaining that Texas courts are obligated to follow "higher Texas courts and the United States Supreme Court" in determining the appropriate federal rule of decision).

[11] This case, tried before the Supreme Court decided *Atlantic Sounding*, did not include a jury submission on punitive damages.

treatment from his personal physician. During those medical visits, Dr. Montet ordered an MRI, a CT scan, and, when the scan uncovered no abnormalities, recommended a conservative course of care. No one, not even Garza's doctors, has once suggested either that the treatment Garza received from Dr. Montet was inadequate or that more aggressive care would have diminished Garza's pain.

Because we do not accept that Dr. Montet failed to treat Garza, we also cannot agree that Garza's recovery period was prolonged during the three months he was Dr. Montet's patient. But assuming that were the case, a prolonged recovery period would not be the result of Weeks Marine's failure to pay for the medical care Dr. Montet provided. The jury was asked to award Garza damages for injuries "that resulted from *the failure to pay maintenance and cure*," not from improper treatment. And, as we have mentioned, Weeks Marine paid for Garza's visits to Dr. Montet, and there is no evidence, nor does Garza allege, that Dr. Montet's treatment was inadequate. *See, e.g.*, *De Zon*, 318 U.S. at 670–71 (recognizing that doctors routinely disagree on diagnoses; a doctor's incorrect diagnosis is not necessarily negligence).

There is no evidence that Garza was injured by Weeks Marine's failure to pay for medical treatment, and the jury was not asked whether Dr. Montet's conservative treatment caused Garza pain. Thus there is no basis to remand this case for a remittitur. Because we can find no evidence that the failure to pay injured Garza, we must render judgment that he take nothing on that theory.

V. Garza was acting under specific orders at the time of the accident.

Weeks Marine also challenges the court of appeals' decision to render judgment against it for 100% of the negligence award. We agree, generally, that Garza's claims are governed by rules

of comparative fault. 45 U.S.C. § 53.[12] At trial, the jury attributed to Garza 20% of the fault for the accident. The trial court did not reduce Garza's award by this percentage, however, because the jury found, and the court of appeals agreed, that Garza's actions fell within an exception to the comparative negligence doctrine—the "specific orders" exception. ___ S.W.3d at ___. Weeks Marine argues that there is no evidence to support the jury's finding regarding this exception. We must therefore examine the basis for an exception and compare it with the evidence in this record.

A seaman can avoid a comparative-fault reduction in a negligence award by proving that he was complying with a superior's specific orders. *See, e.g.*, *Alholm v. Am. S.S. Co.*, 144 F.3d 1172, 1179 (8th Cir. 1998) ("A seaman cannot be found comparatively negligent . . . when following an order to complete a task in a specific manner."). This exception applies when the seaman had no choice but to engage in the action that the jury found contributed to the injury. *See Fashauer v. N.J. Transit Rail Operations, Inc.*, 57 F.3d 1269, 1279 (3d Cir. 1995) ("[W]hen a plaintiff has no real choice, his recovery should not be reduced because he performed the task, regardless of whether the plaintiff acted reasonably or unreasonably."). Although the Fifth Circuit originally construed this exception broadly, *see Williams*, 497 F.2d at 73 ("[A] seaman may not be contributorily negligent for carrying out orders that result in his own injury, even if he recognizes possible danger."), its application is actually quite narrow. The exception does not absolve a seaman of all negligence that results from a supervisor's directive but instead applies only when the seaman is ordered to do a specific task in a specific manner or is ordered to do a task that can be accomplished in only one

[12] This provision is from the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51–60. The Jones Act incorporates the FELA by reference. *See* 46 U.S.C. § 30104 ("Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section.").

way. *See Alholm*, 144 F.3d at 1179 (noting that there is no "blanket rule precluding a seaman from being found contributorily negligent when acting at the direction of a supervisor").[13] In other words, the exception applies when the seaman's only options are either to complete the task or disobey the order.

Applying this exception to Garza's case, the court of appeals correctly concluded that evidence supported the jury's finding that Garza was following a specific order at the time of the accident. Garza testified that while he was being trained to adjust the friction on the anchor barge, his supervisor instructed him to get tools from the *Tom James*. He testified that he could take but one route to accomplish that task, and the injury occurred at that precise location. Based on this evidence, the jury could have determined that Garza's recourse from danger was to flout his supervisor's command. Because some evidence supports the jury finding, the court of appeals correctly declined to reduce Garza's award.

VI. Conclusion

Because no evidence supports Garza's unreasonable-failure-to-pay award, we reverse that part of the court of appeals' judgment and render judgment that Garza take nothing on that claim. We affirm the remainder of the judgment. TEX. R. APP. P. 60.2(a), (c).

[13] The Ninth Circuit has expanded the specific orders exception to cover a seaman who responds to an "urgent, yet general, call to the crew for assistance." *Simeonoff v. Hiner*, 249 F.3d 883, 890 (9th Cir. 2001). Because such a call is not before us, we do not express an opinion on this view.

Wallace B. Jefferson
Chief Justice

OPINION DELIVERED: June 22, 2012

IN THE SUPREME COURT OF TEXAS

NO. 10-0435

WEEKS MARINE, INC., PETITIONER,

v.

MAXIMINO GARZA, RESPONDENT

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

Argued October 4, 2011

JUSTICE GUZMAN, joined by JUSTICE MEDINA and JUSTICE LEHRMANN, dissenting.

In maritime law, an ill or injured seaman is entitled to cure from his employer, which the Court and the Fifth Circuit have defined as the provision of "necessary medical services."[1] __ S.W.3d __, __; *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496, 1499 (5th Cir. 1995). Today, the Court effectively construes the right to necessary medical services to mean only the right to diagnosis—regardless of whether necessary medical services were provided. It is well settled in maritime jurisprudence that when an employer fails to provide cure to a seaman for an on-the-job injury and that failure prolongs or aggravates the original injury, the seaman suffers an additional

[1] The Fifth Circuit has expounded that cure is the employer's obligation "to reimburse the seaman for medical expenses he incurs" and to "take all reasonable steps to insure that the seaman who is injured or ill receives proper care and treatment." *Guevara*, 59 F.3d at 1499–1500. The Court has expounded that a "shipowner is required 'not only to pay for the seaman's maintenance and cure but to take all reasonable steps to make sure that the seaman, when he is injured or becomes sick, receives proper care and treatment.'" __ S.W.3d at __ (quoting GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY § 6-13, at 310 (2d ed. 1975)).

injury. The well-established mechanism for recovery for that additional injury is a failure to cure claim. The Court accurately sets forth this framework but then misapplies it. The evidence here shows a three-month delay from the time the employer's doctor offered a diagnosis but failed to provide necessary medical services until the seaman initiated treatment with his own physician. After the employer failed to treat his condition, the seaman's pain and related suffering and mental anguish led him to seek medical treatment on his own. The evidence of this pain and suffering and mental anguish during this three-month period is some evidence that the employer's failure to provide necessary medical services (*i.e.*, "cure") prolonged the original injury, and because the Court holds otherwise, I respectfully dissent.

The Court observes that a seaman such as Garza can have four claims against his employer: (1) a Jones Act negligence claim; (2) an unseaworthiness claim; (3) a claim for unpaid maintenance and cure; and (4) a claim based on failure to provide maintenance and cure (hereinafter a "failure to cure claim"). __ S.W.3d at __. Here, Garza brought all four claims, but only his failure to cure claim is at issue. Weeks Marine argues that Garza obtained a double recovery when the jury awarded damages for both the Jones Act negligence claim and the failure to cure claim. Specifically, Weeks Marine asserts that there is no evidence that its failure to provide cure to Garza prolonged or aggravated his injury.

The Court recites the settled rule that if there is only one injury, the seaman may recover damages under either a Jones Act negligence claim or a failure to cure claim—but the seaman is entitled to only one recovery because he suffered only one injury in that circumstance. *Id*. at __. If the failure to cure prolongs or aggravates the original injury, the seaman may recover under both

claims (*e.g.*, the Jones Act negligence claim for the original injury and the failure to cure claim for the additional injury). *Id*. at __; *Stevens v. Seacoast Co.*, 414 F.2d 1032, 1040 (5th Cir. 1969) (noting that recovery may be had if failure to pay maintenance and cure "contributed in any degree to additional pain or disability or prolonged the recovery period").

To illustrate how recovery under this rule operates, I invoke two hypothetical examples. First, assume that a seaman is injured and: (1) the employer fails to provide cure; (2) it is a year before the seaman is able to obtain medical care; (3) he takes another year to reach maximum cure; and (4) that initial year delay aggravated the injury, requiring a second surgery. A Jones Act negligence claim should compensate the seaman for the initial injury: the medical expenses not including the second surgery and the pain and suffering and mental anguish for the second year. A failure to cure claim should compensate the seaman for the second injury (the employer's failure to provide cure): the second surgery and the first year of pain and suffering and mental anguish.

Now assume the same facts but that no second surgery is required. The employer's failure to provide cure did not increase the medical expenses, but the seaman nonetheless has a claim for failure to cure. The original injury satisfied any physical impact requirement for Jones Act or maritime cases. *See Gough v. Natural Gas Pipeline Co. of Am.*, 996 F.2d 763, 766 (5th Cir. 1993) (describing physical injury requirement for Jones Act and maritime cases); *Stevens*, 414 F.2d at 1040. In that circumstance, the failure to cure claim would compensate the seaman for the first year of pain and suffering and mental anguish (as there are no additional medical expenses).

The facts of this case closely align to the facts of the second hypothetical example. Weeks Marine hired Dr. Montet to treat Garza. Dr. Montet performed a CT scan and diagnosed Garza as

having a contused cranium with a mild concussion and a cervical sprain, but he released Garza back to work that day with no restrictions. Approximately one month later, Dr. Montet performed an MRI on Garza but again released him to work with no restrictions. The Court characterizes these two visits and accompanying diagnostic scans as treatment. Regardless of the accuracy of that characterization, it is irrelevant. The relevant inquiry is whether the two visits and diagnosis alone were the necessary medical services (*i.e.*, cure) for Garza's condition. The record clearly indicates that diagnosis alone here was not providing necessary medical services to Garza for two reasons. First, the record is devoid of any evidence that Dr. Montet provided any necessary medical services to Garza that would improve his condition, such as recommending rest, returning Garza to work with some restrictions, prescribing medication or physical therapy, or performing spinal injections or surgery.[2] Second, the jury determined that Dr. Montet's diagnosis did not result in maximum cure. The charge defined maximum cure as "the point at which no further improvement in the seaman's medical condition may reasonably be expected." As explained *infra*, the jury only found that Garza would reach maximum cure several months after a 17-month treatment regimen from another doctor. That is to say the jury did not believe that Dr. Montet provided necessary medical services to Garza.

Unsurprisingly, Garza's condition worsened because the medical care Weeks Marine provided during the three months following his injury wholly consisted of diagnostic scanning and a work release with no restrictions. The Court acknowledges this, noting during this time that "[e]ventually, the pain became severe." __ S.W.3d at __. Garza then saw Dr. Perez, who initially

[2] Of course, there may be instances where diagnosis alone without even rest or work restrictions is appropriate. But because the jury found that Garza reached maximum cure only after surgery and a regimen of lesser treatments, Garza's case required more than a diagnosis alone to result in maximum cure.

recommended a neurological consult, therapy and exercise and prescribed medications. After several rounds of spinal injections provided only temporary relief, Dr. Perez performed surgery on Garza after he had been under his care for 17 months. The jury found that Garza reached maximum cure only several months after the culmination of Dr. Perez's medical care.

The facts here align with the facts of the second hypothetical example addressed *supra*. The original injury caused Garza's medical expenses and the 17 months of pain and suffering and mental anguish. The second injury was the 3-month delay in Garza obtaining necessary medical services caused by Weeks Marine's failure to provide cure.[3] Accordingly, legally sufficient evidence supports some of the damages for his failure to cure claim.

The Court believes this outcome untenable because (1) the jury was not asked to find Dr. Montet negligent, and (2) the failure to cure claim was based on Weeks Marine's failure to pay for cure, which Weeks Marine claimed it paid. Neither argument supports overturning the jury's finding for Garza on the failure to cure claim. Although the jury was not asked, and under the causes of action at issue here should not have been asked, to find Dr. Montet negligent, it was asked to determine when Garza reached maximum cure. The jury found Garza reached maximum cure only after the 17 months of treatment by Dr. Perez. Maritime jurisprudence sets out the parameters of our

[3] Garza's pain and suffering and mental anguish during his three months he was not receiving treatment to improve his condition were attributable to Weeks Marine's failure to provide cure—not the original injury. Initially, one must assume that if Weeks Marine had enabled Garza to reach maximum cure, the treatment and ultimate surgery would have occurred the same way Dr. Perez treated Garza because there is no evidence in the record to suggest otherwise. *See* __ S.W.3d at __ ("And there is no evidence that Garza's treatment or recovery would have proceeded differently had Weeks Marine paid for it . . . ."). Had Weeks Marine treated Garza as Dr. Perez did, he would have reached maximum cure three months earlier than he actually did because he would not have had three months without necessary medical services (*i.e.*, the three months of no treatment and 17 months of treatment when Weeks Marine failed to provide cure would have been 17 months of treatment if Weeks Marine had provided cure).

inquiry in this appeal: whether Weeks Marine—through Dr. Montet—enabled Garza to reach the point of no further reasonable improvement, not whether Dr. Montet was negligent.

Likewise, the Court's position that Weeks Marine satisfied its duty to provide cure by simply paying for Dr. Montet's diagnosis is misguided. Weeks Marine's payment for Dr. Montet's diagnosis did not improve Garza's condition, nor did it result in the rendition of necessary medical services in and of itself. Rather, Dr. Perez's treatment—which Weeks Marine did not pay for—did improve Garza's condition. Under even the most generous interpretation, Weeks Marine's payment for diagnosis alone is not maximum cure. Garza's condition only improved when he sought and obtained medical treatment on his own. The Court's focus on "pay" drives its conclusion that this is cure. Granted, the jury was asked whether Weeks Marine "acted unreasonably in failing to pay maintenance and cure." But the charge instructed the jury that it may award damages for failure to pay maintenance and cure if:

1. The plaintiff was entitled to maintenance and cure;
2. It was not provided;
3. The defendants acted unreasonably in failing to provide maintenance and cure; and
4. The failure to provide the maintenance and cure resulted in some injury to the plaintiff.

As the jury necessarily found: (1) Garza was entitled to maintenance and cure; (2) it was not provided; (3) Weeks Marine acted unreasonably in failing to provide it; and (4) that failure resulted in some injury to Garza. There is some evidence in the record that Garza's injury was the three-month delay in his treatment.

I agree with the Court that there is no legally sufficient evidence here to support the failure

to cure claim during Garza's 17-month treatment process. The treatment during this time period was attributable to the original injury and recoverable under the Jones Act negligence claim—not the failure to cure claim. But this should not detract from the simple fact that in the three months Dr. Montet was not providing treatment to improve Garza's condition, Garza's pain and suffering and mental anguish were attributable to the failure to provide cure. There is legally sufficient evidence supporting some of the damages for Garza's failure to cure claim.

The question then is what the disposition should be. In situations where legally sufficient evidence supports some but not the full amount awarded, we have: (1) remanded for the court of appeals to suggest a remittitur, *Guevara v. Ferrer*, 247 S.W.3d 662, 670 (Tex. 2007); (2) remanded for the trial court to determine the issue, *Ford Motor Co. v. Garcia*, __ S.W.3d __, __ (Tex. 2012); or (3) remanded for a new trial, *see Minn. Mining & Mfg. Co. v. Nishika Ltd.*, 953 S.W.2d 733, 740 (Tex. 1997). The most appropriate course here would be for the court of appeals to suggest a remittitur of the amount of damages in the failure to cure claim not supported by legally sufficient evidence. *See Guevara*, 247 S.W.3d at 670. Because the Court holds there is legally insufficient evidence to support the failure to cure claim, I respectfully dissent.

_____

Eva M. Guzman
Justice

OPINION DELIVERED: June 22, 2012

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% 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% 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 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 4273,

[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").

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 dilatory 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. 10-0490

EL APPLE I, LTD., PETITIONER,

v.

MYRIAM OLIVAS, RESPONDENT

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

Argued September 15, 2011

JUSTICE MEDINA delivered the opinion of the Court.

JUSTICE HECHT filed a concurring opinion in which JUSTICE WAINWRIGHT and JUSTICE WILLETT joined.

In this appeal, we consider the calculation of an attorney's fee award in an employment discrimination and retaliation suit brought pursuant to the Texas Commission on Human Rights Act (TCHRA). The TCHRA includes a fee-shifting provision that allows a prevailing party to recover reasonable attorney's fees as part of the costs of pursuing the claim. To calculate attorney's fees under the TCHRA, Texas courts utilize the lodestar method, that is, the number of hours worked multiplied by the prevailing hourly rates. If the lodestar does not reflect a reasonable fee, a multiplier may be applied. In this case, the court of appeals affirmed an attorney's fee award,

applying a multiplier that doubled the base lodestar amount. 324 S.W.3d 181 (Tex. App.—El Paso 2010).

The employer presents two issues. First, it claims that the affidavits used to support the fee application were not legally sufficient to support the trial court's determination of the hours expended or a reasonable hourly rate. Second, the employer argues that the trial court abused its discretion by enhancing the lodestar with a 2.0 multiplier. Because we agree that the evidence in the trial court was insufficient to make a lodestar calculation, we reverse the court of appeals' judgment and remand to the trial court for further proceedings consistent with this opinion.

I

Myriam Olivas, an Applebee's restaurant manager in El Paso, filed suit against her employer, El Apple I, Ltd., alleging sex discrimination and retaliation under the TCHRA. TEX. LAB. CODE §§ 21.001–.55. A jury determined that Olivas was not the target of sex discrimination, but that her decision to file discrimination complaints against her employer was a motivating factor in El Apple's creation of a hostile work environment. Thus, Olivas prevailed on only the retaliation claim. The trial court rendered judgment awarding Olivas compensatory damages of $1,700 for back pay, $75,000 for past compensatory damages, and $28,000 for future compensatory losses.

As the prevailing party, Olivas also submitted an application for attorney's fees. In affidavits, her attorneys estimated that they collectively spent 850 hours on the case. Olivas's lead counsel, Daniel Gonzalez, averred that he spent approximately 700 hours on the case. Her other attorney, Francisco Dominguez, averred that he spent 150 hours in preparing and trying the case. At a hearing on the fee application, Dominguez subsequently testified that he spent 190 hours, but that he was not

seeking compensation for some of that time because it was duplicative of work performed by his co-counsel.

Gonzalez testified that both attorneys' time was reasonable and necessary given the nature of the case and the results obtained. Counsel attributed the number of hours on the case to the number of discovery instruments and pleadings, the number of depositions and witness interviews, as well as the quality of representation. Both Dominguez and Gonzalez testified that they refrained from taking additional clients because of the case.

Following the fee-application hearing, the trial court used the lodestar method to calculate attorney's fees. The court determined that Gonzalez should be compensated at a rate of $250 per hour for 700 hours for a total of $175,000, and that his co-counsel Dominguez should be compensated at a rate of $300 per hour for 190 hours for a total of $57,000. The court then enhanced the lodestar by applying a 2.0 multiplier, resulting in $464,000 in attorney's fees for the trial of the case. Legal assistant fees for 100 hours were also added to the award at a rate of $65 per hour for a total of $6,500. The court further awarded $99,000 in conditional attorney's fees for defending post-judgment motions and appeals.

On appeal, El Apple argued that the attorney's fees awarded through trial was an abuse of discretion because the court did not have sufficient evidence on which to make a reasonable assessment. The company also complained that no basis existed for the trial court's enhancement of the lodestar. The court of appeals vacated the award of Olivas's back-pay damages but otherwise affirmed Olivas's compensatory damages and attorney's fees. 324 S.W.3d at 195. The court held that the affidavits were legally sufficient to support the trial court's determination of hours spent and

a reasonable hourly rate, and that more detailed billing records were unnecessary. *Id.* at 193. The court also determined that the trial court had not erred in enhancing the lodestar because it considered separate factors from those it used to determine the lodestar. *Id.* at 193–94.

II

The remedies provided under the TCHRA mirror those available under Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991. *Compare* Tex. Lab. Code §§ 21.258, 21.2585, 21.259(a) *with* 42 U.S.C. §§ 1981a, 2000e-5(g), 2000e-5(k). One of the TCHRA's purposes is to harmonize state and federal employment discrimination law. TEX. LAB. CODE § 21.001(1). Although state procedural rules govern the determination of attorney's fees in a suit brought under state law, Texas courts have looked to federal law in applying our own statute, including section 21.259(a) of the TCHRA, which provides for an award of attorney's fees to the prevailing party as part of the costs. *See, e.g., Sw. Bell Mobile Sys., Inc. v. Franco*, 971 S.W.2d 52, 55–56 (Tex. 1998); *Burgmann Seals Am., Inc. v. Cadenhead*, 135 S.W.3d 854, 860–61 (Tex. App.—Houston [1st Dist.] 2004, pet. denied); *Elgaghil v. Tarrant Cnty. Junior Coll.*, 45 S.W.3d 133, 144–45 (Tex. App.–Fort Worth 2000, pet. denied). Because federal courts use the lodestar method in awarding attorney's fees in Title VII cases, Texas courts have likewise used lodestar in awarding fees under Section 21.259(a) of the TCHRA. *See, e.g., Dillard Dep't Stores, Inc. v. Gonzales*, 72 S.W.3d 398, 412 (Tex. App.—El Paso 2002, pet. denied); *W. Telemarketing Corp. Outbound v. McClure*, 225 S.W.3d 658, 675–76 (Tex. App.—El Paso 2006, pet. granted, judgm't vacated w.r.m.).

The lodestar method of calculating attorney's fees first "achieved dominance" in federal class actions. *Gisbrecht v. Barnhart*, 535 U.S. 789, 801 (2002). Texas courts similarly adopted lodestar initially for fee setting in class actions, and the Texas Legislature subsequently mandated the method's use in such cases. *See* TEX. CIV. PRAC. & REM. CODE § 26.003(a) (providing that "the trial court shall use the Lodestar method to calculate the amount of attorney's fees to be awarded class counsel").

Under the lodestar method, the determination of what constitutes a reasonable attorney's fee involves two steps. First, the court must determine the reasonable hours spent by counsel in the case and a reasonable hourly rate for such work. *Gonzales*, 72 S.W.3d at 412. The court then multiplies the number of such hours by the applicable rate, the product of which is the base fee or lodestar. *La. Power & Light Co. v. Kellstrom*, 50 F.3d 319, 323–24 (5th Cir. 1995). The court may then adjust the base lodestar up or down (apply a multiplier), if relevant factors indicate an adjustment is necessary to reach a reasonable fee in the case. *Gonzales*, 72 S.W.3d at 412.

Our class action rule identifies the relevant factors when making a lodestar determination by reference to Rule 1.04(b), Texas Disciplinary Rules of Professional Conduct. *See* TEX. R. CIV. P. 42(i)(1) (providing for attorney's fees award in class actions). The disciplinary rule enumerates the following non-exclusive list of factors:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.

TEX. DISCIPLINARY R. PROF'L CONDUCT 1.04(b); *see also Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997) (quoting the eight-factor test for determining attorney's fees).[1] Our class action rule further provides that any adjustment to the base lodestar "must be in the range of 25% to 400% of the lodestar figure." TEX. R. CIV. P. 42(i)(1).

III

The award of attorney's fees generally rests in the sound discretion of the trial court. *Ragsdale v. Progressive Voters League*, 801 S.W.2d 880, 881 (Tex. 1990) (per curiam). But a party applying for an award of attorney's fees under the lodestar method bears the burden of documenting the hours expended on the litigation and the value of those hours. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). El Apple submits that a court cannot calculate the base fee or lodestar without such information and that the trial court here abused its discretion by not requiring the plaintiff to provide these details. El Apple further submits that the prevailing party's documentation should preferably be in the form of contemporaneous time sheets, which evidence the performance of specific tasks,

[1] *Arthur Andersen's* eight-factor test is similar to the test used by the Fifth Circuit in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717–19 (5th Cir. 1974), overruled on other grounds by *Blanchard v. Bergeron*, 489 U.S. 87 (1989).

such that the trial court can make a reasoned determination of how much time was reasonably spent pursuing the litigation.

Olivas responds that Texas law has not required detailed billing records or other documentation as a predicate to an attorney's fees award. *See, e.g., Tex. Commerce Bank, Nat'l Ass'n v. New*, 3 S.W.3d 515, 517–18 (Tex. 1999) (per curiam) (recognizing attorney's affidavit to be sufficient support for award of fees in default judgment); *Save Our Springs Alliance, Inc. v. City of Dripping Springs*, 304 S.W.3d 871, 892–93 (Tex. App.—Austin 2010, pet. denied) (accepting affidavit testimony detailing legal work and rates); *In re A.B.P.*, 291 S.W.3d 91, 99 (Tex. App.—Dallas 2009, no pet.) (noting that documentary evidence is not a prerequisite to an award of attorney's fees); *Schlager v. Clements*, 939 S.W.2d 183, 191– 93 (Tex. App.—Houston [14th Dist.] 1996, writ denied) (holding that the failure to produce documentary evidence would affect the weight of an attorney's testimony regarding fees rather than its admissibility). Olivas submits that our recent decision in *Garcia v. Gomez* is consistent with this line of authority. 319 S.W.3d 638 (Tex. 2010).

Garcia, however, is not on point. It involved a statute that required a trial court to dismiss a health-care liability claim and award attorney's fees to the defendant health-care provider, on motion, if the claimant did not timely serve an expert report. The claimant did not provide the report, and the trial court dismissed the claim. The court, however, did not award attorney's fees as the statute required. The health-care provider appealed, but the court of appeals affirmed the judgment, concluding that there was no evidence of the reasonable attorney's fees incurred by the health-care provider. *Id*. at 641.

Although the provider's attorney testified in the trial court about attorney's fees, appeared on his client's behalf, and filed pleadings in the case, the court of appeals concluded no evidence showed that the health-care provider had actually incurred attorney's fees. *Id*. We disagreed. We concluded that the statute mandated the award of attorney's fees, on motion, and that the attorney's uncontested, albeit cursory, testimony about his fee, along with the other circumstances, was enough to present the issue to the court. *Id*.

The present case, of course, involves a different statute and a different issue. Unlike *Garcia*, the question is not whether the trial court erred in failing to make an award of fees required by statute, but rather whether the court properly applied the lodestar method in determining contested attorney's fees. As El Apple points out, this Court has not previously reviewed a lodestar award under these circumstances.

The lodestar method aims to provide a relatively objective measure of attorney's fees. *Gonzales*, 72 S.W.3d at 412. It has been criticized, however, for providing a financial incentive for counsel to expend excessive time in unjustified work and for creating a disincentive to early settlement. *Gen. Motors Corp. v. Bloyed*, 916 S.W.2d 949, 960 (Tex. 1996) (citing *Court Awarded Attorney Fees*, 108 F.R.D. 237, 246–49 (3d Cir. Task Force 1985)). To avoid these pitfalls, a trial court should obtain sufficient information to make a meaningful evaluation of the application for attorney's fees. Charges for duplicative, excessive, or inadequately documented work should be excluded. *Watkins v. Fordice*, 7 F.3d 453, 457 (5th Cir. 1993). A meaningful review of the hours claimed is particularly important because the usual incentive to charge only reasonable attorney's fees is absent when fees are paid by the opposing party. As the U.S. Supreme Court has observed:

> Counsel for the prevailing party should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission. "In the private sector, 'billing judgment' is an important component in fee setting. It is no less important here. Hours that are not properly billed to one's *client* also are not properly billed to one's *adversary* pursuant to statutory authority."

Hensley, 461 U.S. at 434 (quoting *Copeland v. Marshall*, 641 F.2d 880, 891 (D.C. Cir. 1980) (en banc)). While Texas courts have not routinely required billing records or other documentary evidence to substantiate a claim for attorney's fees, the requirement has merit in contested cases under the lodestar approach.

The starting point for determining a lodestar fee award is the number of hours "reasonably expended on the litigation." *Id.* at 433. The party applying for the award bears the burden of proof. *Id.* at 437. That proof should include the basic facts underlying the lodestar, which are: (1) the nature of the work, (2) who performed the services and their rate, (3) approximately when the services were performed, and (4) the number of hours worked. An attorney could, of course, testify to these details, but in all but the simplest cases, the attorney would probably have to refer to some type of record or documentation to provide this information. Thus, when there is an expectation that the lodestar method will be used to calculate fees, attorneys should document their time much as they would for their own clients, that is, contemporaneous billing records or other documentation recorded reasonably close to the time when the work is performed.

In this case, neither attorney indicated how the 890 hours they spent in the aggregate were devoted to any particular task or category of tasks. Neither attorney presented time records or other documentary evidence. Nor did they testify based on their recollection of such records. The

attorneys instead based their time estimates on generalities such as the amount of discovery in the case, the number of pleadings filed, the number of witnesses questioned, and the length of the trial. While all this is relevant, it provides none of the specificity needed for the trial court to make a meaningful lodestar determination. The court could not discern from the evidence how many hours each of the tasks required and whether that time was reasonable. Without at least some indication of the time spent on various parts of the case, a court has little basis upon which to conduct a meaningful review of the fee award.

Moreover, if multiple attorneys or other legal professionals are involved in a case, the fee application should indicate which attorney performed a particular task or category of tasks. The application here did not provide this information. For instance, the fee application details a list of thirty-seven pleadings and states that they were prepared or reviewed by either Gonzalez or Dominguez. The two attorneys, however, bill at different rates. Without specifying who performed a task, the information is incomplete. Such uncertainty diminishes the objectivity that the lodestar method aims to provide.

Olivas's attorneys also utilized legal assistants in this litigation and were awarded $6,500 for their services ($65 per hour for 100 hours of work). While both attorneys stated in their affidavits that "[l]egal assistant time was necessarily expended in the prosecution of [the] case," no evidence was offered to describe the tasks their legal assistants performed, who performed these services, or their qualifications. When obtaining payment for work done by paralegals or legal assistants, Texas courts have required more information, such as:

> (1) [T]he qualifications of the legal assistant to perform substantive legal work; (2) that the legal assistant performed substantive legal work under the direction and supervision of an attorney; (3) the nature of the legal work performed; (4) the legal assistant's hourly rate; and (5) the number of hours expended by the legal assistant.

All Seasons Window and Door Mfg., Inc. v. Red Dot Corp., 181 S.W.3d 490, 504 (Tex. App.—Texarkana 2005, no pet.) (quoting *Multi-Moto Corp. v. ITT Commercial Fin. Corp.*, 806 S.W.2d 560, 570 (Tex.App.—Dallas 1990, writ denied)). Paralegal fees have been denied absent such proof. *Moody v. EMC Servs., Inc.*, 828 S.W.2d 237, 248 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

We generally accord considerable deference to a trial court's findings regarding whether prevailing counsel's claimed hours are excessive, redundant, or unreasonable. The trial court possesses a superior understanding of the case and the factual matters involved. But when applying for a fee under the lodestar method, the applicant must provide sufficient details of the work performed before the court can make a meaningful review of the fee request. For the purposes of lodestar calculations, this evidence includes, at a minimum, documentation of the services performed, who performed them and at what hourly rate, when they were performed, and how much time the work required.

Because the affidavits and other evidence in this case did not provide sufficient information for a lodestar calculation, we must reverse and remand. We are mindful, however, that the attorneys in this case may not have contemporaneous billing records that document their time as we have not heretofore explained the proof necessary to support a fee application under the lodestar method.

Nevertheless, on remand, they should reconstruct their work in the case to provide the minimum information the trial court requires to perform a meaningful review of their fee application.

IV

El Apple further complains that the trial court erred in doubling the lodestar to approximate a reasonable attorney's fee in the case. As previously noted, our class action rule expressly recognizes the multiplier, authorizing the trial court to make attorney fees awards "in the range of 25% to 400% of the lodestar figure." TEX. R. CIV. P. 42(i)(1). Although that rule does not apply here, the lodestar method should not vary from claim to claim, that is, the formula should be the same in TCHRA suits as in class actions. When appropriate under the particular circumstances of the case, a trial court may therefore use a multiplier to increase or decrease the lodestar figure to approximate a reasonable fee.

El Apple argues, however, that the trial court abused its discretion in using a 2.0 multiplier in this case because no circumstances justify inflating the base figure. El Apple contends instead that a multiplier should have been used in this case to discount the lodestar because Olivas prevailed only on her retaliation claim, while her fee request presumably included the time spent on the discrimination claim as well. Thus, El Apple submits the time Olivas's attorneys spent preparing and trying the discrimination claim should be discounted or excluded from the lodestar figure unless she can show that the time spent pursuing the unsuccessful claim advanced her successful claim.

El Apple further asserts that the lodestar is presumptively a reasonable fee and that enhancements should be rare and reserved for exceptional cases. *Perdue v. Kenny A. ex rel. Winn*, ___ U.S. ___, 130 S. Ct. 1662, 1673 (2010). El Apple contends that the trial court based its decision

to enhance the lodestar solely on the contingent nature of the fee and not on any exceptional aspect of the case. Moreover, El Apple submits that federal law has expressly rejected the contingent nature of an attorney's representation as a basis for the lodestar's enhancement. *City of Burlington v. Dague*, 505 U.S. 557, 567 (1992).

State procedural rules generally govern the determination of attorney's fees in a suit brought under a state statute permitting attorney's fees. Although the TCHRA was enacted to effectuate the policies of Title VII of the Civil Rights Act of 1964, no indication exists that the Legislature intended to incorporate federal procedure for assessing attorney's fees. *See* TEX. LAB. CODE § 21.001; *Hoffmann-La Roche, Inc. v. Zeltwanger*, 144 S.W.3d 438, 445–46 (Tex. 2004). Nevertheless, in applying our state statute, we may draw on the far greater body of federal court experience with lodestar and fee shifting under the similar federal statute. Though not bound to adopt the federal standards, Texas courts may appropriately consider them. *Cf. Williams v. Lara*, 52 S.W.3d 171, 181 (Tex. 2001); *Bloyed*, 916 S.W.2d at 954 n.1.

We accordingly accept the premise that lodestar presumptively produces a reasonable fee, but that exceptional circumstances may justify enhancements to the base lodestar. Whether a multiplier is needed, however, cannot be determined until the base lodestar is known. Because we do not as yet have a legitimate base lodestar in this case, any comment on the need for a multiplier here is premature.

* * * * *

In summary, we hold that the fee application and proof in this case did not provide the trial court legally sufficient evidence to calculate a reasonable fee award using the lodestar method. To

establish the number of hours reasonably spent on the case, the fee application and record must include proof documenting the performance of specific tasks, the time required for those tasks, the person who performed the work, and his or her specific rate. Because the record in this case does not provide these details, we reverse the court of appeals' judgment affirming the attorney's fee award and remand to the trial court for a redetermination of fees consistent with this opinion.

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David M. Medina
Justice

Opinion delivered: June 22, 2012

IN THE SUPREME COURT OF TEXAS

NO. 10-0490

EL APPLE I, LTD., PETITIONER,

v.

MYRIAM OLIVAS, RESPONDENT

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

Argued September 15, 2011

JUSTICE HECHT, joined by JUSTICE WAINWRIGHT and JUSTICE WILLETT, concurring.

I join fully in the Court's opinion with the additional observation that, besides lacking supporting records, Olivas's attorneys' request for fees and the trial court's award were patently unreasonable.

After an eight-day trial, the jury failed to find that El Apple discriminated against Olivas on the basis of gender but found that it created a hostile work environment for her because of her complaints of discrimination. The jury awarded Olivas $1,700 in back pay and $103,000 for past and future compensatory damages. The trial court awarded Olivas $464,000 attorney fees and $6,500 paralegal fees through the rendition of judgment, plus $99,000 conditionally for post-judgment proceedings and appeals. The court of appeals reversed the back-pay award and affirmed

the other damages and attorney fees.[1] The court of appeals held that the award of attorney fees was reasonable. On its face, it could not have been.

Olivas's lead counsel, Daniel Gonzalez, engaged another lawyer, Francisco X. Dominguez, to help him try the case. Dominguez stated that he spent 150 hours total, but later raised the number to 190. Gonzalez stated that he spent 700 hours total and about 200 at trial, meaning that Gonzalez spent 500 hours for pretrial proceedings. Discovery was minimal. The parties exchanged requests for disclosure and a set of interrogatories. Olivas sent El Apple a request for admissions and two requests for production. Gonzalez estimated that 1,200-2,500 pages of documents were produced. Three depositions were taken. One motion to compel was heard and granted.

I agree with the Court that Gonzalez and Dominguez's failure to produce any records supporting the hours they claimed to have spent on the case is fatal to their fee application. Even if they had, their request would not be reasonable. Even if the time they claimed to have spent for trial were considered reasonable, and it is not at all clear that it should be, 500 hours on the pretrial proceedings could not possibly be reasonable.

There are two other, surer indicators of a reasonable fee. One is that El Apple's lawyer, David Pierce, and his associate spent 266.7 hours at about $200 per hour. The trial court ordered El Apple to pay Olivas more than 7 times as much as it paid its own lawyers, for 890 hours of attorney time at an average of $521 per hour. The other is what contingent fee might be reasonable had this been, say, a products liability case. A 50% contingent fee, taking into account the difficulty

[1] 324 S.W.3d 181 (Tex. App.–El Paso 2010).

of the case and the reality that many cases are lost, would have been $51,500. Instead, the trial court awarded Olivas's attorneys 450% of her recovery.

El Apple's counsel repeatedly stated to the trial court that Olivas's attorneys had represented her well and should be fully compensated, objecting only to their exorbitant request. Statutory fee-shifting is not a bonanza. It should take into account what the market should. Olivas's attorneys' request did not do so.

Nathan L. Hecht
Justice

OPINION DELIVERED: June 22, 2012

IN THE SUPREME COURT OF TEXAS

NO. 10-0491

HEARTS BLUFF GAME RANCH, INC., PETITIONER,

v.

THE STATE OF TEXAS AND
THE TEXAS WATER DEVELOPMENT BOARD, RESPONDENTS

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

Argued October 5, 2011

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

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

The judiciary has a historic duty to uphold constitutional protections of individual liberties.[1] But the individual must present a claim countenanced by law. It is not prudent to sanction a seventy million dollar demand against the State of Texas for an alleged taking of a property interest when 1) as acknowledged by all parties, the United States Army Corps of Engineers, not the State of Texas, exercised its exclusive authority to deny petitioner's application for a federal mitigation banking permit on the land, and 2) the federal courts have held that petitioner has no cognizable

[1] This Court has endeavored to do so. *See, e.g., Severance v. Patterson*, __ S.W.3d __ (Tex. 2012); *Texas Rice Land Partners, Ltd., v. Denbury Green Pipeline-Texas, LLC*, 363 S.W.3d 192 (Tex. 2012); *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620 (Tex. 2004).

property right in the federal permit at issue. Under these circumstances, petitioner failed to plead a viable takings claim.

* * *

The backstory for this case is the State's continuing battle to manage its critical water resources. The Texas drought from 1950–1957[2] has been described by a Texas water official as "the most costly and one of the most devastating droughts in 600 years."[3] The 1950s drought "reshaped Texas, ruining thousands of farmers and ranchers and pushing rural residents to migrate out of the country and into the cities."[4] Comal Springs stopped flowing out of the Edwards Aquifer for the first and only time in recorded history.[5] In 1952 the Cotton Bowl, the stadium at Fair Park in Dallas, drilled its own well within the stadium to water the field because the city could not furnish the water

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[2] The award-winning historical novel, *The Time It Never Rained*, parochially describes the drought.

> Just another dry spell, men said at first . . . Men grumbled, but you learned to live with the dry spells if you stayed in West Texas; there were more dry spells than wet ones. No one expected another drouth like that of '33. And the really big dries like 1918 came once in a lifetime.
>
> Why worry? They said. It would rain this fall. It always had.
>
> But it didn't. And many a boy would become a man before the land was green again.

ELMER KELTON, THE TIME IT NEVER RAINED 1–2 (Tom Doherty Assoc., LLC 2008) (1973); *see also* Petitioner's Reply to Response to Petition for Review, App'x 1, at Exhibit 2 (providing highlights of 2007 State of Texas Water Plan).

[3] Farzad Mashhood, *Current Drought Pales in Comparison with 1950s 'Drought of Record,'* AUSTIN AMERICAN–STATESMAN, Aug. 3, 2011, [hereinafter Mashhood, *Current Drought Pales in Comparison*] http://www.statesman.com/news/local/current-drought-pales-in-comparison-with-1950s-drought-1692176.html. All electronic sources checked as of August 22, 2012 and available in the clerk of court's file.

[4] *Id.*

[5] Kathy Wythe, *The Time It Never Rained: How Texas Water Management has Changed Because of Recurring Droughts*, TEXAS WATER INSTITUTE, NORTH TEXAS E-NEWS, Dec. 27, 2011, [hereinafter Wythe, *The Time It Never Rained*] http://www.ntxe-news.com/cgi-bin/artman/exec/view.cgi?archive=45&num=73338.

it needed.[6] By the end of the drought, 244 of Texas' 254 counties were classified as disaster areas,[7] and losses from the drought were estimated at $22 billion in 2011 dollars.[8]

The Legislature responded to the drought by creating in 1957 the Texas Water Development Board (TWDB), charged with forecasting water supply needs and developing a comprehensive state water plan for water management, conservation, and response to drought conditions.[9] With policy-makers focused on the water needs of a thriving State, from 1957 to 1980 Texas constructed more than 126 major reservoirs[10] and from 1957 to 1970 built 69 dams, including Longhorn Dam on the Colorado River, which formed Lady Bird Lake in 1960.[11] These efforts expanded the State's water storage, as the State concurrently sought new sources of groundwater in underground aquifers.[12]

Continuing to address Texas' water needs and usage after another drought in 1996, the Legislature passed Senate Bill 1, likely the most comprehensive water bill in the State's history, requiring the TWDB to publish a comprehensive state water plan every five years and base its projections on a fifty-year time horizon.[13] As of August 2011, the recent drought had left three-quarters of the state in the exceptional drought category and over 99 percent of the state in some

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[6] *Id.*

[7] *Id.*

[8] Mashhood, *Current Drought Pales in Comparison*.

[9] TEX. WATER CODE §§ 6.011, 16.051(a), 16.051(g), 16.053; *see* TEX. CONST. art. III, § 49-c.

[10] Wythe, *The Time It Never Rained*.

[11] Mashhood, *Current Drought Pales in Comparison*.

[12] *Id.*

[13] Act of June 1, 1997, 75th Leg., R.S., ch. 1010, 1997 Tex. Gen. Laws. 3610-83.

form of drought condition.[14] Against this backdrop, the TWDB has identified potential reservoir sites going back decades and revised water plans as tasked by the Legislature.

Hearts Bluff Game Ranch, Inc. (Hearts Bluff) purchased some of the wetlands on one of the sites identified by the TWDB as a potential reservoir location. When the United States Army Corps of Engineers (USACE or Corps) denied its application for a mitigation banking permit because the State had identified the site as a potential reservoir, Hearts Bluff sued the State and the USACE for a taking for interfering with its asserted right to commercially develop the land as a mitigation bank.

The question posed is whether a takings claim against the State may be predicated on the denial of a permit by the federal government when the State had no authority to grant or deny the permit. Our answer is no, absent establishing bad faith, and we affirm the judgment of the court of appeals, reversing the trial court's denial of the plea to the jurisdiction.

I. Introduction and Background

In 2003 and 2004, Hearts Bluff purchased approximately 4,000 acres of "bottomland" in Titus County near the Sulphur River. "Bottomland" is seasonally or continuously flooded hardwood river swamps. 313 S.W.3d 479, 481. Hearts Bluff planned to create a federal mitigation bank which is a commercial endeavor that allows a person who restores, establishes or preserves a wetland or other aquatic resource to sell "mitigation bank credits" he receives from the federal government to third parties who negatively impact aquatic resources in other locations. *See* 33 U.S.C. § 1251; 33 C.F.R. §§ 332.2, 332.3(b)(2) (2011); *Butler v. Comm'r,* 103 T.C.M. (CCH) 1359, at *38, n. 20 (2012) (citing the U.S. Environmental Protection Agency, Mitigation Banking Factsheet, available at http://www.epa.gov/owow/wetlands/facts/fact16.html. 33 C.F.R. 332.1, 332.3(b)(2) (2011). The

[14] Mashhood, *Current Drought Pales in Comparison*.

Corps is the only governmental entity with authority to issue these permits. Clean Water Act, 33 U.S.C. § 1344 et seq. (authorizing the Secretary of the Army, acting through the "Chief of Engineers," to issue these permits); Rivers and Harbors Act of 1899, 33 U.S.C. § 403 (similar); 33 C.F.R. §§ 332.1, 332.3 (describing general compensatory mitigation requirements); *see also* Clean Water Act, Pub. L. No. 108-136, § 314(b), 117 Sta. 1431 (2003). Hearts Bluff acknowledges the exclusive authority of the Corps to grant or deny federal mitigation banking permits.

Hearts Bluff's land lies within the bounds of the potential Marvin Nichols Reservoir, a 67,957 acre site identified by the State since 1968 as a possible drinking water reservoir to service the Dallas and Fort Worth areas. Marvin Nichols Reservoir has been included in every version of the TWDB's state water plan[15] since 1968.[16] Hearts Bluff acknowledged that at the time it purchased the land, it was aware both that the State was considering creating the reservoir and that the land it purchased was within the reservoir's footprint.

After Hearts Bluff purchased the land and applied for a mitigation banking permit with the Corps, the Corps solicited public comment on Hearts Bluff's application. The USACE solicited comments from resource agencies, other federal, state and local government agencies, public interest groups, the general public, adjacent property owners, and other interested parties on various factors. The Corps received over 300 responsive comments, including from state elected officials representing Northeast Texas, the Texas Committee on Natural Resources, the City of Texarkana,

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[15] The plan's purpose is to "provide for the orderly development, management, and conservation of water resources and preparation for and response to drought conditions, in order that sufficient water will be available at a reasonable cost to ensure public health, safety and welfare; further economic development; and protect the agricultural and natural resources of the entire state." TEX. WATER CODE § 16.051(a).

[16] The site, appearing as the "Naples Reservoir" in the 1968 water plan, was later renamed the "Marvin Nichols Reservoir" in the 1984 Texas Water Plan of TWDB. (Louis A. Beechrl, Sr., Chairman).

local municipalities and regional water districts, the United States Fish and Wildlife Service, the Environmental Protection Agency, and the Texas Commission on Environmental Quality. Most of the comments received supported the mitigation bank, however "all of the agencies" expressed concern with the location of the proposed mitigation bank within the footprint of the Marvin Nichols Reservoir. Local municipalities and regional water districts opposed the mitigation bank proposal.

The TWDB responded by letter, dated December 9, 2004, to the Corps' request for comment, explaining how the permit could affect its interests and observing that the mitigation bank could potentially render the Reservoir project less viable or infeasible. The TWDB opined that approval of Hearts Bluff's mitigation bank would "not prevent construction of a reservoir," but it would require a re-analysis of the water management strategy for the Dallas and Fort Worth region of the State. The TWDB advised that it opposed the permit's approval.

The USACE denied the permit application in July 2006.[17] A year later, in May 2007, the Legislature approved the TWDB's 2006 water plan, thus conferring upon the Marvin Nichols Reservoir site the designation as a "unique" potential reservoir site. TEX. WATER CODE § 16.051(g). The Corps' stated reason for denying the application was that the mitigation bank would not exist in perpetuity if the Legislature chose to build the Reservoir. Hearts Bluff then applied for a limited-term mitigation bank permit, but the Corps denied this request because mitigation banks must be perpetual. Hearts Bluff later applied again, but the Corps once again denied the permit in July 2008.

II. Procedural Posture

[17] Hearts Bluff represents that its mitigation banking permit application is the only one that has ever been denied by the Corps.

Hearts Bluff brought an inverse condemnation claim against the State of Texas and the TWDB (collectively the "State"), asserting a regulatory taking under both the Texas and United States Constitutions and seeking $30 to $70 million in damages. In its Second Amended Original Petition, the live pleading, Hearts Bluff alleges that the Corps denied the mitigation banking permit solely because the "mitigation bank was located within the footprint of a reservoir that was a unique reservoir site suitable for construction, that was to be and actually was adopted by the State legislature." It joined the Corps in the suit, because the Corps made the decision to deny the mitigation bank application. The Corps removed the case to federal court, and the federal district court severed the claims, transferring the case against the Corps to the United States Court of Claims and remanding the case against the State to state court. In a written opinion, the Court of Claims dismissed Hearts Bluff's case. *Hearts Bluff Game Ranch, Inc. v. United States*, 669 F.3d 1326, 1327 (Fed. Cir. 2012), *cert. denied*, 2012 WL 1390200 (U.S. June 18, 2012) (No. 11-1264).

Earlier this year, the United States Court of Appeals for the Federal Circuit affirmed the holding of the Court of Claims, explaining that:

> [T]he Corps' discretionary denial of access into the Corps [mitigation bank] program cannot be a cognizable property interest. As Hearts Bluff does not have a property interest in access to the program, it likewise does not have a property interest in the program's related benefits, such as the mitigation banking instrument and credits.

Id. at 1331–32.

In state court on remand, the State filed a motion to dismiss and plea to the jurisdiction, arguing that Hearts Bluff failed to plead a valid takings claim for which sovereign immunity was waived. The trial court denied the State's plea to the jurisdiction. 313 S.W.3d at 484. The court of appeals reversed the trial court's denial and dismissed the case for lack of subject matter jurisdiction.

Id. at 490. The appeals court concluded that Hearts Bluff failed to make the required showing of a viable claim, reasoning that Hearts Bluff's pleadings, taken as true, affirmatively negated the existence of jurisdiction over its claim. *Id.* at 490. Assuming the Corps' denial of the permit was a current, direct restriction on Heart Bluff's property rights, the court of appeals concluded that the State's conduct did not cause the restriction because neither the Legislature nor the TWDB were empowered to grant or deny the permit. *Id.* at 489. The court of appeals did not reach the issue of whether the State's designation of the property as unique constituted a direct, current restriction on the land because it held the State's undisputed absence of authority to deny the permit to be dispositive. *Id.* Hearts Bluff filed a petition for review in this Court.[18]

III. Standard of Review

Whether a court has subject-matter jurisdiction is a question of law, which we review de novo. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). Sovereign immunity, unless waived, shields the state from lawsuits for damages. *Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 405 (Tex. 1997). In the absence of a properly pled takings claim, the state retains immunity. *See Gen. Servs. Comm'n v. Little-Tex Insulation Co. Inc.*, 39 S.W.3d 591, 598–99 (Tex. 2001). In reviewing a grant or denial of a plea to the jurisdiction, we determine whether the plaintiff's pleadings, construed in favor of the plaintiff, allege sufficient facts affirmatively demonstrating the court's jurisdiction to hear the case. *Miranda,* 133 S.W.3d at 226; *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 936 (Tex. 1988). If evidence central to the jurisdictional issue is submitted, it should be considered in ruling on the plea to the jurisdiction. *Miranda*, 133 S.W.3d

[18] Texas Farm Bureau, Texas Association of Dairymen, Texas Forestry Association, Texas Poultry Federation, and Our Land Our Lives collectively submitted an amicus curiae brief in support of Hearts Bluff's petition for review.

at 227. Evidence submitted with the plea may rebut the pleadings and undermine waiver of immunity. *Id.* at 227–28; *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 555 (Tex. 2000).

IV. Inverse Condemnation Jurisprudence

Private property ownership is a fundamental right in the United States. *See Severance v. Patterson*, __ S.W.3d __ (Tex. 2012) (quoting *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 140 (Tex. 1977)). "The right of property is the right to use and enjoy, or dispose of the same, in a lawful manner and for a lawful purpose." *City of Wink v. Griffith Amusement Co.*, 100 S.W.2d 695, 700 (Tex. 1936) (citation omitted). Hearts Bluff brought an inverse condemnation claim against the State. Inverse condemnation is "a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency." *United States v. Clarke*, 445 U.S. 253, 257 (1980); *City of Abilene v. Burk Royalty Co.,* 470 S.W.2d 643, 646 (Tex. 1971) ("The essence of an inverse condemnation proceeding is that property has been taken and the property owner is attempting to recover compensation therefor."). This dispute raises the question of when the State's actions affecting the regulation of property become a taking, compelling us once again to venture into the "sophistic Miltonian Serbonian Bog." *Sheffield*, 140 S.W.3d at 671 (Tex. 2004) (citations omitted); *see also* JOHN MILTON, PARADISE LOST 42, bk. II, ll. 592–94 (Gordon Teskey ed., Norton & Co. 2005) (1674) (describing the land beyond Lethe as "[a] gulf profound as that Serbonian bog / Betwixt Damiata and Mount Casius old / Where armies whole have sunk.").

Our case law on takings under the Texas Constitution is consistent with federal jurisprudence. *See, e.g.*, *City of Austin v. Travis Cnty. Landfill Co.*, 73 S.W.3d 234, 238–39 (Tex.

2002); *Mayhew,* 964 S.W.2d at 933–34. The Just Compensation Clause of the Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation." U.S. CONST. amend. V.[19] Similarly, Article I, section 17 of the Texas Constitution provides, in pertinent part, that "[n]o person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made." TEX. CONST. art. I, § 17. We consider the federal and state takings claims together, as the analysis for both is complementary. *See, e.g.*, *Travis Cnty. Landfill Co.*, 73 S.W.3d at 238–39; *Mayhew,* 964 S.W.2d at 933–38.

Although determining whether a taking has occurred is a question of law**,** *see Mayhew*, 964 S.W.2d at 933; *City of Coll. Station v. Turtle Rock Corp*., 680 S.W.2d 802, 804 (Tex. 1984), courts generally eschew any "set formula" in determining how far is too far when performing a regulatory takings analysis, preferring to "'engag[e] in . . . essentially ad hoc, factual inquiries.'" *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992) (quoting *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)). The Supreme Court has frequently noted that whether a particular property restriction is a taking depends largely "upon the particular circumstances [in that] case." *Penn Cent. Transp. Co.*, 438 U.S. at 124 (citing *United States v. Cent. Eureka Mining Co.*, 357 U.S. 155, 168 (1958)); *see also United States v. Caltex*, *Inc.*, 344 U.S. 149, 156 (1952).

Notwithstanding the fact specific nature of takings cases, the Supreme Court has established a general framework against which courts apply the individualized facts of alleged regulatory takings. *Penn Central*, *Sheffield*, and *Mayhew* govern regulatory takings challenges and they set out three guiding factors. *Penn Cent. Transp. Co.*, 438 U.S. 104 (regulation of development of historic

[19] This constitutional protection has been incorporated through the Fourteenth Amendment to apply to the individual states. *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 175 n.1 (1985) (citing to *Chicago, B. & Q. R. Co. v. Chicago,* 166 U.S. 226, 241 (1897).

landmarks); *Sheffield*, 140 S.W.3d 660 (moratorium on development and rezoning of property); *Mayhew*, 964 S.W.2d 922 (denial of development application). First is the economic impact of the regulation on the claimant. *Penn Cent. Transp. Co.*, 438 U.S. at 124.[20] The second factor under *Penn Central* is the character of the governmental action. *Id*. The third consideration is the extent to which the regulation has interfered with the economic expectations of the property owner. *Id*.

In *Sheffield*, we began our analysis with another consideration for regulatory takings – the *Agins* "substantial advancement" test. 140 S.W.3d at 673. In *Agins v. City of Tiburon,* the Supreme Court stated that "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests." 447 U.S. 255, 260 (1980). "[A] use restriction . . . may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose." *Penn Cent. Transp. Co.*, 438 U.S. at 127; *see also Sheffield*, 140 S.W.3d at 673; *see Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 834 (1987) (quoting *Agins*, 447 U.S. at 260). Although since *Sheffield* the Supreme Court has changed its view of the *Agins* "substantially advances" test,[21] Hearts Bluff rightfully acknowledges that water management and conservation is a legitimate public use. Therefore, we need not discuss this consideration.

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[20] Courts distinguish between physical invasions of private property and regulatory actions affecting the owner's property interest. "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, *see, e.g.*, *United States v. Causby*, 328 U.S. 256 (1946), than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Cent. Transp. Co.*, 438 U.S. at 124. Also, land-use exaction cases– in which the government exacts dedication of a property interest, imposes a fee, or imposes conditions as a prerequisite of approval of development on an ad hoc basis–a are somewhat distinct types of regulatory takings matters. *See, e.g., Lingle v. Chevron U.S.A., Inc*., 544 U.S. 528, 546–48 (2005); *Dolan v. City of Tigard,* 512 U.S. 374, 385–86 (1994); *Nollan v. Cal. Coastal Comm'n.,* 483 U.S. 825, 827 (1987); *see also Town of Flower Mound v. Stafford Estates Ltd. P'ship* 135 S.W.3d 620, 631 (Tex. 2004); *Turtle Rock Corp*., 680 S.W.2d at 804–05.

[21] In its first opportunity to consider the validity of the *Agins* "substantially advances" test, the Supreme Court held that the test prescribes an inquiry in the nature of a due process test, not a takings test, and has no proper place in federal takings jurisprudence. *Lingle*, 544 U.S. at 548; *cf. Sheffield*, 140 S.W.3d at 673–74.

We now turn to clarify the basis of Hearts Bluff's claim and then consider the factors in a regulatory takings analysis.

V. Takings Analysis Applied

A. Hearts Bluff's Claim

In its December 2004 letter in response to the Corps' request for its viewpoint, the State explained that approval of a mitigation bank in the footprint of the possible Marvin Nichols Reservoir site may make the reservoir "a less viable, if not infeasible, project," but a mitigation bank "does not prevent construction of a reservoir." The TWDB also communicated its opposition to the establishment of a federal mitigation bank on the land. In 2007, the Legislature adopted the TWDB's proposed water management plan, which included the potential Marvin Nichols Reservoir site, conferring a "unique" designation on the site.

Hearts Bluff's allegations about the cause of the denial of the mitigation banking permit, and the taking, have not been consistent. At the trial court, Hearts Bluff pled that several actions by the State, individually and together, constituted an intentional taking.

> The inclusion of Marvin Nichols by TWDB in the 2006 Region C Water Plan and the 2007 State Water Plan, the approval of the 2006 Region C Water Plan and the 2007 State Water Plan by TWDB, the adoption of such plans by the Legislature, the declaration of Marvin Nichols as a unique reservoir site suitable for construction, the authorizing of the *Reservoir Site Protection Study* and the affirmative statements that Marvin Nichols Reservoir would be constructed, among other things, individually and cumulatively, caused the denial of the permit by the Corps and resulted in the taking . . . .

A few paragraphs above that, Hearts Bluff's live pleadings give a single reason for the alleged taking: "[T]he Corps denied Hearts Bluff's request for a mitigation bank because the mitigation bank was contained within the footprint of the proposed Marvin Nichols Reservoir."

In this Court, Hearts Bluff changed its position on some of the reasons it cited in its trial court pleadings as the causes for the denial of the federal mitigation bank permit. It acknowledges that the TWDB's Reservoir Site Protection Study, that it had argued was intended to prohibit private development in the reservoir site, is not the cause of the alleged taking.[22] We agree for an additional reason. The Study was not published until July 2008, over a year after the Legislature adopted, in May 2007, the TWDB's 2007 Water Plan that created the unique designation for the Marvin Nichols reservoir site.[23] Hearts Bluff also is clear at this Court that it "does not contend that the mere fact that Marvin Nichols has been in State Water Plans for the last forty-three years is a taking." "[I]f that was all that happened, this lawsuit wouldn't have been filed."

Hearts Bluff also concedes in this Court that state agencies must be able to "lobby or advocate" in connection with questions that arise in connection with federally issued permits, and such lobbying in a "federal regulatory context" is not actionable.[24]

In this Court, Hearts Bluff contends, "[w]hat is important about the 2007 State Water Plan is that it recommended Marvin Nichols for the first time as a unique reservoir site, which the Legislature adopted as the State's official water policy. TEX. WATER CODE § 16.051(b) and (g-1)." Hearts Bluff then focuses its legal position on this issue: the "declaration of a unique reservoir site

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[22] "[T]he State argues that the Reservoir Site Protection Study is not a current direct restriction. Hearts Bluff never said it was . . . . And, if all the State had ever done was issue a Reservoir Site Protection Study, Hearts Bluff would have gotten its permit." Petitioner's Reply Brief to Respondent's Brief on the Merits at 16 n.12.

[23] At the trial court, Hearts Bluff also alleges that the Study was intended to inhibit private development in the reservoir footprint until the property could be acquired, but this argument also suffers from the temporal problem with the date of the Study's publication and the date of the unique designation. The Corps denied the permit in July 2006; the unique designation occurred in May 2007.

[24] "If all the State had done was lobby or advocate for a result, Hearts Bluff would have gotten its mitigation bank permit." Petitioner's Brief on the Merits at 21–22, n.6.

was the factual cause of the denial of the permit." That declaration had a direct and immediate consequence because it "destroyed the perpetuity requirement for mitigation banking and caused the Corps to deny the permit . . . ." The designation also allegedly prohibited private development of the property when allegedly there were "no restrictions on Hearts Bluff's ability to develop its property at the time it purchased it." Hearts Bluff claims that applying the unique label to the reservoir site changed the character of the State's interest in the property.

Reasonably construing Hearts Bluff's pleadings against the State in light of our precedents, we consider whether the Legislature's adoption of the TWDB's 2007 Water Plans and the State's entering a Reservoir Site Protection Study is governmental action that constitutes a taking, or stated another way, caused the Corps to deny the mitigation banking permit.

B. Nature of the Governmental Actions that Constitute Takings

1. Direct Governmental Restriction

We have held that a lack of a direct governmental restriction of the owner's use of her land or a lack of regulatory authority over the land-use decision at issue is dispositive in takings cases. *See, e.g.*, *Westgate*, *Ltd. v. State*, 843 S.W.2d 448, 450 (Tex. 1992); *see also San Antonio River Auth. v. Garrett Bros*., 528 S.W.2d 266, 271 (Tex. Civ. App.—San Antonio 1975, writ ref'd n.r.e.). However, where courts have found direct governmental actions in which the governmental defendant had regulatory authority over the matter causing the plaintiff's harm, they have generally found a taking. *See, e.g., City of Austin v. Teague*, 570 S.W.2d 389, 393–94 (Tex. 1978). Those cases generally involve current, direct restrictions on the property and may be combined with facts tending to show bad faith. *See,* e.g., *Westgate,* 843 S.W.2d at 452, 454; *see also Teague*, 570 S.W.2d at 393. While a statement of intent influencing another actor with final regulatory authority, as is the case

here, lies somewhere in the middle of these two factual scenarios, we conclude that the factual pleading in this case and the evidence[25] considered along with it do not support a regulatory taking.

The State's argument likening this case to our opinion in *Westgate* has merit. In that case, we concluded there was no taking when the State and the City of Austin publicly announced plans to condemn the plaintiff's land, impairing the plaintiff's ability to lease its shopping center. *Westgate,* 843 S.W.2d at 450–51, 453. We held that "publicly targeting a property for condemnation" in the future does not give rise to an inverse condemnation. *Id.* at 453. The plaintiff sought to recover lost profits for the three year period between the public announcement of the State's plans for the property and the actual condemnation. *Id.* at 451. Although the announcement resulted in economic harm to the plaintiff, we confirmed that the "impact of the future project on the present market value of the land was a noncompensable consequential damage." *Id.* at 453 (citing *Hubler v. City of Corpus Christi*, 564 S.W.2d 816, 821 (Tex. Civ. App.—Corpus Christi 1978, writ

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[25] *See* Defendant's First Amended Motion to Dismiss, *Hearts Bluff Game Ranch, Inc. v. Texas*, __ S.W.3d __ (Tex. 2012) (No. D-1-GN-08-002450) (Exhibit A, Plaintiff's First Amended Original Petition; Exhibit B, Letter from Chief, Regulatory Branch, USACE, Fort Worth District to Hearts Bluff Game Ranch, 2006; Exhibit C, Region C Water Plan, 2001; Exhibit D, Water for Texas, 2002; Exhibit E, Region C Water Plan, 2006; Exhibit F, Water for Texas, 2007; Exhibit G, Letter from Texas Water Development Board to Regulatory Branch, USACE, 2004; Exhibit H, Water for Texas 1997; Exhibit I, Texas Water Plan 1990; Exhibit J, Water for Texas, 1984; Exhibit K, Texas Water Plan 1968; Exhibit L, Hearts Bluff's Objections, Answers & Responses to State's First Set of Interrogatories & Request for Production). The State requested the trial court to admit these exhibits as evidence because they:

> constitute official records of a state or federal agency, court pleadings, or responses to discovery, and the sources do not indicate a lack of trustworthiness. Accordingly, as allowed by Tex. R. Evid. 801 & 803, Defendants request that these exhibits be admitted as evidence for consideration by the Court. *See Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547 (Tex. 2000). (Defendants' First Amended Motion to Dismiss at ¶ 18; Defendants' Supplemental Motion to Dismiss at ¶ 18).

The trial court considered the "motions, responses and replies and the evidence and arguments of counsel" in making its ruling. Order Denying Defendants' Motion to Dismiss. Hearts Bluff asserted no objections to the evidence, submitted evidentiary exhibits of its own in response to the motion to dismiss and relied on the State's exhibits in its response to the motion to dismiss at the trial court. In this Court, both parties also rely on and argue information from the trial court exhibits. We will likewise consider the evidence in reviewing the issues in the case. *See Miranda*, 133 S.W.3d at 227 (evidence necessary to the plea is to be considered).

ref'd n.r.e.)). We concluded that, in order for an inverse condemnation claim to be valid, there must be a "current, direct restriction" on the use of the land, referring to a physical act or legal restriction on the property's use, "such as a blocking of access or denial of a permit for development." *Id*. at 452. The threat of "some possible future loss" was insufficient to establish an inverse condemnation. *Id.* at 453.

Hearts Bluff asserts that the denial of the permit itself is a current, direct restriction on Hearts Bluff's ability to develop its property. The State, along with some 300 other parties, responded to the USACE's public request for information and lobbied it with respect to the State's interest, as pled by Hearts Bluff. The State did not, however, under any facts pled or evidence in the record, have the authority to deny the federal permit. In fact, Hearts Bluff admits that only the Corps had the authority to deny the mitigation banking permit. Even if the State had a persuasive role in the Corps' action, just as an announcement to condemn is not a direct restriction on the land, identifying bottomland as a potential water storage site is not a direct restriction. *See Westgate*, 843 S.W.2d at 453. The State's plans for the reservoir in this case are even less concrete than the public statement by the State in *Westgate* of its intention to condemn the land in the future. In *Westgate* we held that "publicly targeting a property for condemnation, resulting in economic damage to the owner, generally does not give rise to an inverse condemnation cause of action unless there is some direct restriction on use of the property." 843 S.W.2d at 453 (citations omitted). It would strain our precedent to conclude that publicly targeting a property for condemnation when the delay of the actual condemnation caused the landowner damages *is not* a taking, but a mere identification of a location as a potential reservoir that may never be condemned *is* a taking. Governmental conduct

in combination with such a designation that legally restricts or prevents private development or use of the land may change the analysis, but such conduct is not at issue in this case.

However, because the plaintiff in *Westgate* did not allege that the government intentionally acted to depreciate the value of the property at issue, the dissent points to language in that opinion that "[t]he policy reasons that support our decision today might not be applicable where the condemning authority is accused of intentionally injuring a landowner." *Id.* at 454. The dissent takes a different approach from the Court. In *Westgate*, the Texas State Department of Highways and Public Transportation announced its decision to condemn the developer's property *after* it had already approved the developer's planned shopping center development and physical construction had begun. *Id*. at 450. The State approved the developer's site plan and the developer had started construction, yet the State had not given Westgate notice of its pending plans to expand its highway project into the development. *Id*. In *Westgate*, the State had the authority to approve or refuse the developer's plans and the State's condemnation was certain—it happened. *See id.* at 450-51. For each of these key facts, in the instant case the result is the converse. The State's identification of the site as a potential reservoir occurred decades before Hearts Bluff sought to commercially develop it, Hearts Bluff was on notice of the designation and its investment backed expectations were different from those in *Westgate*. There are no allegations in this case that the State misled the owner while it proceeded furtively with plans that would damage the property interest.[26] Here the facts were known and the State properly gave the Corps its honest and longstanding assessment of the State's potential plans for the Marvin Nichols Reservoir site. And, importantly, the State did not

[26] Hearts Bluff alleged that the Corps misled it on the permit. The Federal Circuit dismissed these claims. *Hearts Bluff Game Ranch, Inc. v. United States*, 669 F.3d 1326. *See* further discussion *infra* __ S.W.3d at __.

have the authority to approve Hearts Bluff's development plans. *Westgate's* holding that "publicly targeting a property for condemnation" is not a taking is broader than necessary to squarely support our decision. *See id.* at 453.

In *Garrett Brothers*, in which there was evidence of intentional action, the governmental entity at issue was found not liable for a taking. *See Garrett Bros.,* 528 S.W.2d at 273. A landowner sued both the City of San Antonio and the San Antonio River Authority (SARA) after San Antonio purposely delayed the plaintiff's development of a subdivision, acting on the advice of SARA. *Garrett Bros.,* 528 S.W.2d at 269–70. The plaintiff began developing its land after obtaining a permit from San Antonio. *Id.* at 269. However, SARA and San Antonio developed alternate plans for the property, realizing that it would be more expensive to acquire the plaintiff's land if the plaintiff continued to build the subdivision. *See id*. at 268–69. After repeated discussions with SARA, San Antonio instructed various municipal agencies and departments to discontinue services to the plaintiff's subdivision to impede the plaintiff's development. *Id*. at 270. After a delay of over five months, SARA informed San Antonio that the plaintiff's further development no longer presented a problem, at which point the plaintiff was allowed to continue its development. *Id.*

When the plaintiff sued both parties for damages arising from the delay, the court of appeals affirmed a jury award against the City of San Antonio. *Id*. at 280. However, the court also concluded that, because SARA did not possess any regulatory authority over the governmental entities that caused the damage—the municipal agencies and San Antonio—it could not be liable for a regulatory taking, notwithstanding the fact that SARA urged San Antonio to intentionally delay the development until it decided whether it wanted to acquire the plaintiff's land. *Id*. at 269, 271–72.

The opinion observes, "SARA wholly lacked the authority to interfere with plaintiff's development of the subdivision under any circumstances." *Id*. at 271.

Garrett Brothers is close to directly on point, as both SARA and the TWDB are similarly situated and their communications were similar. Each communicated its desires and opinions to a governmental entity with regulatory authority to take action affecting the property. Like SARA in relation to San Antonio, the TWDB made its opinion known to the Corps but had no authority to take the action affecting the owner's property rights. SARA further sought a cooperation agreement between it and San Antonio.

As *Westgate*'s focus on direct action implies, causation is an issue to be considered by Courts in takings cases.[27] This is not the first time courts have addressed causation in a takings action. In 1941, we held that the "true test" is whether the State's intentional acts "were the proximate cause of the taking or damaging of such property." *State v. Hale*, 146 S.W.2d 731, 737 (Tex. 1941)

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[27] As both the State and Hearts Bluff observed during argument, because this is a plea to the jurisdiction, this Court must construe the facts pled liberally in favor of Hearts Bluff unless those facts are rebutted by evidence submitted with or against the plea. *See Miranda*, 133 S.W.3d at 226–27. Because Hearts Bluff pled that the State was the factual cause of the Corps' denial of the permit, the State conceded that was Hearts Bluff's position, but the State repeatedly asserted that it was not the cause. At oral argument, the State confirmed this:

> We don't agree that we have any power over the [Corps] to do that. Now I think what we asked the court was to please site your habitat for migratory water fowl somewhere else. Now whether that "please" had an influence on the Corps I think we have to accept for the purposes of appeal that [as] a factual matter it did, but we disagree that the Corps. [sic] The Corps had discretion to deny it.

Perhaps the State could have been more precise; however, the State has consistently maintained throughout its briefing and argument in this Court, at the court of appeals, and in the trial court that it lacked the authority to grant or deny the federal permit, lacked any regulatory authority over the Corps, and that it believed it could not be held responsible for Hearts Bluff's harm. *See, e.g.*, Defendant's First Amended Motion to Dismiss at 10. ("Hearts Bluff's assertions that the Defendants[']actions constitute 'direct restrictions' are spurious, since the decision to deny the application was made by the Corps."); Brief of Appellants at 13, 313 S.W.3d 479 (Tex. Civ. App.—Austin 2010) (No. 03-09-00598-CV) ("[T]he denial of the mitigation-banking permit cannot constitute a taking by the State of Texas or TWDB because they are powerless to grant or deny such permits . . . "); Respondent's Brief on the Merits at 4. ("[T]he State had no regulatory authority over the action (the refusal to enter into a mitigation banking agreement) that is the centerpiece of Hearts Bluff's complaint.").

(holding that a "direct, physical invasion of the property" was not necessary under the 1876 Constitution for a taking to occur); *see Roberson v. City of Austin*, 157 S.W.3d 130, 138 (Tex. App.—Austin 2005, pet. denied); *Brandywood Hous., Ltd. v. Tex. Dep't. of Transp*., 74 S.W.3d 421, 426 (Tex. App.—Houston [1st Dist.] 2001, pet. denied); *City of Dallas v. Ludwick*, 620 S.W.2d 630, 632 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.) (showing proximate cause is necessary in a takings case where city denied building permit). Proximate cause is an essential element of a takings case. "[W]ithout causation, there is no 'taking.'" *Tarrant Reg'l Water Dist. v. Gragg*, 43 S.W.3d 609, 615 (Tex. App.—Waco 2001), *aff'd*, 151 S.W.3d 546 (Tex. 2004). We affirmed that the State's construction of a reservoir was the cause of flood water damage to farmland. *Id*. at 555. The Supreme Court identified the role of proximate cause in takings cases in *Penn Central*, noting that "whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely 'upon the particular circumstances [in that] case.'" *Penn Cent. Transp. Co.* 438 U.S. at 124 (citing *Cent. Eureka Mining Co.*, 357 U.S. at 168). We have also used the terms "occasioned by the fault of," "to result from," and "arise out of" as proxies for the requirement that the State's intentional acts be the proximate cause of the taking, destruction, or damage to private property. *See Steele v. City of Houston*, 603 S.W.2d 786, 791 (Tex. 1980); *City of Del Rio v. Felton,* No. 04-06-00091-CV, 2007 WL 247655, at *6 (Tex. App.—San Antonio Jan. 31, 2007, no pet.) (mem. op.); *San Antonio Hous. Auth. Found., Inc. v. Smith*, No. 04-10-00759-CV, 2011 WL 3627699 at *3 (Tex. App.—San Antonio Aug. 17, 2011, no pet.) (mem. op.). We also addressed causation in *Westgate*, concluding that there must be a "direct restriction" on the use of the land to establish a taking. 843 S.W.2d at 452–53. The word "direct" seems plainly to indicate that the governmental entity must be the cause of the harm. This "direct restriction" language is

often quoted by other Texas courts analyzing takings allegations.[28] The Ninth Circuit has held that the plaintiff in takings cases must establish all elements of proximate causation. *Esplanade Props., LLC v. City of Seattle*, 307 F.3d 978, 984 (9th Cir. 2002) (citations omitted). Construing *Penn Central's* reference to proximate causation, Chief Justice Rehnquist also argued that ordinary principles of proximate cause govern the causation inquiry for takings claims. *Tahoe-Sierra Pres. Council*, *Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 344–45 (2002) (Rehnquist, C.J., dissenting).

Causation is intrinsic to a takings claim. The governmental entity sued must have taken direct governmental action, or have been the proximate cause, of the harm. Here, neither TWDB nor the State of Texas satisfied that requirement. Instead, that characterization fits the Corps, as the only body with regulatory authority to grant or deny mitigation banking permits.

In *State v. Biggar*, the government defendant had the authority to and imposed direct restrictions on the use of property and we held its actions made the State liable for inverse condemnation. 873 S.W.2d 11, 11–12, 14 (Tex. 1994). The State denied the plaintiffs an otherwise routine real estate transaction in order to lower the value of the plaintiffs' property before acquiring the land by eminent domain. *Id*. The plaintiffs obtained initial approval of a site development plan (SDP) from the City of Austin, contingent upon the completion by a given date of a routine easement exchange with the State. *Id*. at 11–12. The State initially approved the easement exchange. *Id.* at 12. Later, however, the State realized it needed the plaintiffs' land for a highway expansion but

[28] *See, e.g.*, *Schriver v. Tex. Dep't of Transp.*, 293 S.W.3d 846, 850 (Tex. App.—Fort Worth 2009, no pet.); *Cozby v. City of Waco,* 110 S.W.3d 32, 38 (Tex. App.—Waco 2002, no pet.); *City of Grand Prairie v. M.B. Capital Investors Inc.*, No. 05-95-00921-CV, 1996 WL 499790, at *6 (Tex. App.—Dallas Aug. 27, 1996, writ dism'd) (not designated for publication).

plaintiffs declined to sell at the value offered. *Id.* The State then denied the easement exchange, and the SDP lapsed nearly five months later. *Id.* The State then condemned the land at a significantly lower price. *Id.* Plaintiffs asserted that the State acted in bad faith. *Id.* at 13–14.

In *Biggar*, we recognized an inverse condemnation claim in part because of the State's bad faith in using its power to gain an unfair economic advantage over the property owner. *Id.* at 13. Although the State operated well within its discretion in denying the easement exchange, and although the State was not directly involved with the SDP's expiration, the State intentionally refused to participate in the routine easement transaction to allow the SDP to expire and enable it to acquire the land at a lower cost. The State took action within its power to halt a prerequisite to Biggar's development plan, apparently specifically designed to decrease the value of the landowners' property. *Id.* at 14.

As the dissent observes, this case presents some factual similarities to *Biggar*. However, legally this case is materially different. First, in *Biggar*, the State had the authority and the ability to take the action, rejecting the conveyance of its easement, that injured the landowners. The City had approved the SDP. The State unilaterally acted to push the landowners past the deadline to act on the City's SDP and foreclosed the landowners' opportunity to develop, thereby causing reduction in the value of their land. *Id.* at 14. The State made the decision and had the authority to take the intentional act that halted the plaintiff's development. In this instant case, the State did not change its decision to convey a public easement, deny a permit, or refuse a zoning change. It provided accurate and honest input requested by the Corps. The dissent argues, "The Court incorrectly suggests that the State cannot have acted in bad faith in this case because the State 'merely responded' to the Corps' request for public comment on Hearts Bluff's mitigation banking

application. Yet all the State did in *Biggar* was 'merely' refuse to relinquish an easement it owned." __ S.W.3d __ (Hecht, J., dissenting). We do not equate the mere provision of information in this case with the State's intentional countermanding in *Biggar* of its agreement to exchange the easement, which resulted in harm to the property owner.

The Corps alone had the authority to grant or deny the mitigation banking permit. The Corps could have shunned or accepted the State's best arguments about plans for the Marvin Nichols Reservoir. The State had no authority over the Corps and none over Hearts Bluff's desired mitigation bank. It had no opportunity to cause a crucial project-ending delay, as did the State in *Biggar*. Hearts Bluff argues that identifying the land as a potentially valuable reservoir site to the Corps is tantamount to causing the denial of the permit. The parties cite no cases in which a party stated a takings claim against a state government when the federal government had the sole and exclusive authority to deny the development permit at issue and did so. Without more, we decline to recognize such a claim.

The dissent concedes that *Teague* and *Garrett Brothers* support the Court's opinion. __ S.W.3d __ (Hecht, J., dissenting) ("The court noted that in both *Teague* and *Garrett Brothers*, takings liability was imposed on the entity with regulatory power."). In *Teague*, we concluded that actions by the City of Austin resulted in a taking when, after unsuccessfully requesting that the State acquire a scenic easement in the plaintiff's land, Austin denied the plaintiff's water development application, despite his compliance with all of the requirements of the existing ordinance. 570 S.W.2d at 390. After denying the plaintiff's second application and refusing to purchase his land, Austin passed an ordinance requiring any developer to preserve "the natural and traditional character of the land and waterway to the greatest extent feasible." *Id*. at 390–91. The ordinance foreclosed

development of plaintiff's land and imposed a scenic servitude upon the property. *Id.* at 394. We held that Austin could not accomplish through an ordinance of general application what it had no power to do specifically, which was to essentially acquire a scenic easement in the plaintiff's land without just compensation. *Id*. In *Teague*, Austin had the authority to pass the ordinance that would cause harm to the claimants, and it did. Whereas, here, the harm from the permit denial was not at the hands of the State.

Hearts Bluff pled, as the dissent points out, that the Corps told it there were no impediments to the mitigation bank's creation. Hearts Bluff assented, "The Corps told Hearts Bluff that the rumored but never established Marvin Nichols Reservoir would not inhibit the granting of a mitigation banking permit for Hearts Bluff." The State advised the Corps, in evidence submitted with the plea to the jurisdiction, that it confirmed to the Corps that "the [Hearts Bluff mitigation bank] does not prevent construction of a reservoir." But alleged misrepresentations, or even changes in positions, on the possibility of creating a mitigation bank in an actual reservoir was an issue Hearts Bluff had with the Corps. The Federal Circuit reviewed these allegations in Hearts Bluff's case against the Corps and held that these alleged misrepresentations are not actionable:

> [R]elying on representations by the Corps in purchasing the land in the hope that the government will grant a discretionary mitigation banking permit does not create a compensable property interest. At its core, Hearts Bluff argues that it detrimentally relied on the promises and representations of the Corps. Such detrimental reliance, however, does not create a property right under takings law.

Hearts Bluff Game Ranch, Inc. v. United States, 669 F.3d at 1332.

Federal case law on the authority of relevant governmental actors in a takings case also reinforces our reasoning in this case. In *B & G Enterprises*, the court held that state action could only be attributable to the federal government in regard to takings liability if state actors were

"agents" of the federal government. *B & G Enters. v. United States,* 220 F.3d 1318, 1325 (Fed. Cir. 2000). In that case, the owner and operator of vending machines in California alleged a regulatory taking against the federal government based on the California Legislature's enactment of restrictive regulations on the use of tobacco vending machines. *Id.* at 1322. A federal agency conditioned California's receipt of grant money on its passing and enforcing laws regulating minors' access to tobacco products. *Id*. at 1321. "The proposed [federal] regulation did not make tobacco vending machine restrictions a condition of the receipt of the federal block grant, but the [regulating body] did *suggest* that states ban tobacco vending machines or restrict their placement . . . ." *Id.*

The Court held that the federal government was not a regulator and thus could not be held liable for a taking for several reasons. *Id*. at 1323–24. One reason was that California's Legislature could not be considered as acting under federal authority. *Id*. at 1324. Specifically, California had the discretion to enact the law or to decline to do so, making it irrelevant that the federal government advised California that it should pass the regulations. *Id.*

The California Legislature in *B & G Enterprises* and the City in *Garrett Brothers* occupy positions similar to the TWDB in this case. In *B & G Enterprises*, while the federal government's advice may have influenced California's enactment of the restrictive regulations, the decision to act on or ignore that advice was solely California's. *Id.* Similarly, in *Garrett Brothers*, while SARA's land-use plans may have motivated and, perhaps, guided San Antonio in impeding the plaintiff's development, the City of San Antonio was the entity liable for taking the plaintiff's property because only it had the power to regulate. *Garrett Bros.,* 528 S.W.2d at 271.

Here, the decision was the Corps'. It would strain the concept of federalism to contend that the Corps acted under the authority of the State. *See Rapanos v. United States*, 547 U.S. 715, 721

(2006) ("In deciding whether to grant or deny a permit, the [Corps] exercises the discretion of an enlightened despot, relying on such factors as 'economics,' 'aesthetics,' 'recreation,' and 'in general, the needs and welfare of the people.'") (citing 33 C.F.R. § 320.4(a) (2004)). Nor can we can we conclude that the Corps, under the facts alleged, was acting as an "agent" of the State. *See B & G Enters.,* 220 F.3d at 1323. The Corps, a federal political subdivision implementing federal law and federal policy, is directed to make its decision on Hearts Bluff's application based on federal guidelines. *See* 33 C.F.R. § 320.4(a) (requiring a "public interest review" prior to permit issuance). Hearts Bluff acknowledged that the Corps "is the governmental agency responsible for permitting and administering mitigation banks pursuant to § 404 of the Clean Water Act." In sum, Hearts Bluff pled that the State influenced the Corps to deny Hearts Bluff's permit application. Because the State had no authority to approve or refuse the necessary permit for Heart Bluff's development, it will generally not be subject to an inverse condemnation claim for the denial of a federal permit to commercially develop the property.

Even if Hearts Bluff could clear the hurdle of the State's lack of authority to act on its permit application, courts are not required to accept as true parts of its pleadings that are actually legal, rather than factual, allegations. *See Fain v. Great Spring Waters of Am., Inc.*, 973 S.W.2d 327, 329 *aff'd*, *Sipriano v. Great Spring Waters of Am., Inc.*, 1 S.W.3d 75 (Tex. 1999). The statement that creation of a mitigation bank would preempt the development of the reservoir is not admitted by the State, which argues that position may be wrong as a matter of law, as the TWDB advised the Corps in its response letter. In addition, Hearts Bluff claims that the main purpose of the unique designation is to invoke the State's protection of the site from private development. In its 2007 water plans, the TWDB recommended that the Legislature designate Marvin Nichols Reservoir as

unique pursuant to section 16.051(g) of the Texas Water Code. And in May 2007, the Legislature's approval of the TWDB's state water plan automatically resulted in that designation being conferred on the Marvin Nichols Reservoir site. However, the unique designation's purpose, expressed in the statute, is to preclude other governmental units in Texas from acquiring an interest in it. *See* TEX. WATER CODE § 16.051(g).[29] Hearts Bluff cites no authority for its assertion that a unique designation legally inhibits or prevents private development of the site, and the statutory provision itself limits only state governmental entities from pursuing an interest in the reservoir site. The Corps denied Hearts Bluff's application in July 2006, with no mention of the possible unique designation.[30]

2. Bad Faith

Whether the governmental entity acted in bad faith may also be a consideration in determining whether a governmental action gives rise to a compensable taking. *See, e.g.*, *Teague,* 570 S.W.2d at 393 (noting that courts also allow for recovery of damages when the government takes action against the economic interests of a property owner for its own advantage); *Sheffield,* 140 S.W.3d at 678 ("Beyond the three *Penn Central* factors, we are concerned, as we have already indicated, about the City's conduct."). Bad faith, from the viewpoint of the petitioners, was likely in play in *Garrett Brothers*, as both San Antonio and SARA attempted to extract a better sales price or condemnation value out of the plaintiff. *See Garrett Bros*., 528 S.W.2d at 269. However, SARA

[29] "The legislature may designate a site of unique value for the construction of a reservoir. A state agency or political subdivision of the state may not obtain a fee title or an easement that would significantly prevent the construction of a reservoir on a site designated by the legislature under this subsection." TEX. WATER CODE § 16.051(g).

[30] Absent affirmative action specified, the designation terminates in 2015. TEX. WATER CODE § 16.051(g-1) ("The designation of a unique reservoir site under this subsection terminates on September 1, 2015, unless there is an affirmative vote by a proposed project sponsor to make expenditures necessary in order to construct or file applications for permits required in connection with the construction of the reservoir under federal or state law.").

had no regulatory authority to act to harm Garrett Brothers in this circumstance, and was thus not liable. *Id.* at 271–72. There is no evidence in the record showing that the State acted in bad faith.

However, even assuming that the State acted in bad faith in designating the site as unique or influencing the Corps to deny Hearts Bluff's permit, that point is not necessarily dispositive. *See, e.g.*, *Sheffield*, 140 S.W.3d at 678–79, 681 (although we expressed concern with the City's conduct in which it attempted to take unfair advantage of the plaintiff, we reversed in favor of the City); *see also Garrett Bros.,* 528 S.W.2d at 269, 271 (although bad faith was likely involved in the actions of San Antonio and SARA, because SARA had no regulatory authority, it was held not liable). Evidence of bad faith is given due weight, but must be considered against other circumstances, including legitimate public benefits furthered by the action. In *Sheffield*, notwithstanding facts indicating that the City of Glenn Heights may have acted in bad faith, the Court nevertheless reversed the judgment of the court of appeals and rendered judgement that the developer take nothing against Glenn Heights. *Sheffield*, 140 S.W.3d at 678–79, 681. Thus, while Glenn Heights acted in bad faith, we considered all of the circumstances surrounding the case, not least of which was the legitimate government interest sought by Glenn Heights' actions, concluding that the restriction on the land was not unreasonable and did not amount to a taking. *Id*. at 678–79.

If the State had targeted one particular landowner and treated him unfairly, there might be more merit to the claim. *See Sheffield,* 140 S.W.3d at 676 ("[I]t ordinarily is, and should be, harder for the government to show that its interests have been substantially advanced by regulation directed at one lone landowner."); *Mayhew*, 964 S.W.2d at 936; *but see Garrett Bros*., 528 S.W.2d 269, 271 (although SARA and the State targeted only the plaintiff's development, SARA was not liable for a taking because of its lack of regulatory authority).

However, here, the identification of the Marvin Nichols site occurred over three decades before Hearts Bluff purchased the land. Pleading that the State presented its thirty-year old public position on the possible use of a reservoir site to the Corps at the Corps' request and lobbying for its position is, without more, insufficient to state a claim for a regulatory taking. Stated differently, the State does not commit a taking when it promotes its long-held position on potential reservoir sites to a federal agency that asks for its input. If that were the case, a recent purchaser of land in any of the 115 potential Texas reservoir sites could apply for the federal mitigation banking permit and prevent the State from even answering an inquiry from the Corps that the State's public interest could be involved. And neither the reservoir site nor the unique designation targeted a specific landowner, but instead encompassed many landowners and thousands of acres beyond Hearts Bluff's parcel. *See Sheffield,* 140 S.W.3d at 676 (stating that it is harder for a governmental entity to show that is has not committed a taking if it singles out one landowner); *Mayhew*, 964 S.W.2d at 937–38 (discussing that the Mayhews were not singled out by the City that had the authority to deny the permit). Hearts Bluff seeks a rule that a governmental entity that affirms the public's interest in property for water management and drought prevention, even though without the authority to prevent development, may be held liable for damages for a taking. Such a rule is too broad and contrary to long-standing precedent.

3. Public Policy

Public policy argues strongly for our result. The preservation of communication between governmental entities is an important public interest. Given the size and complexity of state and federal governments, it is imperative that political subdivisions generally have a free flow of communication to coordinate projects, strive for more efficiency, and better serve the public. To

effectively perform its mission, the TWDB must communicate freely with the Legislature. The State has a vital interest in communicating openly and candidly with the federal government and other state governments when Texas' interests are implicated in federal and interstate projects. Mere communications without authority are not actionable, whether it be between a state agency and the Legislature, between the federal government and the State, or between the State and another state government. The Legislature's designation of the Marvin Nichols site as unique for reservoir purposes does not give rise to a taking, as that designation is an announcement of potential future state action only binding against subdivisions of the State—not the Corps. *See Westgate*, 843 S.W.2d at 453.

The State's legitimate interest in communicating its water-planning priorities underscores the dramatic negative consequences of the dissent's position. The dissent's approach renders the State potentially liable for a taking any time its response to a request for public comment ultimately results in an economic gain to the State and a loss to a private entity. However, the State is consistently presented with questions and requests for input from the federal government on projects within Texas' borders. The dissent's position would require, to avoid potential takings liability, the State to say, "I cannot answer," to such requests for its views on any project affecting private property in which the State may also have a potential interest. We can only imagine the dramatic harmful consequences to Texas on many federal projects that impact our state's interest – whether transport, electric, energy, or other projects.

We would put the State in a difficult position if it must engage in a cost-benefit analysis, weighing its duty to act in the interests of the people versus defending a lawsuit, whenever it considers responding to requests for comment from a federal agency. If each time the State

communicated with the federal government it potentially could be sued based on the federal government's actions within its sole authority, it would have a chilling effect on those communications, and force the State to choose between actively asserting its interests and leaving the protection of Texas' interests to the federal government. That would be untenable.

C. Economic Impact and Investment-Backed Expectations

A regulatory taking arises when the government imposes restrictions "unreasonably interfer[ing] with landowners' rights to use and enjoy their property." *Mayhew*, 964 S.W.2d at 935 (citing *Lucas*, 505 U.S. at 1015–19 & n.8; *Taub v. City of Deer Park*, 882 S.W.2d 824, 826 (Tex. 1994); *Teague*, 570 S.W.2d at 393). Determining whether the government has unreasonably interfered with a landowner's right to use and enjoy property requires consideration of two factors: 1) the economic impact of the regulation, and 2) the extent to which the regulation interferes with distinct investment-backed expectations. *Mayhew*, 964 S.W.2d at 935 (citing *Lucas*, 505 U.S. at 1019, n.8; *Penn Cent. Transp. Co.*, 438 U.S. at 124).

The first consideration, the economic impact of the regulation, "merely compares the value that has been taken from the property with the value that remains in the property." *Mayhew*, 964 S.W.2d at 935–36 (citing *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987)). A regulatory taking occurs when the government imposes restrictions that deny landowners of all economically viable use of their property.[31] *Lucas*, 505 U.S. at 1015–19 & n.8; *see also Taub*, 882 S.W.2d at 826. A restriction relieves the landowner of all economically viable use of the

[31] The United States Supreme Court has softened its language regarding the loss of all economically viable use of land. *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 334–35. The Court observed that the brevity of the deprivation has to be considered, as courts must also account for the temporary loss of all economic value, such as delays in obtaining building permits and temporarily prohibiting access to crime scenes. *Id.*

property or totally destroys the value of the property if the restriction renders the property valueless. *See, e.g.*, *Turtle Rock Corp.*, 680 S.W.2d at 806.[32] The Supreme Court has held that the factors considered in a takings analysis are not a formulaic test, *Tahoe-Sierra Pres. Council*, 535 U.S. 302 at 326, and we observed that "the economic impact of a regulation may indicate a taking even if the landowner has not been deprived of all economically beneficial use of his property." *Sheffield*, 140 S.W.3d at 672.

Because Hearts Bluff's property is bottomland, its uses are more limited than other lands. There are other plausible uses of its land, e.g., the existing uses for hunting and fishing, although Hearts Bluff noted that the other possible uses would likely not justify the price that it paid for the land.[33] Hearts Bluff argues that the mitigation banking program is a profitable venture and its loss of the expectation of obtaining a valuable mitigation bank at the site is actionable. But this seems to be a risk common to land developers. *See Sheffield*, 140 S.W.3d at 677. The actions of the State do not constitute a taking simply because Hearts Bluff cannot earn as much money on its investment as it originally hoped. *See, e.g., Andrus v. Allard*, 444 U.S. 51, 66 (1979) ("Prediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform. Further, perhaps because of its very uncertainty, the interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests.") (citation omitted). And the takings clause "does not charge the government with guaranteeing the profitability of every piece

[32] Some federal courts of appeal have pronounced that a taking occurs when the government does not allow any use that is "sufficiently desirable" to permit the property owner to sell the property. *See, e.g., Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422, 1433 (9th Cir. 1996); *Park Ave. Tower Assoc. v. City of New York*, 746 F.2d 135, 139 (2d Cir. 1984); *but see Mayhew*, 964 S.W.2d at 935.

[33] Hearts Bluff asserts that it paid $475 an acre for the land and expected the value of the land to increase by somewhere between $10,000 to $25,000.

of land subject to its authority. Purchasing and developing real estate carries with it certain financial risks, and it is not the government's duty to underwrite this risk as an extension of obligations under the takings clause." *Sheffield*, 140 S.W.3d at 677 (citing *Taub*, 882 S.W.2d at 826). Hearts Bluff conceded there are indeed other actual and potential uses of the land.

Concerning its investment expectations, Hearts Bluff alleges that the State has caused it substantial damage since it can no longer use its property as a mitigation bank. Weighing the investment-backed expectations of the landowner, "[t]he existing and permitted uses of the property constitute the 'primary expectation' of the landowner that is affected by regulation." *Mayhew,* 964 S.W.2d at 936 (citations omitted); *see also Lucas*, 505 U.S. at 1016–17 n.7 (an owner's reasonable expectations are shaped by uses permitted by state law). The record does not clearly indicate all the uses of the parcel prior to Hearts Bluff's purchase. However, there is no evidence before us indicating that the State's actions in this case, whether it be communicating with the Corps or designating Marvin Nichols as a unique site, have affected any previously existing uses of the property. Hearts Bluff still has every use of the land available to it other than participation at this time in a federal mitigation banking program.

Hearts Bluff also argued that "the representations by the Corps that the land was suitable for a mitigation bank gave rise to a reasonable investment-backed expectation property interest." *Hearts Bluff Game Ranch, Inc.*, 669 F.3d 1326 at 1332. The Federal Circuit's opinion addressed these claims by Hearts Bluff against the Corps. The Federal Circuit dismissed the argument, concluding that "relying on representations by the Corps in purchasing the land in the hope that the government will grant a discretionary mitigation banking permit does not create a compensable property interest . . . . Such detrimental reliance . . . does not create a property right under takings law." *Id*.

Because the State's lack of regulatory authority—and the attendant attenuation of causation—resolve this case, we need not decide these issues.

VI. The State's Plea to the Jurisdiction

The jurisdictional question at the heart of this case is whether, considering Hearts Bluff's pleadings and the evidence submitted in the plea to the jurisdiction proceeding, there are sufficient facts to support an inverse condemnation. Construing the pleadings liberally in favor of the plaintiffs and considering the evidence submitted with the plea, we conclude that Hearts Bluff has not established the existence of jurisdiction in this case because Hearts Bluff cannot establish a viable takings claim. *See Miranda,* 133 S.W.3d at 226 (citation omitted). Although the value of Hearts Bluff's property interests was likely diminished by the Corps' decision, Hearts Bluff does not challenge the proposition that the State lacked the authority to deny the federal permit required for a mitigation bank.

Hearts Bluff also asks this Court to remand the proceeding to allow additional discovery, a position the dissent endorses. Because courts should determine whether they have jurisdiction as early as practicable, courts should allow "reasonable opportunity for targeted discovery" if necessary to illuminate jurisdictional facts in a plea to the jurisdiction. *See id.* at 233. At the trial court, Hearts Bluff sought "thorough" discovery of its case, which the trial court properly denied but allowed limited discovery. Hearts Bluff participated in discovery. It was granted six depositions by order of the trial court, propounded requests for production to the State, and obtained documents from the Corps and internet websites maintained by defendants and from private engineering and environmental consulting firms. However, the record does not show that Hearts Bluff took any of the depositions to which it was entitled, of the State or of the Corps (or anyone else), during the

thirteen months from its filing of the lawsuit to the date the trial court ruled on the plea to the jurisdiction. Hearts Bluff did, however, fail to answer the State's discovery for months until ordered to do so by the trial court. In addition, Hearts Bluff amended its original petition twice after filing suit, including the Second Amended Original Petition that it filed with its response to the State's motion to dismiss for lack of jurisdiction. *See Steele*, 603 S.W.2d at 788 ("We do not, however, in reversing the judgments below, place our decision upon the absence of an opportunity to amend because no point is presented which asks us to do so.").

The dissent contends that "at the State's insistence, there has been little discovery and no trial." __ S.W.3d __ (Hecht, J., dissenting). The record confirms that Hearts Bluff took discovery of the Corps, the State and others, that it did not avail itself of additional discovery to which it was entitled or which the trial court ordered it could take, and it did not file a motion to continue the hearing on the motion to dismiss to take additional discovery. We perceive no injustice to Hearts Bluff arising from its choice not to take advantage of greater opportunities to discover and present its case before the trial court granted the plea.

VII. Conclusion

For the reasons explained, we affirm the decision of the court of appeals reversing the trial court's denial of the plea to the jurisdiction and hereby dismiss the action for lack of subject-matter jurisdiction.

Dale Wainwright
Justice

OPINION DELIVERED: August 31, 2012

IN THE SUPREME COURT OF TEXAS

NO. 10-0491

HEARTS BLUFF GAME RANCH, INC., PETITIONER,

v.

THE STATE OF TEXAS AND
THE TEXAS WATER DEVELOPMENT BOARD, RESPONDENTS

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

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

Protecting property rights is "one of the most important purposes of government."[1] So is pursuing the public good. These purposes can conflict, as for example, when the government determines that a landowner's free use of his property must be regulated to prevent public harm. "'[I]f regulation goes too far it will be recognized as a taking'",[2] and the government must adequately compensate the landowner. Another example is when government's own interests in the ownership or use of specific property conflict with the landowner's. That is this case. Hearts Bluff acquired some 4,000 acres of bottomland to enroll in the Army Corps of Engineers mitigation bank program,

[1] *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 140 (Tex. 1977).

[2] *Sheffield Dev. Co. v. City of Glenn Heights*, 140 S.W.3d 660, 670 (Tex. 2004) (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

providing a means of offsetting others' damage to wetlands. The State has long had its eye on the same site for a water-supply reservoir but has never reached a decision on whether to move forward with such a project. Hearts Bluff's use of the property as a mitigation bank could preclude the State's acquisition of the property and would certainly increase the property's value and make it much more expensive to condemn. Acting in its own interest, the State has persuaded the Corps to reject Hearts Bluff's application, apparently the first time the Corps has ever rejected a mitigation bank application.

In *City of Austin v. Teague*, we stated that "when the government's action against an economic interest of an owner is for its own advantage",[3] the owner is entitled to adequate compensation under Article I, Section 17 of the Texas Constitution.[4] We quoted the following from the court of appeals' opinion in *San Antonio River Authority v. Garrett Brothers*:

> The 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. To permit government, as a prospective purchaser of land, to give itself such an advantage is clearly inconsistent with the doctrine that the cost of community benefits should be distributed impartially among members of the community.[5]

Hearts Bluff alleges that the government has done to it what *Teague* and *Garrett Brothers* say government cannot do without payment of constitutionally guaranteed compensation.

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[3] 570 S.W.2d 389, 393 (Tex. 1978) (citation omitted).

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

[5] 528 S.W.2d 266, 274 (Tex. Civ. App.–San Antonio 1975, writ ref'd n.r.e.) (citations omitted), *quoted and cited with approval in Teague*, 570 S.W.2d at 393-394.

Given the procedural posture of the case, Hearts Bluff's allegations must be taken as established facts. Hearts Bluff Game Ranch, Inc. sued the State and the Texas Water Development Board ("TWDB") for a regulatory taking. The defendants moved to dismiss, asserting that Hearts Bluff's pleadings do not state a viable takings claim. The trial court refused to dismiss the case, but on interlocutory appeal, the court of appeals did. The standard of review in this situation is well-settled:

> When a plea to the jurisdiction challenges the pleadings, we determine if the pleader has alleged facts that affirmatively demonstrate the court's jurisdiction to hear the cause. We construe the pleadings liberally in favor of the plaintiffs and look to the pleaders' intent. If the pleadings do not contain sufficient facts to affirmatively demonstrate the trial court's jurisdiction but do not affirmatively demonstrate incurable defects in jurisdiction, the issue is one of pleading sufficiency and the plaintiffs should be afforded the opportunity to amend. If the pleadings affirmatively negate the existence of jurisdiction, then a plea to the jurisdiction may be granted without allowing the plaintiffs an opportunity to amend.[6]

We must construe all Hearts Bluff's material allegations in its favor and accept them as true.

Here is what Hearts Bluff pleaded. I quote:

> Hearts Bluff owns a total of approximately 4000 acres of property [that] consists mostly of bottom land, wet land and some upland areas. Hearts Bluff applied for a mitigation banking permit from the Army Corps of Engineers ("the Corps") . . . . Hearts Bluff met all the applicable technical criteria for the issuance of the permit. But the Corps denied the permit because the State Defendants are preparing to construct a water supply reservoir which will include the Hearts Bluff property.

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[6] *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226-227 (Tex. 2004) (citations omitted); *see also Warth v. Seldin*, 422 U.S. 490, 501 (1975) ("For purposes of ruling on a motion to dismiss for want of standing, . . . reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party."); *Brown v. Todd*, 53 S.W.3d 297, 305 n.3 (Tex. 2001) ("Because standing is a component of subject matter jurisdiction, we consider [it] as we would a plea to the jurisdiction, construing the pleadings in favor of the plaintiff.").

. . . [T]he State Defendants targeted Hearts Bluff property because they feared that the granting of a mitigation banking permit by the Corps would: (1) preempt the State Defendants attempts to acquire the property to construct a reservoir; and/or (2) make property acquisition for the reservoir much more expensive. . . .

. . . [A] mitigation bank would . . . substantially increase the value of Hearts Bluff's property and allow Hearts Bluff to make a very substantial profit on what would otherwise be unprofitable or economically unusable land. . . . There are no viable commercial uses for the property other than mitigation banking. . . . In short, the Hearts Bluff property is not suitable for any profitable uses other than a mitigation bank or a mitigation bank type use. . . . [In using its property as a mitigation bank,] Hearts Bluff would have profited in excess of $10,000,000.00 . . . .

. . . Hearts Bluff acquired the property, which ultimately exceeded 4,000 acres, in 2003-04 for $475.00 per acre. . . .

Before acquiring the property in early 2004, Hearts Bluff and its environmental engineers contacted the Corps to make sure that the property was suitable for a mitigation bank and to make sure there were no impediments to the creation of a mitigation bank. The Corps told Hearts Bluff there were no impediments to pemitting that site . . . . The Corps told Hearts Bluff that the rumored but never established Marvin Nichols Reservoir would not inhibit the granting of a mitigation banking permit for Hearts Bluff.

. . . The notion that a reservoir could be placed where the Marvin Nichols Reservoir is currently proposed had been discussed for many years. However, there had never been any significant interest in or serious studies done on Marvin Nichols and it remained, like hundreds of other pieces of property in Texas, simply a possibility and nothing more. . . .

. . . [I]t was Hearts Bluffs' request for a mitigation bank that caused the State Defendants to raise Marvin Nichols from a notion to a reality.

. . . After receiving the application for a mitigation banking permit in the summer of 2004, the Corps sent public notice to interested and affected parties. . . . It was the notice that elevated the State Defendants interest in Marvin Nichols Reservoir.

. . . TWDB was very concerned about the mitigation bank and immediately undertook to accomplish the denial of Hearts Bluff's permit. TWDB's efforts to block Hearts Bluff's application initially took several forms. Based upon information

and belief, Hearts Bluff alleges that the Corps was immediately subjected to intense lobbying by TWDB and Region C to deny Hearts Bluff's application for a permit. Included in these efforts were efforts to discourage . . . Hearts Bluff's nationally known engineering firm[] from continuing to represent Hearts Bluff in connection with the mitigation banking process. Ultimately, these efforts were successful and [the firm] "fired" Hearts Bluff as a client.

. . . In addition, in late 2004 TWDB communicated in writing to the Corps that the proposed Hearts Bluff mitigation bank would negatively affect the development of Marvin Nichols Reservoir. . . .

. . . Beginning in or before December of 2004, TWDB began to formulate a plan to cause the Corps to deny the Hearts Bluff mitigation banking permit and reserve the property for its own purposes. The State Defendants had two (2) concerns. First, the State Defendants were concerned that a mitigation banking permit might preempt the State's later actions to acquire property for Marvin Nichols Reservoir. Second, the State Defendants were very concerned that their costs in creating Marvin Nichols reservoir would be much higher if Hearts Bluff received its permit. Having to mitigate for the Marvin Nichols Reservoir and then mitigate for the lost mitigation which would have been required if Hearts Bluff had been first approved and then condemned as part of the land acquisition process would have substantially increased the cost of the Marvin Nichols Reservoir for the State Defendants. So, the State Defendants acted in their own legal and financial interests to cause the Corps to deny the permit. For all purposes, the State Defendants opposed the permit because they wanted the property for their own use and at a lower price. . . .

. . . In the fall of 2005, the TWDB realized that unless it moved quickly, the Corps was about to approve the Hearts Bluff mitigation banking permit, perhaps as early as January of 2006, because Hearts Bluff had complied with all the requirements for the issuance of the permit. So, TWDB informed the Corps that the Region C Water Plan would include Marvin Nichols as a recommended water management strategy and, for the first time, that it would be designated as a site of unique value for construction of a reservoir. . . . The State Defendants actions were calculated solely to cause the Corps to deny the permit and keep Marvin Nichols as a viable reservoir site. . . . TWDB stepped up its communications with the Corps and continued to impress upon the Corps the fact that the Region C Water Plan not only included Marvin Nichols as a strategy, but also recommended it as a site of unique value for construction and therefore in line for funding and planning.

. . . [T]he granting of the mitigation banking permit would increase the value of the Plaintiff's property by a factor of 100 and would result in increased acquisition costs if and when the State Defendants ever actually sought to acquire the property through negotiation or eminent domain proceedings. This is especially true considering that the value of the property as bottom land was approximately $475 an acre when Hearts Bluff bought it in 2004. On the other hand, the value of the property as a functioning, permitted mitigation bank would be between $10,000 and $25,000 per acre.

. . . If it were not for the State Defendants' actions, the Corps would have granted Hearts Bluff its permit. . . . The acts of the State Defendants, individually and collectively, particularly those in early-mid 2006 were intentional and caused the Corps to deny Hearts Bluff's application.

. . . The policy of the State Defendants is and has been to actively restrict the development of property within the footprint of Marvin Nichols, and other proposed reservoirs, if the proposed development could interfere with the State Defendants' plans for a reservoir or make the reservoir more costly to build in the future. . . .

. . . Other than this request for a mitigation bank, the Fort Worth District of the Army Corps of Engineers has never denied a request for a mitigation banking permit. To the contrary, because wetland mitigation is an important part of the overall Federal regulatory scheme, the Corps actively encourages the creation of mitigation banks. Hearts Bluff is not aware of any mitigation banking permit that has ever been denied, nationwide, other than Hearts Bluffs permit. And, a mitigation bank in the general vicinity of the Hearts Bluff property in the Sulphur River basin, but located outside the footprint of Marvin Nichols, was recently granted a permit by the Corps.

. . . The foregoing acts and omissions of the State Defendants were undertaken to protect the interests of the State Defendants by preventing development of the property as a mitigation bank, because the creation of a mitigation bank would preempt or impede the development of the Marvin Nichols Reservoir. The acts and omissions of the State Defendants were also undertaken to promote the financial interests of the State Defendants by preventing development of the property as a mitigation bank, which would have increased the cost of acquiring the property, at a later date, for Marvin Nichols Reservoir. The State Defendants acts saved them substantial money on future property acquisition costs in violation of Article I, § 17 of the Texas Constitution and the 5th and 14th Amendments of the United States Constitution.

> . . . Although a public water supply reservoir may be a public use, the State Defendants actions do not advance a legitimate state interest. There is no legitimate state interest in the State Defendants causing millions of dollars in damages to Hearts Bluff and destroying the value of its property just so the property will be cheaper for the State Defendants to acquire. In effect, the State Defendants have created for themselves the functional equivalent of a legislative lis pendens or an option to acquire the Hearts Bluff property, without having to pay for it, as required by Article I, Section 17 of the Texas Constitution and the 5th and 14th Amendments of the United States Constitution.
>
> . . . This targeting was done in order to avoid the preemptive effect of a federal permit and to save the State Defendants substantial sums of money if and when Hearts Bluff is acquired for Marvin Nichols Reservoir.
>
> . . . [T]he Hearts Bluff property would have been worth between $10,000 and $25,000 per acre if the mitigation banking permit had been granted but is now rendered economically idle and valueless.

The court of appeals held that Hearts Bluff's pleading affirmatively negated a takings claim against the State because the decision whether to approve Hearts Bluff's property for mitigation banking was the Corps', not the State's.[7] The court noted that in both *Teague* and *Garrett Brothers*, takings liability was imposed on the entity with regulatory power. The court took as true Hearts Bluff's allegation that but for the State's actions, the Corps would have approved mitigation banking, but explained:

> A review of relevant case law leads us to conclude that pleading a valid taking claim requires more than a simple "but-for," cause-in-fact relationship between the state action and the alleged harm. Rather, implicit in the test for inverse condemnation are two understood requirements: (1) the governmental entity against whom the claim is brought must possess — or have possessed during the relevant time period — the regulatory power that effected the taking, and (2) the governmental entity's exercise

[7] 313 S.W.3d 479, 489 (Tex. App.–Austin 2010).

> of its own regulatory power must have imposed the current, direct restriction that gave rise to the taking.[8]

But the court overlooked our decision in *State v. Biggar*.[9] There, Biggar and others obtained city approval for the development of their property, subject to the State's relinquishment of a channel easement across the property.[10] The State routinely agreed with developers to swap an existing easement for another that would serve the same purpose, and after reviewing Biggar's proposal, it initially approved the exchange.[11] But about the same time, as it happened, the State needed part of Biggar's property for a road improvement.[12] When Biggar insisted on being compensated based on the property's enhanced value as an approved development rather than vacant land, the State withdrew its agreement to exchange easements.[13] The city's approval of the site plan expired, the property's value decreased drastically, and the State then condemned the property.[14] Thus:

> In the same stroke, the State managed to foreclose all opportunity to develop, causing the concomitant reduction in value of not only the portion taken, but the entire Biggar tract. We hold the State's actions resulted in compensable damages under Article I, section 17 of the Texas Constitution.[15]

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[8] 313 S.W.3d at 487.

[9] 873 S.W.2d 11 (Tex. 1994).

[10] *Id*. at 11. The approved site development plan would expire unless Biggar succeeded in taking all necessary steps to begin construction prior to the city's deadline. *Id*.

[11] *Id*. at 12 & n.2.

[12] *Id*. at 12.

[13] *Id*.

[14] *Id*.

[15] *Id*. at 14.

Biggar is a case in which takings liability was imposed, not on the regulatory authority — the city — but on the State for refusing to agree to an easement exchange before the city's approval of Biggar's development plan expired. Similarly, in the present case Hearts Bluff is not suing the regulatory authority — the Corps[16] — but is suing the State for opposing mitigation bank approval. And Hearts Bluff alleges what Biggar proved: that the State acted as it did to depress the value of property and reduce the compensation due the owner in a later condemnation. The State protests that it does not control the Corps, but neither did it control the city in *Biggar*. In both cases, the State took advantage of another entity's regulatory machinery to accomplish its own economic ends at a landowner's expense.

The Court acknowledges that the present case "presents some factual similarities to *Biggar*"[17] but nevertheless concludes that "legally" *Biggar* is "materially different" because there, the State could deny the requested easement, while here, only the Corps could deny the mitigation bank permit. But this distinction is meaningless. In both cases, the State acted within its rights to cause another regulatory authority to deny a permit for land use. Hearts Bluff's petition alleges what *Biggar* proved — that the State acted in bad faith in its own interest — and those allegations must be taken as true.

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[16] Hearts Bluff did include the Corps in this suit at one point, but the Corps removed the case to federal court, which transferred Hearts Bluff's claims against the Corps to the United States Court of Federal Claims and remanded the claims against the State. The Federal Circuit held that Hearts Bluff did not have a legally cognizable property interest in a mitigation bank instrument to support a taking claim against the Corps. *Hearts Bluff Game Ranch, Inc. v. United States*, 669 F.3d 1326 (Fed. Cir. 2012), *cert. denied*, ___ U.S. ___ (2012). Even without such an interest with respect to the Corps, however, Hearts Bluff should be entitled to contend, as the landowner did in *Biggar*, that but for the State's efforts to suppress the value of its property, its mitigation bank application would have been approved.

[17] *Ante* at ___.

The Court correctly observes that *Biggar* "recognized an inverse condemnation claim in part because of the State's bad faith in using its power to gain an unfair economic advantage over the property owner."[18] That is exactly what Hearts Bluff alleges here. The Court incorrectly suggests that the State cannot have acted in bad faith in this case because the State merely responded to the Corps' request for public comment on Hearts Bluff's mitigation bank application. Yet all the State did in *Biggar* was merely refuse to relinquish an easement it owned. The State was entitled to do with its own property whatever it chose and had no obligation to agree to an exchange of easements. The State acted no less within its rights in *Biggar* than it claims to have done in the present case, but that did not preclude liability for bad faith in *Biggar*, nor should it do so in this case.

One difference between *Biggar* and the present case is that in *Biggar*, the State, after having caused the value of the landowner's property to be destroyed, proceeded to condemn the part it needed, while here the State has not acted to acquire Hearts Bluff's land. But the situation in this case is actually worse than in *Biggar*. Here, the State tells us, Hearts Bluff's bottomland has been "slated for condemnation to make way for a large reservoir"[19] since 1968 but may never be condemned. The State has not only acted to keep the value of the property low, it may continue to do so without ever deciding to condemn the property.

The State argues that its communications to the Corps were nothing more than a public announcement of future condemnation condoned by this Court in *Westgate v. State*.[20] In *Westgate*,

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[18] *Ante* at ___.

[19] Brief of Respondent State of Texas at 1.

[20] 843 S.W.2d 448 (Tex. 1992).

the landowner complained of lost income from its inability to lease its shopping center because of prospective tenants' uncertainty over the impact of the State's announced condemnation of part of the property for an adjacent roadway while the State delayed the project for three years.[21] We held that unnecessary delay in condemnation is not a basis for imposing takings liability.[22] The landowner did not allege that the State had intentionally delayed condemnation to depress the value of the property for its own economic advantage. We specifically cautioned that "[t]he policy reasons that support our decision today might not be applicable where the condemning authority is accused of intentionally injuring a landowner."[23]

If Hearts Bluff's position is correct, the State worries, it will never be allowed to express concerns on behalf of the public to regulatory authorities without risking liability. But this is simply not true. Hearts Bluff does not fault the State merely for acting in the public interest. Rather, Hearts Bluff complains that the State has furthered its own economic interests by intentionally injuring Hearts Bluff's interests. This is precisely what we condemned in *Teague*, *Garrett Brothers*, and *Biggar*.

In *Westgate*, we stated that "publicly targeting a property for condemnation, resulting in economic damage to the owner, generally does not give rise to an inverse condemnation cause of action unless there is some direct restriction on use of the property."[24] The State argues that there

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[21] *Id*. at 451.

[22] *Id*. at 454.

[23] *Id*.

[24] *Id*. at 453.

is no such restriction on Hearts Bluff's use of its property, but there is: Hearts Bluff cannot use its property as a mitigation bank. A denial of permission to develop property for which the owner would otherwise qualify was a direct restriction in *Teague*, *Garrett Brothers*, and *Biggar*.

The State argues that Hearts Bluff has no right to the Corps' approval of a mitigation bank. But the landowners in *Teague*, *Garret Brothers*, and *Biggar* had no right to their proposed developments, either. The evidence in all three cases was only that approval would not have been withheld but for the government's own contrary economic interest. Hearts Bluff has alleged that the Corps has never rejected a mitigation bank proposal in the history of the program, and that although it rejected Hearts Bluff's, it approved one nearby. We must take these allegations as true.

Finally, the Court speculates that Hearts Bluff's loss of property value has not been substantial enough for a taking. But Hearts Bluff has alleged that its property's value as a mitigation bank would be $10,000-25,000 per acre, and that without a mitigation bank permit, the bottomland is not worth the $475 per acre Hearts Bluff paid to acquire it. Again, we must take these allegations as true.

Imposing regulatory taking liability on the government is not easy, but neither is it impossible. President Reagan famously remarked that he had always felt "the nine most terrifying words in the English language are: 'I'm from the government, and I'm here to help.'"[25] Hearts Bluff has alleged facts that, if proven, could show that the State intentionally injured Hearts Bluff to

[25] President's News Conference August 12, 1986, available from the Ronald Reagan Presidential Library Archives, http://www.reagan.utexas.edu/archives/speeches/publicpapers.html (last visited August 24, 2012), and the University of Santa Barbara American Presidency Project, http://www.presidency.ucsb.edu/index_docs.php (last visited August 24, 2012).

advance its own economic interests. The Court simply cannot bring itself to take as true, as it must in reviewing a dismissal on the pleadings, a landowner's allegation that its development plans were scuttled, and the value of its property ruined, by a state agency intent on keeping its condemnation options open indefinitely. The allegation is dubious, the Court says, because "[t]here is no evidence in the record showing that the State acted in bad faith."[26] This is no surprise, of course, because at the State's insistence, there has been little discovery and no trial. The surprise is that a landowner loses his case for not supporting his allegation with evidence it never had an opportunity to produce. Which is the kind of thing that helps explain, I suppose, why President Reagan felt the way he did.

I respectfully dissent.

_____
Nathan L. Hecht
Justice

OPINION DELIVERED: August 31, 2012

[26] *Ante* at ___.

IN THE SUPREME COURT OF TEXAS

NO. 10-0506

FORD MOTOR COMPANY, PETITIONER,

V.

PATRICIA CHACON, ET AL., RESPONDENTS

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

PER CURIAM

In this case, we determine whether a guardian ad litem was awarded fees for work that exceeded the scope of the authority given to him by the trial court. The trial court appointed the guardian ad litem to represent the interests of a minor-plaintiff during the resolution of a proposed settlement with one defendant in a multiple-defendant lawsuit. After the settlement was finalized, the guardian ad litem continued to represent, without court order, the minor-plaintiff's interests in her claims against the remaining defendants. Because the guardian ad litem continued representing the minor-plaintiff's interests without court order, we reverse the court of appeals' judgment and render judgment that the guardian ad litem's activities following resolution of the initial settlement are not compensable.

In 2005, Oscar Chacon suffered fatal injuries in an automobile accident. The accident allegedly occurred because a tire tread separated from the rear right tire of the 1998 Ford Explorer

in which he was a passenger. Chacon's wife, Patricia Chacon, brought a wrongful death and survival action on behalf of herself, her husband's estate, and her minor daughter, Valerie Chacon (collectively, the Chacons).[1] The Chacons alleged products liability claims against Ford Motor Company and Cooper Tire & Rubber Company,[2] and a negligent entrustment claim against Darrel Brown, the owner of the vehicle.

Almost one year after filing their original petition, the Chacons informed the trial court that they had reached a tentative settlement with Cooper Tire. In connection with that settlement, the Chacons requested that the trial court appoint a guardian ad litem to represent Valerie's interests. The court granted the motion and appointed G. Daniel Mena as guardian ad litem. With Mena's approval, the settlement with Cooper Tire was finalized, and in October 2006, following a hearing to obtain court approval of the settlement, a judgment was entered that successfully resolved the Chacons' claims against Cooper Tire. At that time, Mena submitted to the trial court an application for $11,000 in compensation for his service as guardian ad litem in connection with the Cooper Tire settlement. The trial court approved the $11,000 award and taxed it against Cooper Tire in full. Subsequently, the case was transferred to a different court to avoid potential delays resulting from the election of a new trial judge.

Despite resolution of the Cooper Tire settlement, Mena continued his involvement in the suit. In September 2007, almost one year after the Cooper Tire settlement, the trial court ordered

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[1] The decedent's father, Oscar Chacon Sr., later joined the case as an additional plaintiff.

[2] Pirelli Tire Corporation manufactured the tire that failed. Pirelli was replaced as the defendant by Cooper Tire & Rubber Company.

mediation on all of the Chacons' still-pending claims against the remaining defendants, Ford and Brown. The order for referral to mediation was sent to all of the attorneys in the case as well as Mena. The mediation, which Mena attended, was successful and resulted in the parties reaching a settlement. Mena, apparently acting as Valerie's guardian ad litem, submitted to the trial court a report recommending the settlement. Attached to the report was a document listing billable hour entries for Mena's work as guardian ad litem on behalf of Valerie's interests against Ford. The entries totaled 87.25 hours of work, beginning in August 2006 during the Cooper Tire settlement. The list included two pending entries for future activities—attending the hearing to obtain court approval of the Ford settlement and handling the investment of Valerie's settlement proceeds.

Ford objected to Mena's fee request on several grounds, including that Mena had already been paid for his work in connection with the Cooper Tire settlement and that he was seeking fees for activities beyond the scope of his duties as a guardian ad litem under Texas Rule of Civil Procedure 173. Ford requested an evidentiary hearing on the matter. On the morning of the hearing, Mena filed a verified report that presented entries totaling 80.75 hours of allegedly compensable work. Asserting that a reasonable hourly rate would be $200 to $250 an hour, Mena sought a total fee in the range of $16,150 to $20,187.50. When questioned by Ford about the entries, Mena stated that some of the entries were for work he had already performed during the Cooper Tire settlement. He explained that he sought compensation again for those hours because he spent that time also ensuring "that Ford Motor Company was not let out of this case" and because he "did some of the work simultaneously" in connection with all three defendants.

The trial court awarded Mena $17,087 in fees for his service on behalf of Valerie's interests against Ford. In reaching this total, the court began by removing two entries totaling half an hour for time in which Mena discussed his fees with Ford's attorneys. The court then compensated Mena for the remaining 80.25 hours at a rate of $350 per hour—$100 more than the highest rate requested by Mena. To avoid double payment, the court credited Ford $11,000, which was the amount previously awarded to Mena for his 38.00 hours of work in connection with the Cooper Tire settlement. Thus, the trial court ordered fees in the amount of $17,087 for 42.25 hours of work and taxed them in full against Ford.

The court of appeals reversed and rendered judgment, reducing Mena's award to $10,562.50. 321 S.W.3d 534, 544–45.[3] The court found nothing in the record to support the trial court's $350 hourly rate and reduced the rate to $250 per hour. *Id.* The court additionally noted that the high hourly rate impacted the double-billing credit, as Ford should have been credited $13,300 for the 38.00 hours of work at $350 per hour related to the Cooper Tire settlement. *Id.* at 544. The court of appeals otherwise upheld the fee award, holding that the trial court did not abuse its discretion in compensating Mena for the billing entries listed subsequent to the Cooper Tire settlement. *Id.* at 544–45. After multiplying the remaining 42.25 hours by an hourly rate of $250, the court rendered judgment for Mena in the amount of $10,562.50. *Id.* at 545.

On appeal, Ford challenges the court of appeals' fee award on two grounds. First, Ford contends that Mena's role as guardian ad litem ended after the Cooper Tire settlement was finalized

[3] Mena did not file a brief or appear at oral argument in the court of appeals. Despite this Court's request for briefing and multiple follow-up calls to Mena's office, Mena did not file any briefing in this Court.

on October 16, 2006, and that he should therefore not be compensated for any work done after that settlement. Second, Ford argues that, even if Mena's appointment as guardian ad litem extended past the Cooper Tire settlement, Mena billed for activities that are prohibited under Rule 173.

A guardian ad litem is an officer appointed by the court to assist in protecting a party's interests when that party's next friend or guardian appears to have an interest adverse to the party. *See* TEX. R. CIV. P. 173; *Land Rover U.K., Ltd. v. Hinojosa*, 210 S.W.3d 604, 607 (Tex. 2006). Texas Rule of Civil Procedure 173 governs the procedure for appointing and compensating a guardian ad litem. *See* TEX. R. CIV. P. 173. Rule 173 requires that a guardian ad litem's "appointment must be made by written order" of the trial court. TEX. R. CIV. P. 173.3(b). A guardian ad litem has the burden to ensure that his services do not exceed the scope of the role assigned by the trial court. *See* TEX. R. CIV. P. 173.6(a); *Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1, 10 (Tex. 1991) (placing the burden on the guardian ad litem to prove that the services rendered were reasonable and necessary). In the context of that appointment, a guardian ad litem "may be reimbursed for reasonable and necessary expenses incurred and may be paid a reasonable hourly fee for necessary services performed." TEX. R. CIV. P. 173.6(a). The amount of the award is within the trial court's discretion. *See Ford Motor Co. v. Garcia*, 363 S.W.3d 573, 578 (Tex. 2012). Thus, we review the trial court's fee award for an abuse of discretion, which occurs when the trial court rules (1) arbitrarily, unreasonably, or without regard to guiding legal principles, or (2) without supporting evidence. *Id.*

As we recently explained in *Ford Motor Co. v. Garcia*, in determining the nature and duties of an appointment, we look to the context of the appointment and the duties assigned to the ad litem.

363 S.W.3d at 577. In *Garcia*, we considered whether an attorney was appointed as a guardian ad litem or an attorney ad litem. *Id.* at 577–78. In making that determination, we explored the full context of the attorney's appointment, including the timing of the appointment, the plaintiffs' specific request in their motion for appointment of an ad litem, and the trial court's order appointing the ad litem. *Id.* at 578.

The context of Mena's appointment as guardian ad litem clearly indicates that Mena was appointed for the limited purpose of determining and advising the court whether the Cooper Tire settlement was in Valerie's best interest. *See* TEX. R. CIV. P. 173.4(c). The Chacons' motion for appointment of guardian ad litem specifically stated: "Plaintiffs[] and Cooper Tire and Rubber Company have reached a tentative settlement agreement in this case. Plaintiffs[] respectfully request[] that the Court appoint a guardian ad litem for purposes of disposing of [Valerie Chacon's] claim through a [hearing to obtain court approval of the settlement]." The court then entered a written order stating that Daniel Mena "shall be and is hereby appointed Guardian Ad Litem to represent the interests of the minor child, VALERIE CHACON." After the Cooper Tire settlement was finalized and judgment was entered, Mena filed an application for compensation for guardian ad litem services he provided in connection with the Cooper Tire settlement, which the court awarded in full. *See* TEX. R. CIV. P. 173.6(b) ("At the conclusion of the appointment, a guardian ad litem may file an application for compensation."). There was no subsequent motion or request for appointment of a guardian ad litem in connection with the Ford settlement, nor did the trial court enter an order appointing one. In light of the requirements of Rule 173, we conclude that Mena's work regarding the Ford settlement was beyond the scope of his original appointment.

At the evidentiary hearing following the Ford settlement, Mena attempted to justify his continued involvement in the case by noting that, at the hearing to obtain court approval of the Cooper Tire settlement, Ford made a settlement offer that mirrored the Cooper Tire settlement. He argued that his obligation to represent Valerie's interests required his continued close involvement in the case until Valerie's claims against Ford were fully resolved. The record indicates that the Chacons quickly rejected Ford's offer, at which point there was no pending settlement, settlement offer, or settlement discussion in the case for Mena to review. And it was not until almost a year after the Cooper Tire settlement that the parties reached a tentative settlement, at which point Mena's involvement might arguably have been proper. However, even then, the record does not establish that Ford and the Chacons agreed to the appointment of a guardian ad litem. *See* TEX. R. CIV. P. 173.2(a) (providing that a court must appoint a guardian ad litem when the guardian appears to have an interest adverse to the party, or if the parties agree). Most importantly, the record contains no order from the trial court appointing Mena to act as guardian ad litem on behalf of Valerie's interests in connection with Ford's proposed settlement. *See* TEX. R. CIV. APP. 173.3(b) ("An appointment must be made by written order.").

Mena fulfilled his duties as guardian ad litem upon the finalization of the settlement with Cooper Tire. Without a written court order, Mena had no authority to continue acting as Valerie's guardian ad litem after the trial court entered judgment on that settlement. Accordingly, we hold that all of Mena's activities subsequent to the resolution of the Cooper Tire settlement exceeded the scope of his appointment and were not compensable under Rule 173. Therefore, the trial court abused its discretion by awarding Mena fees for activities that he performed without a written

appointment order. Because we dispose of this case on Ford's first issue, we do not consider its remaining issues. Accordingly, we grant the petition for review and, without hearing oral argument, reverse the court of appeals' judgment and render judgment that Mena's fee award in connection with the Ford settlement be vacated. *See* TEX. R. APP. P. 59.1.

OPINION DELIVERED: June 29, 2012

IN THE SUPREME COURT OF TEXAS

NO. 10-0523

PORT ELEVATOR-BROWNSVILLE, L.L.C., PETITIONER,

v.

ROGELIO CASADOS AND RAFAELA CASADOS, INDIVIDUALLY AND AS REPRESENTATIVES OF THE ESTATE OF THEIR SON RAFAEL CASADOS, RESPONDENTS

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

Argued October 6, 2011

JUSTICE GUZMAN delivered the opinion of the Court.

Rafael Casados suffered a fatal, work-related injury while working for two employers that both had workers' compensation coverage. Casados's parents sued one of the employers. The principal issue in this case is whether workers' compensation was the exclusive remedy to Casados's parents, which would bar their suit against Port Elevator. The court of appeals held that the policy at issue did not cover Casados because he was a temporary worker and affirmed the judgment Casados's parents obtained against Port Elevator. 314 S.W.3d 529, 540. We have long held that the Labor Code and the rule against split workforces require employers to elect workers' compensation coverage for all employees—except for limited statutory and common-law exceptions that do not apply here. Because Port Elevator had a workers' compensation policy, Casados was

an employee, he suffered a work-related injury, and the jury failed to find Port Elevator grossly negligent, the Texas Workers' Compensation Act (TWCA) provides that the exclusive remedy is against the employer's insurer—not the employer. Accordingly, the claim at issue in this appeal is barred, we reverse the judgment of the court of appeals, and render judgment for Port Elevator.

I.

Rafael Casados worked for Staff Force, Inc. (Staff Force), a temporary staffing agency. Staff Force provided Casados to perform general labor for Port Elevator-Brownsville, LLC (Port Elevator) at its grain storage facility in April 2005. Casados suffered a fatal, work-related injury his third day on the job. Staff Force and Port Elevator both carried workers' compensation insurance. Staff Force's carrier was Dallas Fire Insurance Company (Dallas Fire) and Port Elevator's carrier was Texas Mutual Insurance Company (Texas Mutual). The TWCA requires workers' compensation insurers to reimburse burial expenses for employees such as Casados who had no spouse, children, or dependents, and to pay a certain sum into the subsequent injury fund. TEX. LAB. CODE §§ 403.007, 408.186.[1] Dallas Fire offered to reimburse Casados's parents up to the statutory amount for burial expenses and also paid the required $56,238 into the subsequent injury fund. Port Elevator reported the injury to Texas Mutual, but Texas Mutual denied coverage—claiming that Casados was a Staff Force employee and not a Port Elevator employee. There is no evidence that Casados's parents sought benefits from Texas Mutual or appealed Texas Mutual's denial of coverage. Rather, Casados's parents sued Port Elevator for negligence, negligence *per se*, and gross negligence.

[1] In 2007, the Legislature amended the TWCA to also provide 104 weeks of death benefit payments to non-dependent parents in this situation. TEX. LAB. CODE § 408.182(d-1).

Port Elevator's workers' compensation policy with Texas Mutual covered all of Port Elevator's places of employment. The policy requires Texas Mutual to "pay promptly when due the benefits required . . . by workers compensation law." The policy also estimates the premiums due by classifying employees and assessing the risk for each classification. The policy has classification codes for "clerical office employees" and "grain elevator operation & local managers, drivers." The policy has no exclusion for temporary workers such as Casados.

Port Elevator raised the affirmative defense that workers' compensation was the plaintiffs' exclusive remedy. Both sides moved for summary judgment on the exclusive-remedy defense. Port Elevator argued it was a workers' compensation subscriber, Casados was covered, and workers' compensation was the exclusive remedy. Casados's parents argued the policy did not cover Casados because: (1) Port Elevator did not pay premiums for temporary employees; (2) Casados was not covered by any code classification; and (3) Texas Mutual denied coverage. The trial court granted the plaintiffs' motion for summary judgment and denied Port Elevator's—allowing a trial on the negligence and gross negligence claims.

The jury found Port Elevator negligent but not grossly negligent. After factoring in a settlement credit, the trial court entered judgment on the jury's award on the negligence claim. The court awarded $515,167.09 to Casados's estate for pain, mental anguish, and pre-judgment interest and $2,189,967.76 to Casados's parents for mental anguish, loss of companionship and society, and pre-judgment interest. The court of appeals affirmed. 314 S.W.3d at 540.

Because we conclude that Port Elevator conclusively established it subscribed to workers' compensation insurance, that Casados was an employee, and that he suffered a work-related injury, we reverse the court of appeals' judgment and render judgment in favor of Port Elevator.

II.

Unlike workers' compensation laws in every other state, the TWCA allows private Texas employers to choose whether to subscribe to workers' compensation insurance. TEX. LAB. CODE § 406.002(a); *Lawrence v. CBD Servs., Inc.*, 44 S.W.3d 544, 552 (Tex. 2001). Employees of subscribing employers also have a choice: they may opt out of the system within the prescribed time and retain their common-law rights. TEX. LAB. CODE § 406.034; *Lawrence*, 44 S.W.3d at 552. Although the TWCA is unique among the states in allowing private employers to choose whether to subscribe, it encourages employers to subscribe by abolishing their common-law defenses of contributory negligence, assumption of the risk, and fellow servant if they do not subscribe. TEX. LAB. CODE § 406.033; *Lawrence*, 44 S.W.3d at 552.

The Legislature intended the TWCA to benefit both employees and employers. For employees, the TWCA allows them to recover workers' compensation benefits for injuries in the course and scope of employment without proving fault by the employer and without regard to their negligence or that of their coworkers. TEX. LAB. CODE § 406.031; *HCBeck, Ltd. v. Rice*, 284 S.W.3d 349, 350 (Tex. 2009); *Tex. Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 511 (Tex. 1995). We construe the TWCA liberally in favor of coverage as a means of affording employees the protections the Legislature created. *Navarette v. Temple Indep. Sch. Dist.*, 706 S.W.2d 308, 309–10 (Tex. 1986). For employers, their liability to employees is limited. *Garcia*, 893 S.W.2d at

510–11. The TWCA states that "[r]ecovery of workers' compensation benefits is the exclusive remedy of an employee covered by workers' compensation insurance coverage or a legal beneficiary against the employer . . . for the death of or a work-related injury sustained by the employee." TEX. LAB. CODE § 408.001(a). The only exception to the exclusive remedy provision is when an employee's death "was caused by an intentional act or omission of the employer or by the employer's gross negligence." TEX. LAB. CODE § 408.001(b). Here the jury found that Port Elevator was not grossly negligent. Accordingly, the suit against Port Elevator is barred by section 408.001(a). *Western Steel Co. v. Altenburg*, 206 S.W.3d 121, 123–24 (Tex. 2006).

Although the TWCA specifies an employer may subscribe to workers' compensation insurance by generally obtaining or declining coverage,[2] importantly, the employer may not split its workforce by electing coverage for some employees but not coverage for all. *Tex. Workers' Comp. Ins. Fund v. DEL Indus., Inc.*, 35 S.W.3d 591, 596 (Tex. 2000) ("It has long been the law in Texas

[2] TEX. LAB. CODE § 406.002–.003. Other provisions of the TWCA confirm that an employer's election is generally for its workforce as a whole. *See id*. § 406.004 (requiring employer to notify division if it elects not to obtain coverage); *id*. § 401.011(18) (defining "employer" as "a person who makes a contract of hire, employs one or more employees, and has workers' compensation insurance coverage"); *id*. § 401.012(a) (defining "employee" as "each person in the service of another under a contract for hire"); *id*. § 406.031(a) ("An insurance carrier is liable for compensation for an employee's injury without regard to fault or negligence if: (1) at the time of injury, the employee is subject to this subtitle; and (2) the injury arises out of and in the course and scope of employment."); *id*. § 406.005(c) ("Each employer shall post a notice of whether the employer has workers' compensation insurance coverage at conspicuous locations at the employer's place of business as necessary to provide reasonable notice to the employees.").

that an employer may not split its workforce by providing workers' compensation insurance to some workers while leaving others without coverage.").[3]

Statutes and the common law provide certain limited exceptions that allow an employer to split its workforce—but no exception applies here. First, an employer may operate more than one distinct kind of business and elect workers' compensation insurance for only one of its businesses. *Sullivan*, 334 S.W.2d at 786 ("an employee falls outside the coverage secured by an employer if the employer conducts two separate and distinct kinds of business, each of which involves different risks, payrolls and premium rates"). It is undisputed that Port Elevator operated only one business. Second, an employer may elect to exclude a sole proprietor, partner or corporate executive officer. TEX. LAB. CODE § 406.097. Port Elevator made two exclusions, but they were at the executive level. Third, an employer may lease staff from another company under the Staff Leasing Services Act (SLSA). *Id*. § 91.042. However, the SLSA does not apply to work that is "temporary or seasonal in nature." *Id*. § 91.001(14). Absent one of these statutory or common-law exceptions, an employer may not split its workforce.

An employee may have more than one employer within the meaning of the TWCA, and each employer who subscribes to workers' compensation insurance may raise the exclusive-remedy provision as a bar to claims about the injury. *See Garza v. Exel Logistics, Inc.*, 161 S.W.3d 473, 475–76 (Tex. 2005) (stating that client company could assert exclusive-remedy defense to claims

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[3] *See also Wingfoot Enters. v. Alvarado*, 111 S.W.3d 134, 145 (Tex. 2003); *Md. Cas. Co. v. Sullivan*, 334 S.W.2d 783, 786 (Tex. 1960); *Pac. Indem. Co. v. Jones*, 327 S.W.2d 441, 443 (Tex. 1959); *Barron v. Standard Accident Ins. Co.*, 53 S.W.2d 769, 770 (Tex. 1932); *Buice v. Serv. Mut. Ins. Co.*, 90 S.W.2d 342, 343 (Tex. Civ. App.—Waco 1936, writ ref'd).

by temporary employee if it was covered by workers' compensation insurance); *Wingfoot Enters. v. Alvarado*, 111 S.W.3d 134, 143 (Tex. 2003) (holding that exclusive-remedy provision applied to both temporary staffing company and client company). In *Wingfoot*, we held that an employee of a temporary staffing agency sent to a client company that directs the details of his work is an employee of both companies. 111 S.W.3d at 143. We explained that "an employee should not be placed in the position of trying to determine, perhaps at his or her peril, which of two entities was his or her employer on any given day or at any given moment during a day." *Id.* In *Garza*, we held that a client company can avail itself of the exclusive remedy provision against claims by a temporary employee if either: (1) the client company was a named insured on the staffing company's policy; (2) the staffing company obtained a separate workers' compensation policy for the client company; or (3) the client company obtained its own workers' compensation policy. 161 S.W.3d at 480. We remanded because there was no evidence the client company had any such coverage. *Id*. at 481. In *Western Steel*, we stated that the exclusive-remedy provision bars claims by a temporary worker against a client company if the client company establishes: (1) that it was the plaintiff's employer within the meaning of the TWCA, and (2) it subscribed to workers' compensation insurance. 206 S.W.3d at 123. We held that the exclusive-remedy provision barred that suit because the client company was the plaintiff's employer and was a workers' compensation subscriber. *Id*. at 124.

Here, the parties agree that Casados was an employee of both Staff Force and Port Elevator and that Port Elevator was a workers' compensation subscriber at the time of the accident. The parties disagree as to whether Casados was covered by Port Elevator's workers' compensation

policy. However, a client company is entitled to the exclusive remedy defense upon showing that it was the plaintiff's employer and that it was covered by a workers' compensation policy. *Id.* at 123. This is because the TWCA and our decisions are intended to prevent an employer from splitting its workforce by choosing coverage for some employees but not coverage for all—absent limited statutory or common-law exceptions. *See, e.g.*, TEX. LAB. CODE §§ 401.011(18), 401.012(a), 406.002–.003, 406.031(a); *Wingfoot*, 111 S.W.3d at 145; *DEL Indus.*, 35 S.W.3d at 596. There is no evidence that any exception to the rule against splitting workforces applies here: (1) Port Elevator operated only one business; (2) Casados was not an officer of Port Elevator; and (3) Casados was a temporary employee, not a leased employee. Because Port Elevator was Casados's employer, it was a workers' compensation subscriber, and Casados's injury was work-related, Port Elevator conclusively proved its exclusive-remedy defense.

III.

Casados's parents would have us adopt an additional, intent-based exception to the rule against splitting workforces. Specifically, Casados's parents claim that Port Elevator intended to and did exclude Casados from coverage under its workers' compensation policy because: (1) Port Elevator did not pay premiums for temporary workers like Casados; (2) Casados was a temporary employee whose job classification was not listed in Port Elevator's policy; and (3) Texas Mutual denied coverage. We disagree that an employer can contract around the rule against split workforces or that the above three factors mean that Casados was not covered by Port Elevator's policy.

The exception that Casados's parents urge us to adopt would undermine the very purpose of our long-standing rule that an employer may not (intentionally or unintentionally) split its

workforce. An employer may not choose to exclude certain employees from coverage unless a statutory or common-law exception to the rule against split workforces applies. A key purpose of the rule against split workforces is that employees know whether they have the protections of workers' compensation coverage.[4] Allowing employers to select which employees to cover would not only violate our long-standing rule against split workforces but would also be in tension with our decision to liberally construe the TWCA to find coverage for employees. *Navarette*, 706 S.W.2d at 309–10. We see no compelling reason to so significantly alter the rule against split workforces by adopting Casados's parents' position.

Casados's parents' three specific assertions are also unavailing. Their first assertion is that Casados was not covered because Port Elevator excluded him by failing to pay premiums for temporary workers. This assertion fails for two reasons. First, premiums are an issue between the employer and the insurer; they do not affect the employee's coverage. *Tex. Emp'rs' Ins. Ass'n v. Stanton*, 140 S.W.2d 337, 339–40 (Tex. Civ. App.—Amarillo 1940, writ. ref'd) ("[T]he failure to pay the premiums which may be due upon a policy is a matter of no importance as between the insurer and the employee but only concerns the insurer and the employer."). If Port Elevator's policy had set out certain premiums solely for temporary workers and Port Elevator had not paid those premiums, Casados would still have been covered under the policy and the failure to pay

[4] *See Wingfoot*, 111 S.W.3d at 143(noting need for clarity in dual-employment situations of who the employers are and whether the employee is covered). The TWCA requires employers to notify their employees of coverage by posting a general notice. TEX. LAB. CODE § 406.005(c) ("Each employer shall post a notice of whether the employer has workers' compensation insurance coverage at conspicuous locations at the employer's place of business as necessary to provide reasonable notice to the employees."). If employers could pick and choose which employees to cover, such provisions would be meaningless.

premiums would be an issue between Port Elevator and Texas Mutual. *See Coal Operators Cas. Co. v. Richardson*, 414 S.W.2d 735, 738 (Tex. Civ. App.—Beaumont 1967, writ ref'd n.r.e.) ("This [workers' compensation] protection to plaintiff was not lost because his employer failed to pay the proper premium to the insurance company."). Second, even a clear and unambiguous attempt to exclude Casados from coverage would violate the rule against splitting workforces. *See supra* Part II.

Casados's parents' second assertion is that Casados was not covered by any job classification in Port Elevator's workers' compensation policy. As addressed in Part II, the rule against split workforces requires that all employees be covered—absent a limited statutory or common-law exception. Because no exception applies, it does not matter whether Casados was covered by a code classification.

Third, Casados's parents assert that Texas Mutual's denial of coverage means that Casados was not covered. Casados was covered by Staff Force's policy with Dallas Fire as well as Port Elevator's policy with Texas Mutual. Casados had the right to pursue workers' compensation benefits from Dallas Fire, Texas Mutual, or both. *See Wingfoot*, 111 S.W.3d at 143 (stating that the "employee should be able to pursue workers' compensation benefits from either" the temporary staffing company's carrier or the client company's carrier); *see also* TEX. LAB. CODE § 410.033 (prescribing procedure for two or more carriers liable for compensation). Therefore, Casados's parents are only entitled to the recover workers' compensation benefits and the exclusive-remedy provision in the TWCA bars their negligence claim against Port Elevator. TEX. LAB. CODE § 408.001(a).

In conclusion, because Port Elevator subscribed to workers' compensation insurance, Casados was an employee of Port Elevator, and he suffered a work-related injury, the TWCA-provided remedy against Texas Mutual was the exclusive remedy for his injury. Casados's parents' negligence claim against Port Elevator is barred. Accordingly, we reverse the judgment of the court of appeals and render judgment for Port Elevator.

Eva M. Guzman
Justice

OPINION DELIVERED: January 27, 2012

IN THE SUPREME COURT OF TEXAS

NO. 10-0526

IN RE UNITED SCAFFOLDING, INC., RELATOR

ON PETITION FOR WRIT OF MANDAMUS

Argued October 6, 2011

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

JUSTICE WAINWRIGHT filed a concurring opinion.

In *In re Columbia Medical Center of Las Colinas*, we held that a trial court's order granting a motion for new trial must provide a reasonably specific explanation of the court's reasons for setting aside a jury verdict. 290 S.W.3d 204, 213 (Tex. 2009). We rejected a new-trial grant that was premised solely "in the interest of justice." *Id.* at 213. Because the trial court's order in this case can be read to do just that, we conditionally grant the writ of mandamus. We also deny United's request for a writ of mandamus compelling the trial court to render judgment on the verdict.

I. Background

In James Levine's 2008 negligence lawsuit against United Scaffolding, a jury assigned fifty-one percent responsibility for Levine's injuries to United. The jury declined to find past damages,

even though it awarded $178,000 in projected future medical expenses. Following this verdict, the trial court granted Levine's motion for new trial "in the interest of justice and fairness." In light of *In re Columbia*, we conditionally granted United's writ of mandamus in January 2010. *In re United Scaffolding, Inc.*, 301 S.W.3d 661, 663 (Tex. 2010) ("We direct the trial court to specify its reasons for disregarding the jury verdict and ordering a new trial.").

The trial court amended its order to add three alternative rationales:

> After reconsidering Plaintiff James and Lisa Levine's Motion for New Trial, the Court GRANTS the motion and orders New Trial based upon:
>
> A. The jury's answer to question number three[1] (3) is against the great weight and preponderance of the evidence; *and/or*
>
> B. The great weight and preponderance of the evidence supports a finding that the determined negligence of Defendant was a proximate cause of injury in the past to Plaintiff, James Levine; *and/or*
>
> C. The great weight and preponderance of the evidence supports a finding that the determined negligence of Defendant supports an award of past damages; *and/or*
>
> D. In the interest of justice and fairness.

(Emphasis added). United again sought mandamus relief, but the court of appeals found the order reasonably specific and denied the petition, with one justice dissenting. 315 S.W.3d 247.

United argues that the amended order still fails to provide adequate reasoning. In addition to attacking the order's use of "and/or" and the retention of "in the interest of justice," United

[1] Question three asked the jury to separately calculate the different types of damages suffered by Levine. The categories included medical expenses incurred in the past, those projected for the future, pain incurred in the past and likely to be sustained in the future, etc. As alluded to above, the jury answered "$0" for every category except for future medical expenses.

(supported by amicus curiae E.I. du Pont de Nemours and Co.) urges that we require trial courts to conduct, in new-trial orders based on factual sufficiency, the same detailed analysis we required of appellate courts in *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986). United also invites us to review the evidence and conclude that the trial court abused its discretion in granting a new trial on factual insufficiency grounds. We should, United contends, order the trial court to render judgment on the verdict. Levine counters that requiring reasoning any more specific than that used here would waste trial court resources, and that substantive review of these types of orders would be improper.

II. New-Trial Order Requirements

In *In re Columbia*, we reiterated the considerable discretion afforded trial judges in ordering new trials. 290 S.W.3d at 212 (citing *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 917 (Tex. 1985)). That rule has both jurisprudential justifications (trial judges actually attend the trial and are best suited to evaluate its deficiencies), and practical justifications (most trial judges are understandably reluctant, after presiding over a full trial, to do it all over again). Therefore, in considering how detailed a trial court's new-trial order must be, as well as what level of review it is subject to, we must both afford jury verdicts appropriate regard and respect trial courts' significant discretion in these matters.

Imposing a *Pool*-like standard on trial courts would weigh too heavily against trial courts' discretion, since that standard would frequently be impossible for a trial court to meet. In *Pool*, we said:

> In order that this court may in the future determine if a correct standard of review of factual insufficiency points has been utilized, courts of appeals, when reversing on insufficiency grounds, should, in their opinions, detail the evidence relevant to the issue in consideration and clearly state why the jury's finding is factually insufficient or is so against the great weight and preponderance as to be manifestly unjust; why it shocks the conscience; or clearly demonstrates bias. Further, those courts, in their opinions, should state in what regard the contrary evidence greatly outweighs the evidence in support of the verdict.

715 S.W.2d at 635. We cited that standard in *In re Columbia*, and United and DuPont make much of our comparisons of a trial court's new-trial review with the type of review conducted by appellate courts. *See, e.g.*, 290 S.W.3d at 211–12 ("[T]here is no meaningful difference to the parties between an appellate court reversing a judgment based on a jury verdict and a trial court setting the verdict aside . . . ."). But in that same opinion, we also observed that appellate courts normally have a court reporter's record at their disposal, while trial courts must rely on their own observations.[2] *Id.* at 211. This distinction advocates both for giving substantial deference to the trial court's new-trial determinations (since the trial judge may have observed irregularities not wholly apparent in a cold record), and for not requiring *Pool*-level detail (since a trial judge usually does not have a record from which to draw detailed recitations of the evidence presented).

Moreover, a large part of our rationale for prescribing *Pool* review for courts of appeals—concern that, "without that mental process being reflected by the opinion," we could not be sure that a court of appeals had "considered and weighed all the evidence before arriving at a decision of insufficiency," *Pool*, 715 S.W.2d at 635—is less potent as to trial courts. Unlike a court

[2] The burden on a trial judge who is not the same one that presided over the trial is likely to be even more substantial. *See In re Baylor Med. Ctr. at Garland*, 289 S.W.3d 859, 861 (Tex. 2009).

of appeals, which must affirmatively choose to read and consider the entire record (or selectively ignore portions of it, as we feared in *Pool*), a trial judge who rules on a motion for new trial has, in most instances, been present and a participant in the entire trial. We conclude that the *Pool* standards are not appropriate for trial court orders granting motions for new trial.

Consistent with these concerns, we focused in *In re Columbia* not on the length or detail of the reasons a trial court gives, but on how well those reasons serve the general purpose of assuring the parties that the jury's decision was set aside only after careful thought and for valid reasons. 290 S.W.3d at 213. Indeed, our opinion expressly touched on the substance of a trial court's reason only in explaining what that reason could not be: to substitute the trial court's judgment for that of the jury. *Id.* at 212 (citing *Scott v. Monsanto Co.*, 868 F.2d 786, 791 (5th Cir. 1989)). A trial court need not provide a detailed catalog of the evidence to ensure that, however subject to differences of opinion its reasoning may be, it was not a mere substitution of the trial court's judgment for the jury's. That purpose will be satisfied so long as the order provides a cogent and reasonably specific explanation of the reasoning that led the court to conclude that a new trial was warranted. Furthermore, in most cases a new trial will be granted for reasons stated in a motion for new trial, so that such an explanation will alert the parties to the reason the judge found persuasive, further illuminating the substantive basis for the order.

In light of these considerations, we hold that a trial court does not abuse its discretion so long as its stated reason for granting a new trial (1) is a reason for which a new trial is legally appropriate (such as a well-defined legal standard or a defect that probably resulted in an improper verdict); and

(2) is specific enough to indicate that the trial court did not simply parrot a pro forma template, but rather derived the articulated reasons from the particular facts and circumstances of the case at hand.

For example, an order granting a new trial may amount to a clear abuse of discretion if the given reason, specific or not, is not one for which a new trial is legally valid. *See id.* at 210 n.3 ("The good cause for which [Texas Rule of Civil Procedure] 320 allows trial courts to grant new trials does not mean just any cause."). Or, mandamus would lie if the articulated reasons plainly state that the trial court merely substituted its own judgment for the jury's, *see id.* at 210; or that the trial court simply disliked one party's lawyer, *In re BMW*, 8 S.W.3d 326, 328 (Tex. 2000) (Hecht, J., dissenting from the denial of rehearing of a petition for mandamus); or that the reason is based on invidious discrimination, *id.*

Moreover, mandamus may lie if the order, though rubber-stamped with a valid new-trial rationale, provides little or no insight into the judge's reasoning. Usually, the mere recitation of a legal standard, such as a statement that a finding is against the great weight and preponderance of the evidence, will not suffice. The order must indicate that the trial judge considered the specific facts and circumstances of the case at hand and explain how the evidence (or lack of evidence) undermines the jury's findings. A trial court abuses its discretion if its new-trial order provides no more than a pro forma template rather than the trial judge's analysis**.** This two-part test adequately ensures that jury verdicts are not overturned without specific and proper reasons, while still maintaining trial courts' discretion in granting new trials.

III. Application to This Order

Before turning to United Scaffolding's challenge to the substantive basis for the amended order, we first apply the two-part standard articulated above to this case. Under that standard, the amended order in this case (still) plainly violates our holding in *In re Columbia*. In *Columbia*, we made it indisputably clear that "[b]road statements such as 'in the interest of justice' are not sufficiently specific." 290 S.W.3d at 215. And if an order based solely on "the interest of justice" is insufficient, so too is one that, though it contains alternative reasons, could just as well be construed as relying solely on "the interest of justice and fairness."

Here, the trial court's four articulated reasons, including "in the interest of justice and fairness," are all preceded or followed by "and/or." Many courts and critics have denounced the use of "and/or" in legal writing. *E.g.*, TEXAS LAW REVIEW MANUAL ON USAGE & STYLE § 1.42 (Texas Law Review Ass'n ed., 12th ed. 2011) ("Do not use *and/or* in legal writing."); *State ex rel. Adler v. Douglas*, 95 S.W.2d 1179, 1180 (Mo. 1936) (en banc) ("The use of the symbol 'and/or' . . . should be condemned by every court."). The term inherently leads to ambiguity and confusion. WILLIAM STRUNK, JR. & E.B. WHITE, THE ELEMENTS OF STYLE 40 (4th ed. 2000); *see also* Bryan A. Garner, The Redbook: A Manual on Legal Style § 1.80 (2nd ed. 2006). In this order, the use of "and/or" leaves open the possibility that "in the interest of justice and fairness" is the sole rationale.[3] Because

[3] The symbol "/" (a slash, or virgule), itself ambiguous and frowned upon, often indicates alternatives. GARNER, *supra*, at §§ 1.80, 1.81(d). Many style guides translate the phrase "A and/or B" to mean "A or B or both." *See* STRUNK & WHITE, *supra*, at 40; WILSON FOLLETT, MODERN AMERICAN USAGE 64–65 (Jacques Barzun et al. eds., 1966). Thus, the trial court's actual reasons might have been any of the first three, all four of them, or just "in the interest of justice and fairness" by itself.

that is never an independently sufficient reason for granting a new trial, the amended order violated the first prong of the test we announce above. Therefore, we conditionally grant the writ of mandamus in part and instruct the trial court to vacate its amended order.[4] The trial court should issue a new order that resolves the ambiguity discussed above and elaborate, with reference to the evidence adduced at trial, how the jury's answers are contrary to the great weight and preponderance of the evidence.

IV. The Trial Court Need Not Render Judgment on the Verdict

We now turn to United's request that we also grant a writ of mandamus ordering the trial court, not merely to redraft the new-trial order, but to render judgment on the jury verdict. United contends that the amended order is so deficient in every respect that, rather than order the trial court to redraft its order, we should direct it to render judgment on the jury verdict. United argues that the first three reasons in the amended order—those based on the "great weight and preponderance of the evidence"—are just as much boilerplate as "in the interest of justice and fairness," and that the factual record does not support them. We disagree that rendition on the jury verdict is warranted in this circumstance. First, as we have discussed, the actual basis for the trial court's order is unclear; if it rests on the greater-weight rationale, then our writ would compel the trial court to elaborate on that reasoning. The trial court's failure to properly state why it granted a new trial does not mandate a conclusion that it did not have a valid reason for doing so. And absent the trial court's having

[4] Our decision rests on the possibility that the trial court granted a new trial based solely on the interest of justice, and does not speak to the viability of the other three reasons provided in the order.

particularized its reason—or reasons—United would be entitled to mandamus directing the trial court to render judgment on the verdict only if it showed no valid basis exists for the new-trial order. It has not done so here—the record United has presented is only a partial one containing Levine's motion for new trial and the exhibits to that motion, such as deposition transcripts, and the transcript of the hearing on the motion for new trial. *See* TEX. R. APP. P. 52.7.

V. Conclusion

Because of the ambiguity caused by the trial court's use of "and/or" and "in the interest of justice and fairness," we conditionally grant the writ of mandamus in part and order the trial court to vacate its order. The writ will only issue if the trial court fails to comply. We are confident the trial court's next amended order will resolve all ambiguity, leaving behind only the specific and valid reasons that, in the context of this case, explain why it granted a new trial.

_____

Debra H. Lehrmann
Justice

OPINION DELIVERED: August 31, 2012

IN THE SUPREME COURT OF TEXAS

NO. 10-0526

IN RE UNITED SCAFFOLDING, INC., RELATOR

ON PETITION FOR WRIT OF MANDAMUS

Argued October 6, 2011

JUSTICE WAINWRIGHT, concurring in the judgment.

I agree with the Court that the order granting a new trial in this case fails to pass muster under *In re Columbia Medical Center of Las Colinas*, 290 S.W.3d 204, 213 (Tex. 2009).

I respectfully disagree with some of the propositions in the Court's opinion. In considering the substantive support for new trial determinations, I disagree that a trial court's presumed lack of a trial record should be a basis for determining the scope of the sufficiency review of a trial court's grant of a motion for new trial. In this age of technology, trial courts have access to the record and more, including personal observations of the trial and their notes of the proceedings. Even more than a decade ago, the court reporter for my court provided this former trial judge with "real time" electronic transcripts of trial testimony, as needed. She also maintained custody of the trial exhibits and the court clerks maintained, or could obtain, documents from the clerk's record. Presumably trial judges today have more, not less, access to trial records needed to formulate valid, well-reasoned bases for granting motions for new trial that overturn jury verdicts. Incidents that occur during a trial that may warrant overturning the jury's verdict can be documented or explained in the

record for appropriate consideration on appeal, including things such as (God forbid) sleeping jurors, counsel, or jurists, explosions outside the courthouse during a trial over burn injuries, and other matters. I also am convinced that the rationale for requiring valid, substantive reasons for a trial court's reversal of a jury verdict should be more than the concern that a judge will substitute her judgment for the jury's on matters within the jury's province. A trial court's reasons for granting a new trial should be valid and proper because of the significance of the right to trial by jury and the respect due jury verdicts. *See Columbia*, 290 S.W.3d at 211 n.3, 212, 213.

We determined in *In re Columbia Medical Center of Las Colinas* that, just as appellate courts that set aside jury verdicts are required to detail reasons, trial courts must also give an explanation for setting aside a jury verdict. 290 S.W.3d at 206. We held that a trial court abuses its discretion if it fails to specify the reasons for its decision to grant a new trial and that "in the interest of justice" is not a proper reason. *Id.* at 213, 215. The formulaic "in the interest of justice" is a vague explanation for granting a new trial, and "does not enhance respect for the judiciary or the rule of law . . . ." *Id*. at 213. Emphasizing that parties and the public are entitled to an "understandable, reasonably specific explanation" when a new trial is granted, we determined that a trial court must give "proper reasons" for overturning a jury verdict. *Id*. at 211 n.3, 212, 213.

The question we have not yet addressed is how in-depth the appellate review of orders granting new trials should be, an issue raised in this case but unnecessary for the Court to address. Today we grant a petition for writ of mandamus that squarely raises the issue of the nature and breadth of the substantive appellate review of orders granting motions for new trial. *In re Toyota Motor Sales, U.S.A., Inc.*, No. 10-0933, 55 Tex. Sup. Ct. J. __ (Aug. 31, 2012).

Texas trial courts have historically been afforded broad discretion in granting new trials. *Columbia*, 290 S.W.3d at 210; *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 918 (Tex. 1985). But that discretion is not limitless. *Columbia*, 290 S.W.3d at 210 (citing *Larson v. Cactus Util. Co.*, 730 S.W.2d 640 (Tex. 1987)); *In re Bayerische Motoren Werke, AG*, 8 S.W.3d 326, 327 (Tex. 2000) (Hecht, J., dissenting from denial of the motion for rehearing of the petition for writ of mandamus) ("Broad as the trial court's discretion is, it is not unbounded.").

We need to remind ourselves what is at stake. Our Constitution protects the right to trial by jury, which "shall remain inviolate." TEX. CONST. art. 1, § 15. A similar guarantee was included in the original version of our current Constitution of 1876 and in all of the earlier Texas Constitutions, including the Constitution of the Republic of Texas. *See* REPUB. TEX. CONST. of 1836, Declaration of Rights, art. 9, *reprinted in* 1 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897 1083 (Austin, Gammel Book Co. 1898); *see also* TEX. CONST. of 1869, art. I, §§ 8, 12; TEX. CONST. of 1866, art. I, § 12, art. IV, § 20; TEX. CONST. of 1861, art. I, § 12, art. IV, § 16; TEX. CONST. of 1845, art. I, § 12. Unbounded discretion to grant new trials is at odds with these principles. For over a century, this Court has recognized the limited discretion afforded in granting a new trial.

> Judges, in the trial of all causes before them, should from necessity have and exercise great legal discretion in every stage of the trial, to the end that the laws may be enforced, and justice and equity administered to all. But that discretion should be a sound and legal discretion, exercised in compliance with known rules, and principles of law; and not the arbitrary will and pleasure of the judge presiding.

Lloyd v. Brinck, 35 Tex. 1, 6 (1871). In *Lloyd*, the Court awarded mandamus relief to set aside a new trial order where the order was issued without providing a reason. *Id.* at 8–9. And we re-affirmed that principle in *Columbia*. 290 S.W.3d at 210; *see also* 315 S.W.3d 246, 253 (Gaultney,

J., dissenting) ("A trial judge should have no need or requirement to write the equivalent of an appellate opinion explaining why the judge reasons the jury verdict is clearly wrong and unjust, but it is not too much to require the trial judge to provide an answer beyond standardized phrases.").

Columbia mandated that a trial judge must list "reasonably specific," "valid," and "proper reasons" for granting a motion for new trial because of the significance of the right to trial by jury. 290 S.W.3d at 211 n.3, 212, 213. This language points our jurisprudence toward appellate review of the reasons given for reversing a verdict. *Id.* at 210 n.3 (stating "good cause" to grant a new trial "does not mean just any cause").

A facial review that fails to confirm that the record supports a new trial order does injustice to the commitment and service of a jury that faithfully swore to reach a true verdict. A facial review is inconsistent with the constitutionally guaranteed right to have a jury resolve disputes. Reasons given may become meaningless formulas and verdicts reversed for reasons that are pretextual, legally incorrect, or unsupported by the record. And an order granting a new trial for an invalid reason is just as insufficient as an order that fails to provide any reason at all. Similar to appellate court judgments on verdicts, the reasons for taking them away must be set out for the public, bench and bar to see. *See id.* at 206.

It is important to remember what's at stake. When a motion for new trial is granted and the case is retried, two jury verdicts will have been rendered. After the second verdict, the litigants may seek relief through an appeal with the court of appeals. In the appeal, litigants may raise legal and factual sufficiency issues, damages errors, procedural problems, or other matters, and the second jury verdict in the case receives a level of scrutiny to confirm or overturn it. The fact findings and legal

conclusions are judged against the law and the record of the proceedings at trial. The second verdict is respected in the appellate process through appropriate standards of review and well-reasoned and transparent analysis by appellate courts.

The first verdict should likewise be accorded a commensurate level of respect. The jurors in the first trial heard testimony, listened carefully to counsel's arguments, and endeavored to follow the trial court's instructions. As with the second jury, the first jury deliberated and rendered a verdict in the grand tradition of the constitutional right to a jury trial. However, without a substantive review of the reasons for granting the new trial, the first verdict may be invalidated without the careful analysis and rigor of review accorded the second verdict. Why should the second verdict be treated as more important than the first? Why should the first jury receive less respect than the second? Why should the efforts and work of counsel and expense to parties in the first trial be subject to invalidation under a less thorough analytical review than in the second?

There are procedural limitations in a mandamus review of a new trial order that would not be of concern in an appeal. For example, the mandamus standard of review is abuse of discretion rather than a de novo review of the verdict, with proper deference accorded to the jury's fact findings and credibility determinations. Should the first verdict be subject to the same appellate review as the second, and grants of motions for new trial be treated as final instead of interlocutory? After all, the new trial order reversed a jury verdict, which would be considered a final judgment if accomplished in a judgment notwithstanding the verdict or ruling on a motion for entry of judgment; and, as in an order for a new trial, the case may be retried after appellate consideration. Should there be legal congruence between the review of a motion for new trial and a judgment notwithstanding

the verdict? The counterargument is, "Well, we have a tradition of treating them differently." Perhaps, but we took a step in *Columbia* toward correcting problems with motions for new trials, and we recognized that:

> [T]here is no meaningful difference to the parties between an appellate court reversing a judgment based on a jury verdict and a trial court setting the verdict aside or disregarding it. The end result is that the prevailing party loses the jury verdict and the judgment, or potential judgment, based on it.

290 S.W.3d at 211–12. While there are many procedural issues and practical challenges to surmount in resolving these issues, which I do not attempt to answer today, I have jurisprudential concerns in treating the two verdicts differently.

We have faith in the integrity of our trial bench as well as that of the appellate bench. *Id.* at 214. A serious merits review of grants of motions for new trial will not put burdens on trial or appellate courts that are not already expected—to issue fair and just rulings under the law in cases and controversies filed in their courts. Instead, this review protects the right to trial by jury and a trial judge's discretion in granting a new trial for reasonably specific, valid, and proper reasons. While I agree that trial judges should provide valid, substantive reasons for granting a motion for new trial, I agree with the Court that we should not require trial courts to prepare new trial orders with the same detailed analysis required of appellate courts in *Pool v. Ford Motor Co.*, 715 S.W.2d, 629, 635 (Tex. 1986).

But without a true merits-based review of the reasons given for granting new trials, *Columbia* will not be fully effective. A rule that cannot be enforced is, in reality, no rule at all.

_____

Dale Wainwright
Justice

OPINION DELIVERED: August 31, 2012

IN THE SUPREME COURT OF TEXAS

NO. 10-0548

RUSK STATE HOSPITAL, PETITIONER,

v.

DENNIS BLACK AND PAM BLACK, INDIVIDUALLY AND AS REPRESENTATIVES OF THE ESTATE OF TRAVIS BONHAM BLACK, DECEASED, RESPONDENTS

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

Argued October 6, 2012

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

JUSTICE HECHT filed a concurring opinion.

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

In this health care liability claim the trial court denied Rusk State Hospital's challenge to the plaintiffs' expert reports. The Hospital filed an interlocutory appeal from that ruling. On appeal the Hospital, for the first time, asserted it was immune from suit. The court of appeals refused to consider the immunity issue because it had not been presented to the trial court. After addressing the merits of the Hospital's challenge to the expert reports, the court of appeals remanded the case to the trial court for further proceedings.

We conclude that the court of appeals erred by refusing to consider the immunity claim because immunity from suit implicates courts' subject-matter jurisdiction. After considering the immunity claim, which was briefed and argued in this Court, however, we affirm the judgment of the court of appeals remanding the case to the trial court because (1) the pleadings and record neither establish a waiver of the Hospital's immunity nor conclusively negate such a waiver; and (2) the Hospital has not shown conclusively that either the plaintiffs had a full, fair opportunity in the trial court to develop the record as to immunity and amend their pleadings, or that if the case is remanded and the plaintiffs are given such an opportunity they cannot show immunity has been waived.

I. Background

Travis Black was a psychiatric patient in Rusk State Hospital when he was found unconscious with a plastic bag over his head. Efforts to resuscitate him were unsuccessful and he died. Delbert Van Dusen, M.D., performed an autopsy, determined Travis died of asphyxiation, and concluded that he committed suicide.

Travis's parents, Dennis and Pam Black, filed a health care liability suit against the Hospital and other entities that are not parties to this appeal.[1] The Blacks alleged that the Hospital (1) was negligent by providing or allowing Travis access to a plastic bag that was inherently dangerous in an inpatient psychiatric setting, and the negligence involved a condition, use, or misuse of tangible personal property; (2) was negligent in training and supervising its employees, which resulted in Travis's death either by assisted suicide or murder; and (3) acted with deliberate indifference to

[1] The Blacks also sued the State of Texas and the Texas Department of State Health Services. The court of appeals dismissed the claims against the State and the Department. ___ S.W.3d ___, ___. The Blacks do not complain of that action.

Travis's medical and psychiatric needs by depriving him of sleep and refusing to prescribe appropriate medication.

The Blacks timely served the Hospital with an expert report from psychologist Dennis Combs, Ph.D., and a copy of Dr. Van Dusen's autopsy report. *See* TEX. CIV. PRAC. & REM. CODE § 74.351. The Hospital moved for dismissal of the suit on the basis that these reports failed to satisfy the statutory requirements of section 74.351. *See id.* The trial court denied the motion and the Hospital appealed. *See id.* § 51.014(a)(9) (providing that a person may immediately appeal an interlocutory trial court order that denies all or part of the relief sought by a motion under section 74.351(b)).

On interlocutory appeal the Hospital argued that the trial court erred by denying its motion to dismiss and, for the first time, asserted it had sovereign immunity from suit. Regarding its immunity claim, the Hospital argued that the Blacks' pleadings did not allege a cause of action for which the Hospital's immunity was waived and therefore the Blacks failed to meet their burden of showing the trial court had jurisdiction. ___ S.W.3d ___, ___. The Blacks responded that their filings complied with statutory expert report requirements; the court of appeals could not consider the Hospital's immunity argument because it was neither presented to nor considered by the trial court; and in any event their pleadings were sufficient to demonstrate a claim for which the Hospital's immunity was waived. *Id.* at ___.

The court of appeals did not address the immunity issue because "the weight of authority" precluded it from considering the issue on interlocutory appeal when it had not been presented to or ruled on by the trial court. *Id.* at ___. The appeals court, considering both Dr. Combs's report and

Dr. Van Dusen's autopsy report as statutory reports, concluded that the Blacks' claims regarding sleep deprivation, failure to prescribe adequate medication, and indifference to Travis's medical needs were not addressed by them, so it dismissed those claims with prejudice. *Id.* at ___. Although the appeals court also concluded that the Blacks' expert reports were deficient with respect to their remaining negligence claims, it determined the reports nonetheless represented a good-faith effort to comply with section 74.351 and remanded for the trial court to consider whether to grant a 30-day extension for the Blacks to cure the deficiencies. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(c) (providing that "the court may grant one 30-day extension to the claimant in order to cure the deficiency" if it concludes the claimant's timely filed expert reports are deficient); *Leland v. Brandal*, 257 S.W.3d 204, 205 (Tex. 2008) (holding that "when elements of a timely filed expert report are found deficient, either by the trial court or on appeal, one thirty-day extension to cure the report may be granted" and remanding the case to the trial court for it to consider whether to grant an extension).

The Blacks did not seek review of the court of appeals' decision, but the Hospital did and we granted its petition for review. 54 Tex. Sup. Ct. J. 1156 (June 17, 2011). The Hospital argues that immunity from suit deprives the trial court of subject-matter jurisdiction and the interlocutory appeal statute did not preclude the court of appeals from determining the jurisdictional issue. The Hospital then argues that we should dismiss the case because the Blacks' pleadings, even if true, do not allege a claim for which the Hospital's immunity has been waived by the Tort Claims Act (TCA). *See* TEX. CIV. PRAC. & REM. CODE §§ 101.001–.109.

We begin by addressing our jurisdiction over the interlocutory appeal.

II. Interlocutory Appeal Jurisdiction

Generally, Texas appellate courts have jurisdiction only over final judgments. *Bally Total Fitness Corp. v. Jackson*, 53 S.W.3d 352, 352 (Tex. 2001). An exception exists for certain interlocutory orders. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a); *Jackson*, 53 S.W.3d at 355. In relevant part, section 51.014(a) provides that

> A person may appeal from an interlocutory order of a district court, county court at law, or county court that:
> . . .
> (8) grants or denies a plea to the jurisdiction by a governmental unit . . . ; [or]
> . . .
> (9) denies all or part of the relief sought by a motion under Section 74.351(b), except that an appeal may not be taken from an order granting an extension under Section 74.351.

TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8), (9). Section 74.351(b), which section 51.014(9) references, specifies that a court must dismiss a health care liability claim if the plaintiff does not timely serve an expert report and the defendant physician or health care provider properly objects. *See id.* § 74.351(b).

When an interlocutory appeal is taken pursuant to section 51.014(a), the court of appeals' judgment ordinarily is conclusive. *See* TEX. GOV'T CODE § 22.225(b)(3). But we may consider an interlocutory appeal when the court of appeals' decision conflicts with the decision of another court of appeals on a material issue of law. *Id.* §§ 22.001(a)(2), (e); 22.225(c). This case presents an issue on which the courts of appeals are in conflict: May an appellate court consider on interlocutory appeal whether a governmental entity has immunity when the trial court did not address the issue first. *Compare* ___ S.W.3d. at ___ ("[W]e hold that the weight of authority precludes our

consideration on interlocutory appeal of jurisdictional challenges not presented to or ruled on by the trial court."), *with Fort Bend Cnty. Toll Road Auth. v. Olivares*, 316 S.W.3d 114, 118 (Tex. App.—Houston [14th Dist.] 2010, no pet.) ("An appellate court must consider challenges to the trial court's subject-matter jurisdiction on interlocutory appeal, regardless of whether such challenges were presented to or determined by the trial court."). We have jurisdiction to resolve the conflict. TEX. GOV'T CODE § 22.001(a)(2).

III. Sovereign Immunity

A. Nature of Immunity

The doctrine of sovereign immunity derives from the common law and has long been part of Texas jurisprudence. *See Hosner v. DeYoung*, 1 Tex. 764, 769 (1847) (holding that the State could not be sued in her own courts absent her consent "and then only in the manner indicated"); *see also City of Dallas v. Albert*, 354 S.W.3d 368, 373 (Tex. 2011) ("[The] boundaries [of sovereign immunity] are established by the judiciary, but we have consistently held that waivers of it are the prerogative of the Legislature.").

Sovereign immunity in Texas embodies two concepts: immunity from liability and immunity from suit. *Albert*, 354 S.W.3d at 373. Immunity from liability protects governmental entities from judgments, while immunity from suit completely bars actions against those entities unless the Legislature expressly consents to suit. *Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 374 (Tex. 2006); *Tooke v. City of Mexia*, 197 S.W.3d 325, 332 (Tex. 2006) ("[I]mmunity from suit . . . bars suit against [a governmental] entity altogether."); *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 696 (Tex. 2003) ("Unlike immunity from suit, immunity from liability does not

affect a court's jurisdiction to hear a case and cannot be raised in a plea to the jurisdiction."); *Tex. Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 857 (Tex. 2002) ("We again reaffirm that it is the Legislature's sole province to waive or abrogate sovereign immunity."); *Tex. Dep't of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999) (per curiam).[2]

The Legislature has waived governmental entities' immunity from certain claims by means of the Tort Claims Act (TCA). *See* TEX. CIV. PRAC. & REM. CODE §§ 101.001–.109. But the TCA embodies only limited waivers of sovereign immunity; it does not abolish it. *See Kerrville State Hosp. v. Clark*, 923 S.W.2d 582, 584 (Tex. 1996).

B. Immunity and Interlocutory Appeals

Referencing our decision in *Waco Independent School District v. Gibson*, 22 S.W.3d 849, 851 (Tex. 2000), the Hospital argues that immunity from suit is an issue of subject-matter jurisdiction that may be raised for the first time on interlocutory appeal in the same manner as standing and ripeness. Conversely, the Blacks argue that *Gibson* is distinguishable and other cases cited by the Hospital do not support its position because they involved either appeals from final judgments or interlocutory appeals in which the trial court had granted or denied a plea to the jurisdiction.

In *Gibson*, the trial court granted, in part, Waco Independent School District's (WISD) motion to dismiss for want of jurisdiction. 22 S.W.3d at 851. The motion was based on WISD's claim that the Gibsons failed to exhaust their administrative remedies before filing suit. *Id.* The

[2] In this case we address immunity from suit, so references to immunity will be references only to immunity from suit unless specified otherwise.

Gibsons filed an interlocutory appeal. *Id.* WISD responded not only by re-urging its argument concerning exhaustion of remedies, but also by challenging the trial court's jurisdiction on standing and ripeness grounds. *See id.* at 851. The court of appeals refused to address WISD's standing and ripeness arguments, reasoning that those issues were not preserved for appeal because WISD had not presented them to the trial court in its motion to dismiss. *Id.* This Court reversed:

> [T]he court [of appeals] concluded that standing and ripeness were not properly preserved for its review. We disagree. We decided in [*Texas Association of Business v. Texas Air Control Board*, 852 S.W.2d 440, 445 (Tex. 1993)] that because subject matter jurisdiction is essential to the authority of a court to decide a case, it cannot be waived and may be raised for the first time on appeal.

Id.

The Blacks are correct that *Gibson* does not precisely square with the facts and posture of this case. *Gibson* involved an interlocutory appeal from a trial court order granting a plea to the jurisdiction, whereas here no jurisdictional argument was presented to or ruled on by the trial court. *Compare id.* at 851, *with* ___ S.W.3d at ___. The jurisdictional issues in *Gibson* were also different: there the questions concerned standing and ripeness rather than immunity. *See Gibson*, 22 S.W.3d at 851. Further, in *Gibson* the school district pled that the Gibsons' claims were not ripe and that the Gibsons did not have standing. *Id.* But we disagree that these differences dictate a different outcome here.

The court of appeals reasoned that section 51.014(a) precluded it from reviewing an immunity claim that was neither raised nor ruled upon in the trial court. *See* ___ S.W.3d ___. The Hospital argues that this reasoning misapprehends the analysis regarding section 51.014(a) because the statute does not supplant the constitutional requirement that courts must have jurisdiction to

adjudicate a dispute. We agree with the Hospital. The inquiry is not whether section 51.014(a) *grants* appellate courts authority to review an immunity claim; rather, it is whether section 51.014(a) *divests* appellate courts of such authority. We conclude that it does not.

We have said on numerous occasions that sovereign immunity deprives courts of subject-matter jurisdiction. *See, e.g.*, *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225-26 (Tex. 2004); *Jones*, 8 S.W.3d at 638; *see also State v. Lueck*, 290 S.W.3d 876, 880 (Tex. 2009) (recognizing that a plea to the jurisdiction properly presents the immunity issue). It has been suggested that while immunity *implicates* subject-matter jurisdiction, it does not necessarily *equate* to a lack of subject-matter jurisdiction. *See Reata*, 197 S.W.3d at 381 ("[S]overeign immunity includes concerns about both subject-matter and personal jurisdiction but is identical to neither.") (Brister, J., concurring). The dissent echoes that theme today. But regardless of whether immunity equates to a lack of subject-matter jurisdiction for all purposes, it implicates a court's subject-matter jurisdiction over pending claims. So if a governmental entity validly asserts that it is immune from a pending claim, any court decision regarding that claim is advisory to the extent it addresses issues other than immunity, and the Texas Constitution does not afford courts jurisdiction to make advisory decisions or issue advisory opinions. *Valley Baptist Med. Ctr. v. Gonzalez*, 33 S.W.3d 821, 822 (Tex. 2000) (per curiam) ("Under article II, section 1 of the Texas Constitution, courts have no jurisdiction to issue advisory opinions."); *see also* TEX. CONST. art. IV, §§ 1, 22 (empowering the attorney general, as part of the executive department of government, to issue advisory opinions to the governor and other officials).

Section 51.014(a) expands the jurisdiction of courts of appeals. It specifies circumstances in which a litigant may immediately appeal from an order that would otherwise be unappealable because a final judgment has not been rendered in the matter. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a); *see also Cherokee Water Co. v. Ross*, 698 S.W.2d 363, 365 (Tex. 1985) (orig. proceeding) (per curiam) ("Unless there is a statute specifically authorizing an interlocutory appeal, the Texas appellate courts have jurisdiction only over final judgments."). Because section 51.014(a) is a limited exception to the general rule that a party may appeal only from final judgments or orders, it is strictly construed. *See Bally*, 53 S.W.3d at 355. Strictly construing a statute, however, does not call for reading restrictions into it that violate constitutional principles. The court of appeals effectively construed section 51.014(a) to require appellate courts to address the merits of cases without regard to whether the courts have jurisdiction. That construction violates constitutional principles. TEX. CONST. art. II, § 1. But section 51.014(a) can be construed in a way so that it does not conflict with the Constitution. *See Stockton v. Offenbach*, 336 S.W.3d 610, 618 (Tex. 2011); *Brooks v. Northglen Ass'n*, 141 S.W.3d 158, 169 (Tex. 2004). *See also* TEX. GOV'T CODE § 311.021(1) (specifying that the Legislature intends statutes to comply with the Constitution). We hold that if immunity is first asserted on interlocutory appeal, section 51.014(a) does not preclude the appellate court from having to consider the issue at the outset in order to determine whether it has jurisdiction to address the merits. We disapprove of those cases in which courts of appeals have held differently.[3]

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[3] *E.g.*, *Clear Lake City Water Auth. v. Friendswood Dev. Co.*, 256 S.W.3d 735, 747 n.14 (Tex. App.—Houston [14th Dist.] 2008, pet. dism'd); *City of Celina v. Dynavest Joint Venture*, 253 S.W.3d 399, 404 (Tex. App.—Austin 2008, no pet.); *Univ. of Tex. Sw. Med. Ctr. at Dallas v. Estate of Arancibia*, 244 S.W.3d 455, 461-62 (Tex. App.—Dallas

In addition to the constitutional concerns set out above, we note a practical significance to precluding appellate review of immunity on interlocutory appeal: precluding such review would be inconsistent with the purpose of section 51.014(a). If we agreed with the court of appeals' reasoning—as the Blacks ask us to do and the dissent contends we should do—then on remand the Hospital could assert immunity and file a plea to the jurisdiction. If its plea were denied the Hospital could file another interlocutory appeal. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8). Such a process would work against the main purpose of the interlocutory appeal statute, which is to increase efficiency of the judicial process. *See Tex. A&M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 845 (Tex. 2007).

But as we have previously acknowledged, a plaintiff may not have had fair opportunity to address jurisdictional issues by amending its pleadings or developing the record when the jurisdictional issues were not raised in the trial court. *See Gibson*, 22 S.W.3d at 853 (recognizing that safeguards are necessary to protect a plaintiff when an appellate court considers an issue of subject-matter jurisdiction in the first instance because the plaintiff has not had an opportunity to amend its pleadings, but concluding that the Gibsons could not show their claim was ripe even with "every available opportunity to generate record evidence opposing WISD's challenges"). Under such circumstances appellate courts must construe the pleadings in favor of the party asserting jurisdiction, and, if necessary, review the record for evidence supporting jurisdiction. *Tex. Ass'n of*

2007), *aff'd on other grounds*, 324 S.W.3d 544 (Tex. 2010); *Kinney Cnty. Groundwater Conservation Dist. v. Boulware*, 238 S.W.3d 452, 461 (Tex. App.—San Antonio 2007, no pet.); *Austin Indep. Sch. Dist. v. Lowery*, 212 S.W.3d 827, 834 (Tex. App.—Austin 2006, pet. denied); *Brenham Hous. Auth. v. Davies*, 158 S.W.3d 53, 61 (Tex. App.—Houston [14th Dist.] 2005, no pet.); *City of Dallas v. First Trade Union Sav. Bank*, 133 S.W.3d 680, 687-88 (Tex. App.—Dallas 2003, pet. denied).

Bus., 852 S.W.2d at 446. In some instances the pleadings or record may conclusively negate the existence of jurisdiction, in which case the suit should be dismissed. *See Miranda*, 133 S.W.3d at 227 ("If the pleadings affirmatively negate the existence of jurisdiction, then a plea to the jurisdiction may be granted without allowing the plaintiffs an opportunity to amend."). But if the pleadings and record neither demonstrate jurisdiction nor conclusively negate it, then in order to obtain dismissal of the plaintiff's claim, the defendant entity has the burden to show either that the plaintiff failed to show jurisdiction despite having had full and fair opportunity in the trial court to develop the record and amend the pleadings; or, if such opportunity was not given, that the plaintiff would be unable to show the existence of jurisdiction if the cause were remanded to the trial court and such opportunity afforded. If the governmental entity meets this burden, then the appellate court should dismiss the plaintiff's case. *See Koseoglu*, 233 S.W.3d at 840 ("[W]e agree that Koseoglu deserves the opportunity to amend his pleadings if the defects can be cured. But Koseoglu's pleading defects cannot be cured, and he has made no suggestion as to how to cure the jurisdictional defect."); *Gibson*, 22 S.W.3d at 853 ("With every available opportunity to generate record evidence opposing WISD's challenges, the Gibsons could not have done so because the evidence required to do so did not exist."). If, however, the governmental entity does not meet this burden, the appellate court should remand the case to the trial court for further proceedings. *See Westbrook v. Penley*, 231 S.W.3d 389, 395 (Tex. 2007) ("If the pleadings are insufficient to establish jurisdiction but do not affirmatively demonstrate an incurable defect, the plaintiff should be afforded an opportunity to replead."); *Cnty. of Cameron v. Brown*, 80 S.W.3d 549, 559 (Tex. 2002) (remanding a case to the

trial court for repleading when the pleadings failed to show jurisdiction but did not affirmatively demonstrate an incurable jurisdictional defect).

C. Response to the Dissent

The dissent urges that we fully re-examine the basis for our numerous prior statements that immunity deprives courts of subject-matter jurisdiction.[4] What the dissent effectively urges is a change in the nature of immunity in Texas, and in the relationship between the legislative and judicial branches of government regarding management of the public fisc. That is a significant issue, but the parties did not raise it in the courts below or this Court. Addressing it would take us beyond what is necessary to decide this appeal and we decline to do so, except to the extent it is addressed by our opinion and holding.

IV. The Blacks' Claim

A. The Tort Claims Act

The court of appeals did not address the Hospital's claim of immunity. Rather than remanding the case to the court of appeals for it to do so, however, we address the issue in the interest of judicial economy. *See* TEX. R. APP. P. 53.4; *Reid Road Mun. Util. Dist. No. 2 v. Speedy Stop Food Stores, Ltd.*, 337 S.W.3d 846, 855 (Tex. 2011).

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[4] *See Tex. Dep't of Ins. v. Reconveyance Servs., Inc.*, 306 S.W.3d 256, 258 (Tex. 2010) (per curiam); *Univ. of Tex. at El Paso v. Herrera*, 322 S.W.3d 192, 202 (Tex. 2010); *Lueck*, 290 S.W.3d at 880-81; *Koseoglu*, 233 S.W.3d at 843; *State v. Shumake*, 199 S.W.3d 279, 283 (Tex. 2006); *Reata*, 197 S.W.3d at 374; *Harris Cnty. v. Sykes*, 136 S.W.3d 635, 638 (Tex. 2004); *Miranda*, 133 S.W.3d at 225-26; *Hoff v. Nueces Cnty.*, 153 S.W.3d 45, 48 (Tex. 2004) (per curiam); *Dallas Area Rapid Transit v. Whitley*, 104 S.W.3d 540, 542 (Tex. 2003); *State ex rel. State Dep't of Highways & Pub. Transp. v. Gonzalez*, 82 S.W.3d 322, 327 (Tex. 2002); *IT-Davy*, 74 S.W.3d at 855; *Dep't of Transp. v. Garza*, 70 S.W.3d 802, 803 (Tex. 2002); *Travis Cnty. v. Pelzel & Assocs., Inc.*, 77 S.W.3d 246, 248 (Tex. 2002), *superseded on other grounds by statute as recognized in*, *Tooke*, 197 S.W.3d at 342; *Tex. Natural Res. Conservation Comm'n v. White*, 46 S.W.3d 864, 866 (Tex. 2001); *Tex. Dep't of Criminal Justice v. Miller*, 51 S.W.3d 583, 585 (Tex. 2001); *Kinnear v. Tex. Comm'n on Human Rights ex rel. Hale*, 14 S.W.3d 299, 300 (Tex. 2000) (per curiam).

As relevant to the Blacks' claim against the Hospital, the TCA provides that a governmental unit is liable for "personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law." TEX. CIV. PRAC. & REM. CODE § 101.021(2). Section 101.021(2) waives immunity for claims based upon the "use" of tangible personal property only when the governmental unit itself uses the property. *See id.*; *San Antonio State Hosp. v. Cowan*, 128 S.W.3d 244, 245-46 (Tex. 2004). A governmental unit does not "use" property within the meaning of the TCA when it merely allows someone else to use it. *Cowan*, 128 S.W.3d at 246; *see Dallas Cnty. v. Posey*, 290 S.W.3d 869, 871 (Tex. 2009). Immunity is waived for claims based on a "condition" of tangible property if the condition proximately causes personal injury or death. *See* TEX. CIV. PRAC. & REM. CODE § 101.021(2); *Posey*, 290 S.W.3d at 872; *Dallas Cnty. Mental Health & Mental Retardation v. Bossley*, 968 S.W.2d 339, 343 (Tex. 1998). A condition does not proximately cause an injury or death if it does no more than furnish the means to make injury or death possible; that is, immunity is waived only if the condition (1) poses a hazard in the intended and ordinary use of the property and (2) actually causes an injury or death. *See Posey*, 290 S.W.3d at 871, 873; *Bossley*, 968 S.W.2d at 343. The TCA does not waive immunity for claims arising from intentional torts. *See* TEX. CIV. PRAC. & REM. CODE § 101.057(2) ("This chapter does not apply to a claim . . . arising out of assault, battery, . . . or any other intentional tort.").

B. Was the Hospital's Immunity Waived?

The Hospital contends the Blacks' allegations that it provided or failed to prohibit access to a plastic bag, or that a Hospital employee either murdered Travis or assisted his suicide, do not fit

within the TCA's limited waiver of immunity, even if they are true. The Blacks disagree. They emphasize that the Hospital's policy classified the plastic bag as inherently dangerous in an inpatient psychiatric setting. The Blacks argue that their pleadings assert the Hospital was negligent in providing, furnishing, or allowing Travis to access the bag; its negligence involved a use or condition of tangible personal property; and the negligence proximately caused Travis's death. They suggest such pleadings sufficiently allege a claim within the TCA's waiver of immunity. We disagree with the Blacks.

Neither providing nor prohibiting access to the bag was a "use." The Blacks' "use" argument erroneously equates providing, furnishing, or allowing access to tangible property with putting or bringing the property into action or service or applying the property to a given purpose. *See Cowan*, 128 S.W.3d at 245-46 (explaining that "use" means "to put or bring into action or service; to employ for or apply to a given purpose" (citations omitted)). Comparing *Cowan* to the case at bar illustrates this point. *Cowan* involved the death of James Roy Cowan, a psychiatric patient at San Antonio State Hospital. *Id.* at 245. The hospital allowed Cowan access to suspenders and a walker, which Cowan then used in causing his own death. *Id.* We held that the hospital's immunity was not waived by the TCA because the hospital did not "use" the suspenders and walker within the meaning of section 101.021(2) by merely giving them to Cowan. *See id.* at 246 ("[T]he Hospital's immunity can be waived only for its own use of Cowan's walker and suspenders, and not by Cowan's use of them."). Here, the Blacks allege the Hospital allowed Travis access to the plastic bag that was used in causing his death. These allegations do not present a claim for which the Hospital's immunity is waived by the TCA because, as we held in *Cowan*, a hospital does not "use" tangible personal

property (*e.g.*, a plastic bag) within the meaning of section 101.021(2) by merely providing, furnishing, or allowing a patient access to it.

The Blacks also allege that a "condition" of the plastic bag caused Travis's death. They emphasize the plastic bag was a contraband item and inherently dangerous in the inpatient psychiatric setting. These facts, they argue, bring their claim under the TCA's waiver of immunity pursuant to our decision in *Lowe v. Texas Tech University*, 540 S.W.2d 297 (Tex. 1966). The Hospital responds that the Blacks' reliance on *Lowe* is misplaced because in that case the property was being put to its intended and ordinary use when a defect in the property caused an injury. The Hospital argues that because the plastic bag was not being put to its ordinary, intended use when it caused Travis's death, the Hospital's immunity is not waived for a claim based on the alleged condition of the bag. The Hospital is correct.

In *Lowe*, the plaintiff alleged that he injured his knee playing football after the University's football coach ordered him to remove his knee brace and reenter a game without it. *Id.* at 302 (Greenhill, C.J., concurring). The Court concluded that the knee brace was an integral part of Lowe's football uniform and held that the TCA waived the University's immunity because the uniform it gave Lowe was defective due to its lack of a knee brace. *See id.* at 300 (majority opinion). We subsequently limited the precedential value of *Lowe* "to claims in which a plaintiff alleges that a state actor has provided property that lacks an integral safety component and that lack of this integral component led to the plaintiff's injuries." *Kerrville State Hosp. v. Clark*, 923 S.W.2d 582, 585 (Tex. 1996).

Here, the Blacks argue that the Hospital's act of furnishing Travis with a plastic bag considered inherently dangerous in the inpatient psychiatric setting was analogous to giving him property that lacked an integral safety component. They support this assertion by pointing out that we framed the issue in *Cowan* as "whether merely providing someone with personal property that is *not itself inherently unsafe* is a 'use' within the meaning of the Act." 128 S.W.3d at 245 (emphasis added). But, as the Hospital maintains, the Blacks' argument fails to recognize that the TCA waives immunity for an inherently dangerous condition of tangible personal property only if the condition poses a hazard when the property is put to its intended and ordinary use, which the plastic bag was not. *See Posey*, 290 S.W.3d at 872. In the circumstances of Travis's care at the Hospital, any inherently dangerous aspects of the plastic bag were at most a means to make his death possible. *Cf. id.* (reasoning that exposed telephone wires did not proximately cause an inmate's death because the exposed wires were no more than a condition of the property that the inmate used to form a ligature to take his life).

The Blacks alternatively urge that the Hospital's negligence resulted in Travis's death by assisted suicide or murder. Their argument focuses on the possibility that a Hospital employee assisted Travis in committing suicide, and they contend that aiding suicide is not an intentional tort within the meaning of section 101.057. *See* TEX. CIV. PRAC. & REM. CODE § 101.057(2) (providing that the TCA does not apply to claims arising out of intentional torts). The Hospital's response is twofold. It first asserts that the TCA waives immunity only for certain torts, and assisted suicide is a crime, not a tort. Second, the Hospital argues that even if assisted suicide falls within the ambit of the TCA, it is more akin to an intentional tort than negligence because it requires an intent to

cause injury or death, *see* TEX. PENAL CODE § 22.08(a), and section 101.057(2) specifies that the Hospital's immunity is not waived for such a claim. *See* TEX. CIV. PRAC. & REM. CODE § 101.057(2). We first address the Hospital's second argument because it is dispositive.

A person commits the criminal offense of aiding suicide if "with intent to promote or assist the commission of suicide by another, he aids or attempts to aid the other to commit suicide." TEX. PENAL CODE § 22.08(a). The statute proscribes action taken with the intent that a suicide result. Actions taken with the specific intent to inflict harm are characterized as intentional torts. *See Reed Tool Co. v. Copelin*, 689 S.W.2d 404, 406 (Tex. 1985). Thus, assuming, without deciding, that assisting suicide or murder is a tort, it requires actions taken with intent to cause harm and is an intentional tort. The Hospital's immunity as to such a tort is not waived. *See City of Laredo v. Nuno*, 94 S.W.3d 786, 789 (Tex. App.—San Antonio 2002, no pet.) (holding that section 101.057(2) applied to claims against a police officer in part because the officer's conduct was referable to an intentional decision to seize a vehicle illegally).

In sum, even construed in their favor, the Blacks' pleadings do not allege a cause of action within the TCA's waiver of the Hospital's immunity. And the record does not contain any evidence to support jurisdiction.

The Hospital argues that if we reach this point in our analysis, we should dismiss the Blacks' claims with prejudice because they failed to carry their burden to show the trial court had jurisdiction. *See, e.g.*, *Miranda*, 133 S.W.3d at 226-27; *City of Garland v. Louton*, 691 S.W.2d 603, 605 (Tex. 1985). But because the Hospital made its immunity argument for the first time in the court of appeals, the case will be remanded for further proceedings on the jurisdictional issue unless the

Hospital shows that one of three situations exist: (1) the Blacks' pleadings or the record conclusively negate jurisdiction; (2) the Blacks had a full and fair opportunity in the trial court to develop the record and amend their pleadings to show jurisdiction yet failed to do so; or (3) if the Blacks did not have such an opportunity, they cannot show jurisdiction even if the case is remanded to the trial court and they are given the opportunity to develop the record as to jurisdiction and amend their pleadings. We next look to see whether the Hospital has conclusively shown one of the above situations.

The Blacks contend that they did not have a fair opportunity in the trial court to develop the record as to jurisdiction. They note that there have been no oral depositions of the parties and they have been unable to explore the basis of statements contained in a report based on the Texas Department of Family and Protective Service's investigation into Travis's death—particularly statements of another Hospital patient who claimed to have seen a Hospital staff member putting a bag over Travis's head.

We agree with the Blacks, in part. The Hospital has not shown conclusively by this record either that they had a full and fair opportunity in the trial court to develop the record as to jurisdiction and amend their pleadings, or that if the case is remanded to the trial court for further proceedings they will be unable to show jurisdiction. Thus, the cause will be remanded to the trial court for further proceedings.

VI. Conclusion

The judgment of the court of appeals is affirmed. The Blacks' claims against the Hospital are remanded to the trial court for further proceedings consistent with this opinion.

Phil Johnson
Justice

OPINION DELIVERED: August 31, 2012

IN THE SUPREME COURT OF TEXAS

NO. 10-0548

RUSK STATE HOSPITAL, PETITIONER,

v.

DENNIS BLACK AND PAM BLACK, INDIVIDUALLY AND AS REPRESENTATIVES OF THE ESTATE OF TRAVIS BONHAM BLACK, DECEASED, RESPONDENTS

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

JUSTICE HECHT, concurring.

We recently wrote that "we, like the U.S. Supreme Court, have recognized that our sometimes intemperate use of the term 'jurisdictional' has caused problems."[1] All we decide in this case is whether an appellate court in an interlocutory appeal permitted by statute can decide an issue of governmental immunity from suit outside the scope of the appeal. The Court answers yes and wisely stops there.

Rusk State Hospital appealed from the trial court's denial of its motion to dismiss this health care liability claim for want of an adequate expert report required by the Medical Liability Act ("MLA"),[2] but also argued that its governmental immunity from suit has not been waived by the

[1] *In re United Servs. Auto. Ass'n*, 307 S.W.3d 299, 306 (Tex. 2010) (footnote omitted).

[2] TEX. CIV. PRAC. & REM. CODE § 74.351.

Texas Tort Claims Act ("TTCA"),[3] an argument it did not make in the trial court. The statute permitting this interlocutory appeal from the denial of the Hospital's motion to dismiss does not extend to issues of immunity,[4] and the court of appeals, mindful that its jurisdiction over interlocutory appeals is limited to that provided by statute,[5] refused to consider the Hospital's TTCA argument, deciding only that the trial court erred in failing to dismiss some of the claims against the Hospital on its motion to dismiss under the MLA.[6] But immunity from suit implicates subject-matter jurisdiction, as the Court states, and thus "involves a court's power to hear a case",[7] which must be ascertained by every court in every case.[8] A statute authorizing an interlocutory appeal does not empower a court to decide issues in a case over which it lacks subject-matter jurisdiction.

For two reasons, I agree that immunity from suit "sufficiently partakes of the nature of a jurisdictional bar"[9] that it must be considered on interlocutory appeal, even if not raised in the trial court. One is that if immunity is ultimately established, the decision on the merits of the

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[3] *Id*. §§ 101.021, 101.025.

[4] *Id*. § 51.014(a)(9) (providing that a person may appeal from an interlocutory order that "denies all or part of the relief sought by a motion under Section 74.351(b)").

[5] *Cherokee Water Co. v. Ross*, 698 S.W.2d 363, 365 (Tex. 1985) ("Unless there is a statute specifically authorizing an interlocutory appeal, the Texas appellate courts have jurisdiction only over final judgments.").

[6] ___ S.W.3d ___ (Tex. App.–Tyler 2010).

[7] *Tellez v. City of Socorro*, 226 S.W.3d 413, 413 (Tex. 2007) (per curiam) (quoting *United States v. Cotton*, 535 U.S. 625, 630 (2002)).

[8] *Univ. of Tex. Sw. Med. Ctr. at Dallas v. Loutzenhiser*, 140 S.W.3d 351, 358 (Tex. 2004) ("[A] court is *obliged* to ascertain that subject matter jurisdiction exists regardless of whether the parties have questioned it." (emphasis in original)).

[9] *Edelman v. Jordan*, 415 U.S. 651, 678 (1974) (referring to Eleventh Amendment immunity).

interlocutory appeal will have been advisory at the time it was rendered and therefore outside the court of appeals' jurisdiction.[10] The other reason is practical: an interlocutory appeal is also permitted from a denial of immunity,[11] and it would conserve time and expense to decide the issue in one interlocutory appeal instead of two. Because an appellate court *can* decide an immunity issue beyond the scope of an interlocutory appeal, and there are reasons why it *should*, I agree with the Court that it *must* do so unless, as in this case, the record has not been sufficiently developed.

But the Court does not equate immunity to a lack of subject-matter jurisdiction. The similarities between the two led us to state in *Texas Department of Transportation v. Jones* that "the law in Texas has been that absent the state's consent to suit, a trial court lacks subject matter jurisdiction."[12] But the only issue in that case was whether immunity from suit can be asserted in a plea to the jurisdiction so that the government can immediately appeal an adverse ruling.[13] *Jones* cannot fairly be read to equate immunity from suit with a lack of subject-matter jurisdiction.

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[10] *Valley Baptist Med. Ctr. v. Gonzalez*, 33 S.W.3d 821, 822 (Tex. 2000) (per curiam) ("Under article II, section 1 of the Texas Constitution, courts have no jurisdiction to issue advisory opinions.").

[11] TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8) (providing that a person may appeal from an interlocutory order that "grants or denies a plea to the jurisdiction by a governmental unit"); *see Tex. A&M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 843 (Tex. 2007) ("Pleas to the jurisdiction asserting sovereign immunity are the subject of Section 51.014(a)(8).").

[12] 8 S.W.3d 636, 638 (Tex. 1999) (per curiam).

[13] 8 S.W.3d at 639. We have since held that a denial of immunity from suit can be immediately appealed regardless of the procedural vehicle used to raise the issue. *Tex. Dep't of Crim. Justice v. Simons*, 140 S.W.3d 338, 349 (Tex. 2004).

There are important differences between immunity from suit and lack of subject-matter jurisdiction.[14] For one thing, the government can waive immunity from suit, either for broad classes of claims or on a case-by-case basis.[15] But it cannot waive subject-matter jurisdiction, for example, by consenting to suit on a claim beyond the court's jurisdiction. For another, while a court is obliged to examine its subject-matter jurisdiction on its own in every case, we have never suggested that a court should raise immunity on its own whenever the government is sued. This case is more typical: not only did the trial court not raise immunity, the government itself did not raise the issue and has no explanation why.

[14] *See Reata Const. Corp. v. City of Dallas*, 197 S.W.3d 371, 381 (Tex. 2006) ("[S]overeign immunity includes concerns about both subject matter and personal jurisdiction, but is identical to neither.") (Brister, J., concurring).

[15] TEX. CIV. PRAC. & REM. CODE §§ 107.001-.004; *see also Reata*, 197 S.W.3d at 378 (a city's decision to file suit for damages "encompassed a decision to leave its sphere of immunity from suit" for monetary claims against the city that are "germane to, connected with, and properly defensive to" the city's affirmative claims; the city was not immune to monetary claims against it to the extent those claims would offset the city's affirmative claims).

"'Jurisdiction,' it has been observed, 'is a word of many, too many, meanings.'"[16] Not all of them have been, or can be, attributed to immunity from suit. With that understanding, I join in the Court's opinion.

Nathan L. Hecht
Justice

OPINION DELIVERED: August 31, 2012

[16] *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998) (quoting *United States v. Vanness*, 85 F.3d 661, 663 n.2 (D.C. Cir. 1996)); *see also Morales v. Liberty Mut. Ins. Co.*, 241 S.W.3d 514, 516 n.1 (Tex. 2007) ("Of course, 'jurisdiction' has many meanings, and both courts and legislators often use it to mean something other than a court's power to adjudicate a case. Both the United States Supreme Court and this Court have cautioned against assuming 'jurisdiction' means 'subject-matter jurisdiction' due to the stark consequences that accompany the latter term." (citations omitted)).

IN THE SUPREME COURT OF TEXAS

NO. 10-0548

RUSK STATE HOSPITAL, PETITIONER,

v.

DENNIS BLACK AND PAM BLACK, INDIVIDUALLY AND AS REPRESENTATIVES OF THE ESTATE OF TRAVIS BONHAM BLACK, DECEASED, RESPONDENTS

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

JUSTICE LEHRMANN, joined by CHIEF JUSTICE JEFFERSON and JUSTICE MEDINA, concurring and dissenting.

Although I concur that this case should be remanded to the trial court, I respectfully dissent, in part, from the Court's judgment. While I agree that subject matter jurisdiction issues such as mootness and ripeness must be considered by an appellate court even if they were not first presented to the trial court, I disagree that sovereign immunity is of the same character. While sovereign immunity does, as the Court notes, implicate subject matter jurisdiction, it also implicates personal jurisdiction. However, acknowledging that sovereign immunity implicates subject matter jurisdiction does not mean that the harsh rules associated with that label necessarily apply. Because we should look to the jurisdictional rules individually, applying them according to the purpose behind the doctrine of sovereign immunity, I would require governmental entities to raise the issue first in the trial court.

I. SOVEREIGN IMMUNITY

The Court rests its decision on the notion that sovereign immunity "*implicates* subject matter jurisdiction," but carefully avoids squarely determining that it *is* an issue of subject matter jurisdiction. I write separately to explain why I would hold that it is not, were we to reach the issue.

This Court first recognized sovereign immunity in 1847, holding that "no State can be sued in her own courts without her consent and then only in the manner indicated." *Hosner v. DeYoung*, 1 Tex. 764, 769 (1847). The Court has frequently referred to sovereign immunity as jurisdictional. *See, e.g.*, *Anderson, Clayton & Co. v. State ex rel. Allred*, 62 S.W.2d 107, 110 (Tex. 1933) (holding that when the State waived immunity by filing suit, the trial court "acquired jurisdiction of the parties and subject-matter"); *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 224–26 (Tex. 2004). We have often held that sovereign immunity is properly asserted in the trial court by a plea to the jurisdiction. *See, e.g.*, *Miranda*, 133 S.W.3d at 225–26; *Tex. Dep't of Transp. v. Jones*, 8 S.W.3d 636, 638–39 (Tex. 1999) (per curiam).

Although we have consistently referred to sovereign immunity as jurisdictional, we have not clearly defined that term. Subject matter jurisdiction and personal jurisdiction are jurisdictional; a court cannot render judgment without both. *CSR Ltd. v. Link*, 925 S.W.2d 591, 594 (Tex. 1996). Subject matter jurisdiction involves a court's power to hear and resolve the legal and factual issues of a class of cases. *Middleton v. Murff*, 689 S.W.2d 212, 213 (Tex. 1985) (per curiam) (citing *Deen v. Kirk*, 508 S.W.2d 70, 72 (Tex. 1974)). Subject matter jurisdiction cannot be waived or conferred by agreement, can be raised at any time, and must be considered by a court sua sponte. *Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 379 (Tex. 2006) (Brister, J., concurring) (citing

Univ. of Tex. Sw. Med. Ctr. at Dallas v. Loutzenhiser, 140 S.W.3d 351, 358 (Tex. 2004)); *see also Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 850 (Tex. 2000). In contrast, personal jurisdiction involves a court's power to bind a particular party. *CSR Ltd.*, 925 S.W.2d at 594. Unlike subject matter jurisdiction, personal jurisdiction can be voluntarily waived by an appearance. *Reata*, 197 S.W.3d at 379 (Brister, J., concurring) (citing *Hilburn v. Jennings*, 698 S.W.2d 99, 100 (Tex. 1985)).

In the last decade, we have sometimes referred to sovereign immunity as a matter of subject matter jurisdiction, beginning with a per curiam opinion in Texas Department of Transportation v. Jones, 8 S.W.3d at 639 (holding that the court of appeals had to determine whether the driver's pleadings in a suit for damages stated a claim under the Texas Tort Claims Act before affirming the trial court's denial of the Department of Transportation's plea to the jurisdiction); *see also, e.g.*, *Univ. of Tex. at El Paso v. Herrera*, 322 S.W.3d 192, 202 (Tex. 2010); *Reata*, 197 S.W.3d at 374; *Miranda*, 133 S.W.3d at 225–26. However, these cases did not involve a governmental unit attempting to raise sovereign immunity for the first time on interlocutory appeal; instead, in every case the governmental unit had raised the issue of sovereign immunity to the trial court. *See Herrera*, 322 S.W.3d at 193; *Tex. Dep't of Ins. v. Reconveyance Servs., Inc.*, 306 S.W.3d 256, 258 (Tex. 2010) (per curiam); *State v. Lueck*, 290 S.W.3d 876, 879 (Tex. 2009); *State v. Shumake*, 199 S.W.3d 279, 282 (Tex. 2006); *Hoff v. Nueces Cnty.*, 153 S.W.3d 45, 47 (Tex. 2004) (per curiam); *Reata*, 197 S.W.3d at 373; *Harris Cnty. v. Sykes*, 136 S.W.3d 635, 637 (Tex. 2004); *Miranda*, 133 S.W.3d at 221–22; *Dallas Area Rapid Transit v. Whitley*, 104 S.W.3d 540, 541 (Tex. 2003); *State ex rel. State Dep't of Highways & Pub. Transp. v. Gonzalez*, 82 S.W.3d 322, 325 (Tex. 2002); *Travis Cnty. v. Pelzel & Assocs., Inc.*, 77 S.W.3d 246, 247 (Tex. 2002); *Tex. Natural Res. Conservation*

Comm'n v. IT–Davy, 74 S.W.3d 849, 851 (Tex. 2002); *Tex. Dep't of Transp. v. Garza*, 70 S.W.3d 802, 804 (Tex. 2002); *Tex. Dep't of Crim. Justice v. Miller*, 51 S.W.3d 583, 586 (Tex. 2001); *Tex. Natural Res. Conservation Comm'n v. White*, 46 S.W.3d 864, 866 (Tex. 2001); *Jones*, 8 S.W.3d at 637. Moreover, in none of these cases has the Court analyzed the legal issues involved in holding that sovereign immunity is an issue of subject matter jurisdiction.

A. Sovereign Immunity Implicates Aspects of Both Subject Matter Jurisdiction and Personal Jurisdiction

Characterizing an issue as subject matter jurisdiction has profound consequences. Therefore, we should be cautious when we apply that label and should not default to using it in circumstances when it is not clear that the issue is solely one of subject matter jurisdiction. I would hold that, because sovereign immunity implicates aspects of both personal jurisdiction and subject matter jurisdiction, but is identical to neither, the rules associated with subject matter jurisdiction do not apply generally. Rather, jurisdictional rules apply individually, according to the purposes underlying the doctrine of sovereign immunity. *Reata*, 197 S.W.3d at 382 (Brister, J., concurring).

Although some of our recent cases have, with no analysis, referred to sovereign immunity as an issue of subject matter jurisdiction, sovereign immunity implicates elements of both personal jurisdiction and subject matter jurisdiction, and has always had its own set of jurisdictional rules. In the earliest Texas cases, sovereign immunity was addressed in terms of amenability to suit, a term borrowed from personal jurisdiction. *Reata*, 197 S.W.3d at 380 & n.16 (Brister, J., concurring) ("'[I]t is one of the essential attributes of sovereignty not to be amenable to the suit of a private person without its own consent . . . .'" (quoting *Bd. of Land Comm'rs v. Walling*, Dallam 524 (Tex.

1843))). These cases were not anomalies, as sovereign immunity has been traditionally considered a problem of personal jurisdiction. In his *Commentaries on the Laws of England*, Blackstone concluded that sovereign immunity arose from the nature of the sovereign party, not the subject matter of the case:

> Hence, it is, that no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him. For all jurisdiction implies superiority of power: authority to try would be vain and idle, without an authority to redress; and the sentence of a court would be contemptible, unless that court had power to command the execution of it: but, who . . . shall command the king?

1 WILLIAM BLACKSTONE, COMMENTARIES *242. The Founders also referred to sovereign immunity in terms of personal jurisdiction. *See* Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1565–66 (2002) (explaining that the Founders believed sovereign immunity was more relevant to personal jurisdiction than subject matter jurisdiction). In addressing the question of state sovereign authority, Alexander Hamilton borrowed the language of personal jurisdiction when he wrote in the Federalist Papers, "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*." THE FEDERALIST NO. 81 (Alexander Hamilton); *see also, e.g.*, *Kawasaki Steel Corp. v. Middleton*, 699 S.W.2d 199, 200 (Tex. 1985) (per curiam) (listing the defendant being "amenable to the jurisdiction of the court" as one of the elements of personal jurisdiction).

As I have noted, sovereign immunity implicates elements of both subject matter jurisdiction and personal jurisdiction. While the decision whether to compensate particular claimants may raise separation of powers concerns, implicating policy issues beyond the traditional realm of judicial

proceedings, *see Tex. Parks & Wildlife Dep't v. Sawyer Trust*, 354 S.W.3d 384, 401 (Tex. 2011) (Hecht, J., concurring in part and dissenting in part), and invoking subject matter jurisdiction issues, these considerations also arise from the fact that the State is the party being sued. While it is true that the judiciary is not the proper branch of government to decide how the State should spend its money, the authority to render judgment that obliges parties to pay is not related to whether the party can or should pay. The sovereign immunity doctrine flows from the fact that the State is the party at risk—an issue more closely aligned with personal jurisdiction. At its core, there is something incongruous about saying that traditional contract and tort suits are beyond the subject matter of the judiciary simply because one party is a governmental entity. *See* Scott Dodson, *Mandatory Rules*, 61 STAN. L. REV. 1, 20 (2008) ("The primary function of state sovereign immunity—granting a state the right not to be subject to a lawsuit at the insistence of an individual—speaks to a right of a particular party, not to a limitation on the court's power to hear the case."). A suit against the State is beyond the judicial cognizance of the courts because of the State's role as a party, not because of the subject matter of the suit. Despite sometimes referring to sovereign immunity as an issue of subject matter jurisdiction, we have also held that the State no longer had immunity because it filed an affirmative claim for relief. *Reata*, 197 S.W.3d at 377 (holding that the City of Dallas's decision to file suit "encompassed a decision to leave its sphere of immunity" for related claims); *see also Kinnear v. Tex. Comm'n on Human Rights*, 14 S.W.3d 299, 300 (Tex. 2000) (per curiam) (holding that the trial court had jurisdiction over claims against the State in a case where the State had filed suit); *IT–Davy*, 74 S.W.3d at 861 (Hecht, J., concurring) ("[T]he State can waive immunity by filing suit."). These decisions are inconsistent with the absolute nature of subject matter jurisdiction,

which cannot be waived and can be raised at any time. *See Gibson*, 22 S.W.3d at 850 ("[S]ubject matter jurisdiction challenges cannot be waived, and may be raised for the first time on appeal."); Scott Dodson, *Hybridizing Jurisdiction*, 99 CALIF. L. REV. 1439, 1473 (2011) (noting that sovereign immunity lacks some features of subject matter jurisdiction). The ability of states to waive immunity or consent to suit is an important feature which is inconsistent with the characterization of sovereign immunity as an issue of subject matter jurisdiction:

> The state legislature may wish to waive immunity in an entire class of cases, such as discrimination cases. Or, the state may wish to consent to a particular lawsuit from which it would otherwise be immune. Public pressure or individualized considerations of fairness and justice may motivate a state's decision to waive or consent. On the other hand, equally important concerns for the state fisc might justify a decision not to waive immunity or consent to suit. In short, the [non-subject matter jurisdiction] characteristics of waiver and consent provide an opportunity for the states to strike a balance between the legitimate concerns of suing a state and the need for redress of injuries caused by the state. The importance of the ability to waive immunity or consent to suit supports a [non-subject matter jurisdictional] characterization.

Dodson, *Mandatory Rules*, *supra*, at 23 (citations omitted). It is clear that "sovereign immunity is difficult—perhaps impossible—to characterize as [subject matter jurisdiction] because it can be waived or consented to." Dodson, *Hybridizing Jurisdiction*, *supra*, at 1483.

Similarly, in federal courts, sovereign immunity is not synonymous with subject matter jurisdiction. *See Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 267 (1997) (holding that the Eleventh Amendment "enacts a sovereign immunity from suit, rather than a nonwaivable limit on the Federal Judiciary's subject-matter jurisdiction"); Katherine Florey, *Insufficiently Jurisdictional: The Case Against Treating State Sovereign Immunity as an Article III Doctrine*, 92 CALIF. L. REV.

1375, 1399 (2004) ("[S]tate sovereign immunity and [subject matter] jurisdictional requirements are more different than alike."). Federal courts have recognized that states may waive their sovereign immunity, revealing an inconsistency with subject matter jurisdiction, which cannot be created by waiver or consent. *See Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986) (explaining that parties cannot confer subject matter jurisdiction beyond the limitations imposed by Article III by consent (citing *United States v. Griffin*, 303 U.S. 226, 229 (1938))); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1985) (noting that a State may waive its immunity and consent to suit in federal court); *Ballew v. Cont'l Airlines, Inc.*, 668 F.3d 777, 786 (5th Cir. 2012) (noting that parties cannot create subject matter jurisdiction by consent or waiver (citing *Buchner v. FDIC*, 981 F.2d 816, 818 (5th Cir. 1993))); *Elam v. Kan. City S. Ry. Co.*, 635 F.3d 796, 802 (5th Cir. 2011) ("Litigants cannot bestow subject matter jurisdiction on federal courts by waiver or consent."); *Meyers ex rel. Benzing v. Tex.,* 410 F.3d 236, 255 (5th Cir. 2005) ("[W]hen Texas removed this case to federal court it voluntarily invoked the jurisdiction of the federal courts and waived its immunity from suit in federal court." (citing *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613 (2002))); Nelson, *supra*, at 1610 ("In deriving its doctrine of sovereign immunity, the [Supreme] Court has therefore mixed together two very different sorts of ideas; it has blended concepts drawn from the law of personal jurisdiction with concepts drawn from the law of subject matter jurisdiction."). One scholar summed up the difficulties inherent in federal courts treating sovereign immunity as a subject matter jurisdiction issue:

> [S]overeign immunity doctrine contains elements that are inconsistent with regarding it as a limit on subject matter jurisdiction. While parties cannot ordinarily create a basis for federal jurisdiction by consenting to litigate in federal court, a state may

> waive sovereign immunity both explicitly and by its conduct during litigation. A court *may* raise an Eleventh Amendment issue *sua sponte*; by contrast, it *must* address Article III matters, such as standing or an absence of federal question jurisdiction, as soon as they come to its attention. Congress may, when acting pursuant to its Fourteenth Amendment authority, abrogate state sovereign immunity; it has no corresponding power with respect to any other Article III doctrine. Finally, state sovereign immunity, unlike any other Article III question, is subject to a broad and important exception: under the doctrine of *Ex parte Young*, a suit for prospective injunctive relief against a state official is not considered a suit against the state and may be pursued in federal court.

Florey, *supra*, at 1379–80 (citations omitted). The ability of states to waive sovereign immunity or consent to suit is inconsistent with the characterization of sovereign immunity as a subject matter jurisdiction issue under both federal and Texas case law.

Additionally, in many states, sovereign immunity is not considered an element of subject matter jurisdiction. *See, e.g.*, *Sea Hawk Seafoods, Inc. v. State*, 215 P.3d 333, 339 (Alaska 2009) (describing state sovereign immunity as an affirmative defense "that does not affect a court's subject-matter jurisdiction"); *Washington v. Whitaker*, 451 S.E.2d 894, 898 (S.C. 1994) ("[W]e overrule the antiquated rule that sovereign immunity is a jurisdictional bar and, accordingly, cannot be waived. We join those jurisdictions which hold that sovereign immunity is an affirmative defense that must be pled." (citations omitted)). Indeed, some states have held that sovereign immunity is an issue of personal jurisdiction rather than an issue of subject matter jurisdiction. *See, e.g.*, *German v. Wis. Dep't of Transp., Div. of State Patrol*, 612 N.W.2d 50, 55 (Wis. 2000) ("If sovereign immunity is properly raised, then the court is without personal jurisdiction over the state."); *Data Gen. Corp. v. Cnty. of Durham*, 545 S.E.2d 243, 246 (N.C. Ct. App. 2001) ("[S]overeign immunity presents a

question of personal jurisdiction rather than subject matter jurisdiction . . . ."). Sovereign immunity is far from universally considered a subject matter jurisdiction issue.

Given that sovereign immunity implicates aspects of both subject matter and personal jurisdiction, it becomes apparent that its jurisdictional rules cannot be derived simply by labeling sovereign immunity subject matter or personal jurisdiction. Accordingly, it is time to recognize that "sovereign immunity has always had its own set of jurisdictional rules because jurisdiction over private and public parties is simply different." *Reata*, 197 S.W.3d at 379 (Brister, J., concurring).

B. The Implications of Treating Sovereign Immunity as a Subject Matter Jurisdiction Issue

A decision that sovereign immunity presents a question of subject matter jurisdiction would have profound implications. Since subject matter jurisdiction "'cannot be conferred upon any court by consent or waiver,' a judgment [against a governmental actor] will never be considered final if the court lacked subject-matter jurisdiction." *Dubai Petrol. Co. v. Kazi*, 12 S.W.3d 71, 76 (Tex. 2000) (quoting *Fed. Underwriters Exch. v. Pugh*, 174 S.W.2d 598, 600 (Tex. 1943)). In *Wisconsin Department of Corrections v. Schacht*, Justice Kennedy noted problems with allowing States to belatedly assert sovereign immunity:

> [W]e allow States to proceed to judgment without facing any real risk of adverse consequences. Should the State prevail, the plaintiff would be bound by principles of res judicata. If the State were to lose, however, it could void the entire judgment simply by asserting its immunity on appeal.

524 U.S. 381, 394 (1998) (Kennedy, J., concurring). Even a losing plaintiff would be able to avoid the entire judgment by asserting the State's sovereign immunity on appeal. If sovereign immunity

deprives the courts of subject matter jurisdiction, governmental entities could attack years-old judgments by asserting sovereign immunity because without subject matter jurisdiction, the judgments would be void. Due to the dramatic effects and perpetual uncertainty caused by characterizing an issue as one of subject matter jurisdiction, this Court in *Dubai* noted that "the modern direction of policy is to reduce the vulnerability of final judgments to attack on the ground that the tribunal lacked subject matter jurisdiction." 12 S.W.3d at 76 (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 11 cmt. e (1982) (internal quotation marks omitted)).

II. ASSERTING SOVEREIGN IMMUNITY ON INTERLOCUTORY APPEAL

Generally, appellate jurisdiction exists only in cases where a court has rendered a final judgment disposing of all issues and parties. *See* TEX. CIV. PRAC. & REM. CODE § 51.012. The Legislature provided a narrow exception for interlocutory appeals in section 51.014, which allows them under certain circumstances, including when the trial court denies a plea to the jurisdiction by a governmental entity. *See id.* § 51.014(a)(8); *Bally Total Fitness Corp. v. Jackson*, 53 S.W.3d 352, 355 (Tex. 2001) (noting "the Legislature's intent that section 51.014 be strictly construed"). Our courts of appeals have repeatedly held that sovereign immunity should be raised in the trial court, and that issues not presented to the trial court on a plea to the jurisdiction may not be raised in an interlocutory appeal. *See Scott v. Alphonso Crutch LSC Charter Sch., Inc.*, ___ S.W.3d ___, ___ (Tex. App.—Austin 2010, pet. filed) (mem. op.); *Scott v. Alphonso Crutch Life Support Ctr.*, ___ S.W.3d ___, ___ (Tex. App.—Austin 2009, pet. filed) (mem. op.); *Clear Lake City Water Auth. v. Friendswood Dev. Co.*, 256 S.W.3d 735, 747 n.14 (Tex. App.—Houston [14th Dist.] 2008, pet.

dism'd); *City of Celina v. Dynavest Joint Venture*, 253 S.W.3d 399, 404 (Tex. App.—Austin 2008, no. pet.); *Univ. of Tex. Sw. Med. Ctr. at Dallas v. Estate of Arancibia*, 244 S.W.3d 455, 461–62 (Tex. App.—Dallas 2007), *aff'd on other grounds*, 324 S.W.3d 544 (Tex. 2010); *Kinney Cnty. Groundwater Conservation Dist. v. Boulware*, 238 S.W.3d 452, 461 (Tex. App.—San Antonio 2007, no pet.); *Austin Indep. Sch. Dist. v. Lowery*, 212 S.W.3d 827, 834 (Tex. App.—Austin 2006, pet. denied); *Brenham Hous. Auth. v. Davies*, 158 S.W.3d 53, 61 (Tex. App.—Houston [14th Dist.] 2005, no pet.); *City of Dallas v. First Trade Union Sav. Bank*, 133 S.W.3d 680, 687–88 (Tex. App.—Dallas 2003, pet. denied). *But see Tex. Dep't of Transp. v. Olivares*, 316 S.W.3d 89, 95 (Tex. App.—Houston [14th Dist.] 2010, no pet.).

Looking to the purposes behind the doctrine of sovereign immunity for guidance, I agree with those courts of appeals that have held that an immunity defense may not be raised for the first time on appeal. First, immunity from suit protects the government from the expense involved in defending lawsuits. *Reata*, 197 S.W.3d at 382 (Brister, J., concurring). Requiring the government to raise the issue of sovereign immunity in the trial court reduces such expense by avoiding ongoing, unnecessary litigation early in the process. Because sovereign immunity's modern rationale is the protection of the public fisc, it should be asserted as early as possible. *See Tooke v. City of Mexia*, 197 S.W.3d 325, 331–32 (Tex. 2006) (stating that an important purpose of sovereign immunity is "to shield the public from the costs and consequences of improvident actions of their governments"); *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 695 (Tex. 2003) (noting that states have retained immunity to "protect the public treasury"). The purpose of protecting the public fisc is ill-served by allowing immunity to be raised post-judgment, possibly even years after litigation has

ended. *See* Dodson, *Mandatory Rules*, *supra*, at 24 (noting that a governmental actor "has little to gain by asserting immunity only late in the proceedings"). Taxpayers are penalized when the State is not required to bring the matter up early to get the case dismissed before money is expended defending the lawsuit. When attorneys for the State fail to raise sovereign immunity in the trial court, that failure might not be based on oversight. The State's attorneys often make tactical decisions in deciding which issues they choose to raise. By not requiring the State to raise the issue of sovereign immunity in the trial court, the Court is providing it with a strategic advantage that other parties lack. Moreover, such a lenient rule penalizes taxpayers by dissuading conscientious attorneys for the State from developing procedures to ensure that the matter is raised timely (in order to avoid subsequent liability), resulting in unnecessary and costly litigation. Second, the doctrine should not result in "one law for the sovereign and another for the subject," as such a rule would look "less like sovereign immunity than sovereign inequity." *Reata*, 197 S.W.3d at 383 (Brister, J., concurring). Whether the failure to assert immunity in the trial court is intentional or not, no other party is excused from raising an issue due to inadvertence; the State should not be treated differently. For these reasons, I would hold that governmental entities may not raise sovereign immunity for the first time on appeal.

III. Conclusion

I concur in the Court's judgment remanding the case to the trial court, but for the reason set forth by the court of appeals—so that the trial court may consider granting the Blacks a thirty-day extension to cure the deficiencies in their reports—rather than for the reasons expressed by this Court

today. Any issues dealing with sovereign immunity should be raised at that time in the trial court. I disagree that the government is entitled to raise the issue for the first time on appeal.

_____

Debra H. Lehrmann
Justice

OPINION DELIVERED: August 31, 2012

IN THE SUPREME COURT OF TEXAS

NO. 10-0554

AMERICAN ZURICH INSURANCE COMPANY, PETITIONER,

v.

DANIEL SAMUDIO, RESPONDENT

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

Argued January 10, 2012

JUSTICE LEHRMANN delivered the opinion of the Court.

Under the Texas Workers' Compensation Act, an injured worker's impairment income benefits are determined in part by the impairment rating assigned by the Texas Department of Insurance's Division of Workers' Compensation. TEX. LAB. CODE § 408.121(a)(1). In an appeal to the district court of the Division's impairment rating determination, unless there is evidence of a substantial change in the worker's condition, the court may consider only evidence of impairment that was presented to the agency, and may only adopt an impairment rating assigned by a doctor in the administrative proceedings. TEX. LAB. CODE § 410.306(c). We must decide whether a reviewing court lacks subject matter jurisdiction to resolve an impairment rating appeal if the only rating presented to the agency was invalid. We hold that the absence of a valid impairment rating does not

deprive the court of jurisdiction. Consequently, we reverse the court of appeals' judgment and remand to the trial court.

I. Background

Daniel Samudio suffered a back injury during the course of his employment that was compensable under the Texas Workers' Compensation Act. *See* TEX. LAB. CODE § 401.11. He eventually had four surgeries to rectify the injury, including a spinal fusion and a laminectomy. His physicians did not order preoperative flexion or extension x-rays, which would have provided evidence of any loss of motion segment integrity, a factor in determining the level of impairment. *See Am. Home Assur. Co. v. Poehler*, 323 S.W.3d 626, 631 (Tex. App.—Tyler 2010, pet. pending). Petitioner Zurich American Insurance Company provided workers' compensation coverage to Samudio's employer.

After Samudio filed a claim for medical benefits under the Act, the Division appointed Dr. Gaston Machado as the designated doctor in the case to determine the date Samudio reached maximum medical improvement and his impairment rating under section 408.123 of the Act. An injured worker who suffers a permanent functional or anatomical impairment after reaching maximum medical improvement is entitled to impairment income benefits, the duration of which depend on the assigned impairment rating. TEX. LAB. CODE §§ 408.123, 408.121(a)(1). The impairment rating represents "the percentage of permanent impairment of the whole body resulting from a compensable injury." *Id.* § 401.011(24). Impairment income benefits equal seventy percent of the worker's average weekly wages; the benefits are paid for three weeks for each percentage point of impairment. *Id.* §§ 408.121(a)(1); 408.126. An impairment rating of more than fifteen

percent may entitle the worker to supplemental income benefits after impairment income benefits would otherwise expire. *Id.* § 408.142(a)(1).

Section 408.123 of the Act provides that an impairment rating "must be based" upon the fourth edition of the Guides to the Evaluation of Permanent Impairment, published by the American Medical Association.[1] The methodology for determining impairment ratings recognized in that edition of the Guides used objectively verifiable evidence to place injured workers into one of eight diagnosis-related estimate (DRE) categories. In cases where spinal fusion surgery like Samudio's had been performed, the Guides called for the impairment rating to be based upon pre-operative flexion and extension x-rays. At the time of the administrative proceedings to determine Samudio's impairment rating, however, the Division had implemented two advisories, Advisory 2003–10 and Advisory 2003–10B, which attempted to provide an alternative standard for establishing an impairment rating when no preoperative flexion or extension x-rays had been performed. Under the advisories, a physician could consider evidence of spinal fusion surgery of the type Samudio had in assigning a DRE. In his initial report to the Division, Dr. Machado concluded that Samudio's impairment rating was twenty percent based on a Category IV DRE. He initially asserted that the rating was based upon the Guides, but later submitted a letter clarifying that he had relied on the advisories in light of the absence of the pre-operative flexion or extension x-rays called for in the

[1] Although as originally enacted, section 408.124 required use of the third edition of the Guides, in 1999, the Legislature authorized the Commissioner of Workers' Compensation to adopt the fourth edition of the Guides. Act of May 30, 1999, 76th Leg., R.S., ch. 1426, § 12, 1999 Tex. Gen. Law 4865, 4869 (codified at TEX. LAB. CODE § 408.124(c)).

Guides. Under the advisories, Machado included Samudio's spinal fusion surgery as a factor in calculating the impairment rating.

American Zurich disputed the impairment rating, and the Division commenced a contested case hearing. At the hearing, the carrier submitted a letter from Dr. John Obermiller. Although he opined that Samudio's impairment rating would be properly calculated at ten percent, Obermiller never examined Samudio, and expressly stated that he was not providing an impairment rating. Instead, he explained that his purpose was to show that Machado's analysis did not conform to the Guides. After the close of the hearing, the hearing examiner issued a decision finding that Samudio had an impairment rating of twenty percent. The examiner also specifically found that only one impairment rating was offered during the contested case proceeding. American Zurich appealed the examiner's decision to the appeals panel. In February 2006, the Division notified the parties that the hearing officer's decision was final.

American Zurich then appealed to the district court. It contended that the impairment rating the Division assigned was invalid, and that Samudio had either no impairment rating, or that the correct rating was ten. While the appeal was pending, the Austin court of appeals decided *Texas Department of Insurance Workers Compensation Division v. Lumbermens Mutual Casualty Co.*, 212 S.W.3d 870 (Tex. App.—Austin 2006, pet. denied). In that case, the court ruled that the advisories were inconsistent with the Guides and thus invalid, and enjoined their further use. *Id.* at 876–77.[2] After the *Lumbermens* decision, Samudio filed a plea to the jurisdiction contending that the trial

[2] The Division issued Bulletin B-0033-77 providing that the advisories would no longer be used after we denied the Division's petition for review in *Lumbermens*. Albert Betts, Tex. Dep't of Ins., Comm'r's Bll. No. B-0033-07 (July 18, 2007), http://www.tdi.texas.gov/bulletins/2007/cc34.html.

court lacked subject matter jurisdiction because the trial court was not empowered to provide the relief American Zurich sought. Samudio argued that American Zurich's petition presented no justiciable controversy because the trial court was only empowered to award an impairment rating that was presented to the agency, and the only rating before the agency was the twenty percent rating advocated by Machado. The trial court granted Samudio's plea and dismissed the case, awarding Samudio $29,246.40 in attorney's fees under section 408.221(c) of the Act. The court of appeals affirmed. 317 S.W.3d 336, 348.

II. Jurisdiction

In an appeal of an injured worker's entitlement to impairment income benefits, the Legislature has provided for a modified trial de novo. *Tex. Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 515 (Tex. 1995); TEX. LAB. CODE § 410.306 (c). Under that standard, the trier of fact is informed of the impairment rating assigned by the Division. TEX. LAB. CODE § 410.304. Unless there has been a substantial change in the worker's condition, *id.* §§ 410.306 (c), 410.307, evidence of the extent of impairment is limited to that presented to the Division, and the trier of fact "shall adopt one of the impairment ratings under Subchapter G, Chapter 408." *Id.* § 410.306(c). In affirming the trial court's dismissal for lack of subject matter jurisdiction, the court of appeals reasoned that only one impairment rating, Machado's, had been presented to the Division. 317 S.W.3d at 348. The court concluded that the trial court could not, therefore, grant American Zurich any relief, even assuming that the rating presented to the agency was invalid under *Lumbermens*. *Id.* at 348–49.

A. Section 410.306(c) is not a jurisdictional limit

In *Garcia*, we rejected the contention that section 410.306(c) of the Act violated injured workers' right to trial by jury. 893 S.W.2d at 528–30 (Tex. 1995). We equated the provision with procedural rules barring the presentation of witnesses or information that was not timely disclosed in a civil trial. *Id.* at 528 (citing TEX. R. CIV. P. 215.5). Section 410.306(c) shaped the manner of submitting the impairment issue to the jury and the scope of the permissible remedy. *Id.* at 528–529. But because the provision still left the determination of impairment within the jury's hands, it did not violate the right to trial by jury. *Id.* at 530. At no point did we suggest that section 410.306(c) could be seen as a limit on trial courts' subject matter jurisdiction.

Subject matter jurisdiction limits speak to the power of courts to decide a particular *type* of controversy, not to the evidence that courts may consider or the scope of the remedy they can afford in a particular case. *See Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 74–75 (Tex. 2000). In the case the court of appeals primarily relied upon, for example, *State Bar of Texas v. Gomez*, 891 S.W.2d 243 (Tex. 1994), we concluded that the district court lacked subject matter jurisdiction in a case in which the plaintiffs sought to require Texas attorneys to provide pro bono legal services. *Id.* at 246. We noted that the case fell within our exclusive administrative power to regulate the bar. *Id.*. The district court could not grant relief because it "would . . . be cast in the impermissible role of effectively promulgating policies and regulations governing Texas lawyers." *Id.* American Zurich's appeal of the impairment rating the Division assigned Samudio is the type of case for which judicial review is available under the Act, so long as the appealing party has exhausted its administrative remedies. TEX. LAB. CODE §§ 410.251, 410.301. While section 410.306(c) does not allow a

reviewing court to consider impairment evidence that was not before the Division, or to award an impairment rating that was not presented to the agency, it does not limit the trial court's subject matter jurisdiction.

The court of appeals' decision was driven largely by its conclusion that the trial court was not empowered to set aside the impairment rating assigned by the division in the absence of a competing rating that was presented to the agency. *See* 317 S.W.3d at 349. We agree with the court that the trial court could not have awarded Samudio a rating of zero or, alternatively, of ten percent. While Obermiller opined that an appropriate impairment rating for Samudio would be ten percent, he never examined Samudio, as section 408.123 requires, and expressly disclaimed an intent to assess an impairment rating. Further, no one presented evidence to the Division that Samudio's impairment rating was zero, and it is undisputed that he had suffered some permanent impairment. We disagree with the court of appeals, however, that the trial court was left with no alternative but to leave in place a putatively invalid impairment rating.

B. Remand to the agency

Samudio contends that the trial court properly dismissed this case because section 410.306(c) deprived it of any power to set aside the impairment rating assigned by the Division, even if the rating was invalid. American Zurich and amicus curiae Texas Department of Insurance Workers' Compensation Division disagree. They maintain that, if the trial court concluded that the assigned

rating was invalid, it could reverse the Division's decision and remand to the agency.[3] We agree with American Zurich and the Division.

Our fundamental purpose in construing statutes is to determine and give effect to the Legislature's intent. *LTTS Charter Sch., Inc. v. C2 Constr., Inc.*, 342 S.W.3d 73, 75 (Tex. 2011). The words the Legislature employed are the best indicators of that intent. *Id.* And we may be "aided by the interpretive context provided by 'the surrounding statutory landscape.'" *Id.* at 75 (quoting *Presidio Ind. Sch. Dist. v. Scott*, 309 S.W.3d 927, 929–30 (Tex. 2010)). The application of these principles lead us to conclude that a trial court may remand to the Division to allow it to determine a valid impairment rating if the court concludes that no valid impairment rating was presented to the agency in the underlying contested case.

First, under section 410.306(c) the trier of fact, "in its determination of the extent of impairment, shall adopt one of the impairment ratings under Subchapter G, Chapter 408." As the Division argues, if a rating does not comport with the Guides, as section 408.124 requires, it is not adopted "under subchapter G." To the contrary, such an impairment rating would be invalid precisely because it was not adopted in compliance with section 408.124(b). Moreover, in considering whether an impairment rating submitted to the Division is valid, a reviewing court is not making a "determination of impairment." Instead, the court is deciding a purely legal question: whether the proffered rating was made in accordance with statutory requirements.

[3] Amicus curiae State Office of Risk Management agrees that section 410.306(c) does not preclude a reviewing court from setting aside an impairment rating, but disagrees that the court could remand to the agency. It contends that a remand is unnecessary because the parties could reinitiate the case at the agency if an impairment rating is invalidated.

More importantly, the general statutory scheme laid out by the Legislature compels a remand to allow the Division to determine Samudio's impairment rating as of April 7, 2004, the date the parties stipulated he reached maximum medical improvement, if the trial court finds that Samudio's twenty percent rating is invalid. The Legislature established a detailed, very specific process for the assignment of impairment ratings and the resolution of ratings disputes. *See* TEX. LAB. CODE §§ 408.122–.125, 410.021–.209. And the Legislature unequivocally mandated that impairment ratings be determined according to the Guides. *Id.* § 408.124(b) ("For determining the existence and degree of an employee's impairment, the division *shall use* [the Guides]). The regulatory scheme as a whole illustrates an intent that impairment ratings be determined by the Division, subject to limited de novo review. *Id.* § 410.306 (c); *Garcia*, 893 S.W.2d at 515. Furthermore, no language in the Act prohibits a reviewing court from remanding to the agency. Instead, while a reviewing court cannot assign an impairment rating that was not presented to the Division, the statute is silent as to the court's power to remand. Accordingly, section 410.306(c) does not preclude a trial court from remanding to the Division when the only impairment rating offered is invalid. To the contrary, a remand is the course most consistent with the overall process established by the Legislature. The court of appeals erred in affirming the trial court's judgment dismissing American Zurich's appeal.

III. Attorney's fees

Finally, American Zurich contends that, to the extent the court of appeals erred in affirming the trial court's judgment, it also erred in awarding fees under section 408.221 of the Act. We agree. In light of our reversal, it is no longer true that Samudio prevailed on an issue on which judicial review was sought by the carrier. See TEX. LAB. CODE § 408.122(c).

IV. Conclusion

While section 410.310(c) limits the evidence that a trial court may consider in reviewing an impairment rating assigned by the Division and precludes the court from assigning a rating that was not presented to the agency, it does not prevent the court from setting aside an invalid rating and remanding to the Division for further proceedings. We therefore reverse the court of appeals' judgment and remand to the trial court. If the trial court determines that no rating made in conformance with the Guides was presented to the agency, it should remand to the Division for a new impairment determination.

_____

Debra H. Lehrmann
Justice

OPINION DELIVERED: June 29, 2012

IN THE SUPREME COURT OF TEXAS

NO. 10-0603

TEXAS WEST OAKS HOSPITAL, LP AND
TEXAS HOSPITAL HOLDINGS, LLC, PETITIONERS,

v.

FREDERICK WILLIAMS, RESPONDENT.

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

Argued November 8, 2011

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

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

At issue in this interlocutory appeal is whether the claims of an employee against his employer, both of whom are health care providers, alleging injuries arising out of inadequate training, supervision, risk-mitigation, and safety in a mental health facility, constitute health care liability claims (HCLCs) under the Texas Medical Liability Act (TMLA or Act). *See* TEX. CIV. PRAC. & REM. CODE ch. 74 *et seq*. We conclude that the TMLA does not require that the claimant be a patient of the health care provider for his claims to fall under the Act, so long as the Act's other requirements are met. We hold that the employee here is properly characterized as a "claimant" under the Act and his allegations against his nonsubscribing employer are health care and safety claims under the TMLA's definition of HCLCs, requiring an expert report to maintain his lawsuit.

We further hold that the Act does not conflict with the Texas Workers' Compensation Act (TWCA). We therefore reverse the judgment of the court of appeals.

I. Background

Texas West Oaks Hospital, LP and Texas Hospital Holdings, LLC operate Texas West Oaks Hospital (West Oaks), a state-licensed, private mental health hospital located in Houston, Texas. Frederick Williams, a psychiatric technician and professional caregiver at West Oaks, was injured on the job while supervising a patient, Mario Vidaurre. Vidaurre was admitted to West Oaks on June 11, 2007. Due to his history of paranoid schizophrenia, including manic outbursts and violent behavior directed at family members and professional staff, Vidaurre was placed by his admitting physician on one-to-one observation, an elevated level of supervised care in the psychiatric unit. Vidaurre was also put on "unit restriction," meaning he could only be taken out of the psychiatric unit by direct order of a physician. A few days after Vidaurre's admission, while Williams was supervising him, Vidaurre became agitated. To calm him, Williams took Vidaurre to an outdoor enclosed smoking area, in violation of the unit-restriction policy. The door to the enclosure locked behind them and the unsupervised area contained no cameras, audio supervision, mirrors, or other monitoring apparatus. Although Williams previously had taken Vidaurre to the smoking area without incident, a physical altercation occurred on this occasion, resulting in Vidaurre's death and injuries to Williams.

Vidaurre's estate sued West Oaks, and later Williams, asserting HCLCs under the TMLA, codified in Chapter 74 of the Texas Civil Practice and Remedies Code. TEX. CIV. PRAC. & REM. CODE §§ 74.001-74.507. Williams later asserted cross claims of negligence against West Oaks pursuant to section 406.033 of the Texas Labor Code, a statutory provision governing employee

common law claims against employers not subscribed to workers' compensation. *See* TEX. LAB. CODE § 406.033. West Oaks' status as a nonsubscriber to workers' compensation is uncontroverted, and therefore, Williams' claims against his employer are not barred by the Texas Workers' Compensation Act. *See id.*; *Port Elevator-Brownsville, L.L.C. v. Casados*, 358 S.W.3d 238, 241 (Tex. 2012) (discussing the "exclusive remedy" doctrine).

Williams alleged that West Oaks was negligent in:

> (a) Failing to properly train Williams to work at West Oaks' premises, including warning him of the inherent dangers of working with patients with the conditions and tendencies that Mario Vidaurre possessed; (b) Failing to adequately supervise West Oaks' employees, including Williams, while working with patients with conditions and tendencies that Mario Vidaurre possessed; (c) Failing to provide adequate protocol to avoid and/or decrease the severity of altercations between its employees, such as Williams, and patients; (d) Failing to provide its employees, including Williams, with adequate emergency notification devices to alert other employees of altercations in which assistance is needed; (e) Failing to warn Williams of the dangers that West Oaks knew or should have known were associated with working with patients such as Mr. Vidaurre; and (f) Failing to provide a safe workplace for its employees, including Williams.

West Oaks filed a motion to dismiss on the grounds that Williams' claims constituted HCLCs under the TMLA and that Williams had not served an expert report on West Oaks, as required under the Act. *See* TEX. CIV. PRAC. & REM. CODE § 74.001(a)(13) (defining health care liability claims), and § 74.351(a), (b) (requiring a trial court to dismiss a health care liability claim if an expert report is not served within 120 days of filing suit).[1] Williams responded that his claims sound in ordinary negligence rather than health care liability. Following a hearing, the trial court denied West Oaks' motion. West Oaks then filed this interlocutory appeal. *See id.* § 51.014(a)(9).

[1] The HCLC definition was amended after Williams' cause of action accrued, and the prior law is applicable to his claims. Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.09, 2003 Tex. Gen. Laws 847, *amended by* Act of July 19, 2011, 82nd Leg., 1st C.S., ch. 7, § 4.02, 2011 Tex. Gen. Laws 5445 (amending section 74.001(a), adding subsection (a)(12)(A)(viii) (including a health care collaborative as a "health care provider") and making nonsubstantive changes).

The court of appeals affirmed the trial court's order. 322 S.W.3d 349, 354. The court analyzed Williams' claims as breaches of West Oaks' duty of safety to its employee. *Id*. at 352. The court of appeals began its analysis from the premise that the phrase "directly related to health care" in section 74.001(a)(13) modifies not only "professional or administrative services," but also the term "safety." *Id*. It concluded that a safety claim "must be directly related to and inseparable from health care." *Id.* It is not disputed here that Vidaurre's claims against West Oaks are HCLCs, but Williams argues his claims against West Oaks are not. The court of appeals noted the related nature of the two parties' cases but concluded, based in part on our withdrawn opinion in *Marks v. St. Luke's Episcopal Hospital*, 52 Tex. Sup. Ct. J. 1184, *withdrawn and superseded on rehearing*, 319 S.W.3d 658 (Tex. 2010), that Williams' claims against West Oaks are separable from health care and are not HCLCs. 322 S.W.3d at 353. Reasoning that the source of West Oaks' duty to Williams is the employer-employee relationship and that the nature of Vidaurre's relationship with West Oaks—patient to health care provider—is different from Williams', the court of appeals concluded that the safety claims "flow from the employment relationship" between Williams and West Oaks and are not "directly related" to health care, as required by the statute. 322 S.W.3d at 352–53; TEX. CIV. PRAC. & REM. CODE § 74.001(a)(13). West Oaks filed a petition for review in this Court.

II. Discussion

In seeking to distinguish ordinary negligence claims from HCLCs, the heart of these cases lies in the nature of the acts or omissions causing claimants' injuries and whether the events are within the ambit of the legislated scope of the TMLA. Causes of action that are HCLCs cannot be transmuted to avoid the strictures of the medical liability statute. *Omaha Healthcare Ctr., LLC v. Johnson*, 344 S.W.3d 392, 394 (Tex. 2011); *Diversicare Gen. Ptr., Inc. v. Rubio*, 185 S.W.3d 842,

851 (Tex. 2005). We recognize that the Legislature intended the Texas Medical Liability Insurance Improvement Act (TMLIIA), the TMLA's predecessor, to be broad, and it broadened that scope further in 2003 with its repeal and amendments resulting in the TMLA. Act of May 30, 1977, 65th Leg., R.S., ch. 817, § 1.02(6), 1977 Tex. Gen. Laws 2039, 2040 (former TEX. REV. CIV. STAT. art. 4590i, § 1.02(6)), *repealed by* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.09, 2003 Tex. Gen. Laws 847, 884. After the 2003 amendments, the breadth of HCLCs include causes of action against physicians and health care providers for negligence in the provision of "medical care, or health care, or safety or professional or administrative services directly related to health care." TEX. CIV. PRAC. & REM. CODE § 74.001(a)(13).

West Oaks argues that Williams' claims, mirroring the same facts as Vidaurre's HCLCs, are HCLCs and therefore implicate the requirement to serve an expert report. Such a conclusion would mandate a dismissal because Williams did not serve a report on West Oaks. TEX. CIV. PRAC. & REM. CODE § 74.351(a), (b). West Oaks also urges that Williams' status as a health care provider at the hospital—as opposed to a patient—does not remove Williams from the requirement that he pursue his allegations as HCLCs. On the other hand, Williams characterizes his allegations as ordinary negligence claims against a nonsubscriber to the workers' compensation scheme. Williams contends that the court of appeals was correct in concluding that his claims fall outside the HCLC definition and therefore an expert report is not required for his suit to proceed. *See* 322 S.W.3d 349, 353–54. Williams also echoes the court of appeals in asserting that West Oaks' alleged safety and security breaches do not require expert medical testimony and are interchangeable with safety and security issues arising in non-medical settings such as corrections facilities. *See id.* at 353 (opining that Williams' safety and security claims involve issues also "aris[ing] in other settings, such as jails

and prisons"). In essence, Williams argues that the hospital is the mere situs of his claims, that his role as psychiatric technician overseeing a mental patient has no bearing on the character of his claims, and the fact that his claims arose in a mental health facility has little or no bearing on their character.

A. Standard of Review

West Oaks' and Williams' arguments both implicate the scope of claims reached by the TMLA. The nature of the claims the Legislature intended to include under the TMLA's umbrella is a matter of statutory construction, a legal question we review de novo. *Marks*, 319 S.W.3d at 663 (interpreting the TMLIIA); *see also MCI Sales & Serv., Inc. v. Hinton*, 329 S.W.3d 475, 500 (Tex. 2010) (observing that questions of statutory construction are generally reviewed de novo). In construing a statute, our aim "'is to determine and give effect to the Legislature's intent,'" and we begin with the "'plain and common meaning of the statute's words.'" *McIntyre v. Ramirez*, 109 S.W.3d 741, 745 (Tex. 2003) (quoting *Tex. Dep't of Transp. v. Needham*, 82 S.W.3d 314, 318 (Tex. 2002); *State Dep't of Highways & Pub. Transp. v. Gonzalez*, 82 S.W.3d 322, 327 (Tex. 2002) (further citations omitted)).

B. Relationship Between the Parties Under the Act

Williams argues that the lack of a patient-physician or patient-health-care-provider relationship between him and West Oaks is a clear barrier to inclusion of his claims within the Legislature's definition of HCLCs. He asserts that such a relationship is necessary to HCLCs. At one point in the past, Williams may have had a good argument. However, modifications over time to the TMLA and its predecessor indicate a different scope for HCLCs under current law.

The TMLIIA was enacted in 1977 to relieve a medical "crisis [having] a material adverse effect on the delivery of medical and health care in Texas." Act of May 30, 1977, 65th Leg., R.S., ch. 817, § 1.02(6), 1977 Tex. Gen. Laws 2039, 2040 (repealed 2003). In 2003, facing another "medical malpractice insurance crisis" and a corresponding "inordinate[]" increase in the frequency of HCLCs filed since 1995, the Legislature repealed the TMLIIA, amending parts of the previous article 4590i and recodifying it as Chapter 74 of the Texas Civil Practice and Remedies Code. Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.11(a), 2003 Tex. Gen. Laws 847, 884.

The 2003 legislation featured a significant modification to the existing law; it changed the HCLC definition:

> 'Health care liability claim' means 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)(emphases added). The Legislature replaced the term "patient" with "claimant" in the definition of an HCLC.[2] *Compare* TEX. CIV. PRAC. & REM. CODE § 74.001(a)(13), *with* TEX. REV. CIV. STAT. art. 4590i, § 1.03(a)(4) (repealed 2003). The Legislature also defined the new term in the Act:

> 'Claimant' means a person, including a decedent's estate, seeking or who has sought recovery of damages in a health care liability claim. All persons claiming to have sustained damages as the result of the bodily injury or death of a single person are considered a single claimant.

[2] The Legislature also broadened the subject-matter scope of the activities constituting HCLCs through the addition to the definition of "professional or administrative services directly related to health care." *Id.* § 74.001(a)(24).

TEX. CIV. PRAC. & REM. CODE § 74.001(a)(2). "Person" is not defined in the TMLA and therefore must be given its common law meaning. *Id.* § 74.001(b). Changing the term "patient" to "claimant" and defining "claimant" as a "person" expands the breadth of HCLCs beyond the patient population. This in turn necessarily widened the reach of the expert report requirement, unless otherwise limited by other statutory provisions.

However, "health care" and "medical care" HCLCs are separately defined in the Act and reference treatment furnished "for, to, or on behalf of a patient." *Id.* § 74.001(a)(10), (a)(19).[3] As discussed more fully below, "medical care" and "health care" HCLCs require that the claimant be a patient. *See* Part II.D.1, *infra*.

With the exception of medical care and health care claims, our focus in determining whether claims come under the TMLA is not the status of the claimant, but the gravamen of the claim or claims against the health care provider. *See Diversicare*, 185 S.W.3d at 854.

C. Williams' Status as a "Claimant" Under the Act

We next examine whether Williams is a "claimant" under the TMLA. Only claimants are obligated to serve expert reports on physicians or health care providers. TEX. CIV. PRAC. & REM. CODE § 74.351(a), (b). West Oaks argues that the language and structure of the definition of "claimant" in the current statute, especially when compared to its predecessor, indicate that the term includes not only patients, but other persons as well. Williams asserts that he is not a "claimant" because his claims are not HCLCs, as they do not involve the exercise of professional medical judgment. Williams also argues that the Legislature's substitution of "patient" with "claimant" is

[3] This conclusion is in harmony with the Legislature's stated intent to "reduce [the] excessive frequency . . . of health care liability claims through reasonable improvements and modifications in the Texas insurance, tort, and medical malpractice systems . . . ." Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.11(b)(1), 2003 Tex. Gen. Laws 847, 884.

meant only to include derivative claims by the relatives and representatives of deceased patients, not employees of health care provider defendants.

As observed above, a "claimant" is broadly defined as a "person," including the estate of a person, bringing an HCLC. TEX. CIV. PRAC. & REM. CODE § 74.001(a)(2). A claimant is a person seeking damages for an HCLC. *See id*. § 74.001(a)(2), (13). As noted above, the TMLIIA, by contrast, featured an HCLC definition predicated on injury to a "patient." TEX. REV. CIV. STAT. art. 4590i, § 1.03(a)(4) (repealed 2003). Neither "person" nor "patient" is a defined term in the TMLA and therefore possesses such meaning as is consistent with the common law. TEX. CIV. PRAC. & REM. CODE § 74.001(b).

Although he likely would not have been a "patient" under the TMLIIA, Williams is a "claimant" and a "person" under the textual change to the definition of HCLCs in the TMLA. Not only is the term "patient" not included within the definition of "claimant," the Legislature used the term "including" to precede the reference to a decedent's estate. This renders any components of the definition nonexclusive. TEX. GOV'T CODE § 311.005(13); *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 440–41 (Tex. 2009) (noting that the term "including" is a term of enlargement and cautioning against "circumventing Legislative intent" by misapplying non-exhaustive lists in statutes); *see also In re Allcat Claims Serv., L.P.*, 356 S.W.3d 455, 468 (Tex. 2011) (observing that the term "including" in that case was an explanatory term of enlargement).

The dissent argues that the 2003 amendment substituting "claimant" in lieu of "patient" in the HCLC definition merely clarifies that a patient's estate or others acting in a representative capacity may bring an HCLC. __ S.W.3d at __ (Lehrmann, J., dissenting). But further belying the contention that a "claimant" may be only a patient or her estate is the Act's definition of

"representative." The term "representative," used in the Act's medical-records-disclosure provision, is defined as the "agent of the patient *or* claimant," indicating that patient and claimant do not necessarily refer to the same category of persons. TEX. CIV. PRAC. & REM. CODE § 74.001(a)(25) (emphasis added), 74.052; *Wilson N. Jones Mem'l Hosp. v. Ammons*, 266 S.W.3d 51, 61–62 (Tex. App.—Dallas 2008, pet. denied) (also drawing the distinction). Neither the language of the TMLA nor the logic of the amendments can support a narrow reading of the term "claimant."

D. Character of Williams' Claims

In defining the types of claims against health care providers constituting HCLCs, the question we face is not whether it seems that a claimed injury really arose from treatment commonly understood to be some type of medical or health care; nor do we address whether the incident causing the injury would have been a common law negligence claim. Instead, the issue posed is whether the umbrella fashioned by the Legislature's promulgation of the TMLA includes the cause of action brought by a claimant against physicians or health care providers.

The foundations of our analysis are well established. As in *Diversicare* and *Marks*, we determine whether the relevant allegations are negligence claims or are properly characterized as HCLCs under the Act. *Marks*, 319 S.W.3d at 662 (construing the TMLIIA); *Diversicare*, 185 S.W.3d at 847.

An HCLC contains three basic elements:[4] (1) a physician or health care provider must be a defendant; (2) the claim or claims at issue must concern treatment, lack of treatment, or a departure from accepted standards of medical care, or health care, or safety or professional or administrative services directly related to health care; and (3) the defendant's act or omission complained of must proximately cause the injury to the claimant. *See* TEX. CIV. PRAC. & REM. CODE § 74.001(a)(13); *Marks*, 319 S.W.3d at 662 (construing the similar definition found in the TMLIIA).

The second element is at issue in this case: whether Williams' claims alleging West Oaks' failure to properly train the facility's staff, warn of risks associated with violent psychiatric patients, provide adequate protocols and equipment to limit such risks, and provide a safe work environment under such circumstances implicate one or more of the standards listed in the HCLC definition. There are several types of HCLCs set out in the TMLA: in addition to claims involving treatment and lack of treatment, the Act contemplates claims for alleged "departure[s] from accepted standards of medical care, or health care, or safety or professional or administrative services directly related to health care." TEX. CIV. PRAC. & REM. CODE § 74.001(a)(13). All of these categories of claims, except safety, are defined terms in the Act. *See, e.g.*, *id*. § 74.001(a)(10), (a)(19), and (a)(24) (defining "health care," "medical care," and "professional or administrative services"). West Oaks asserts that Williams' claims allege departures from accepted standards of either "health care" or "safety." Williams argues that neither of these categories of claims applies to his allegations, removing him from the Act's reach.

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[4] "'Health care liability claim' means 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).

1. Claimed Departures from Accepted Standards of Health Care

We examine whether Williams' complaints are "claimed departure[s] from accepted standards of . . . health care." TEX. CIV. PRAC. & REM. CODE § 74.001(a)(13). In *Diversicare*, we held that a claim alleges a departure from accepted standards of health care if the act or omission complained of is an inseparable or integral part of the rendition of health care. 185 S.W.3d at 848, 850. "[T]raining and staffing policies and supervision and protection of [patients] . . . are integral components of a [health care facility's] rendition of health care services . . . ." *Id*. at 850. Williams' claims are similar to the health care claims at issue in *Diversicare*. However, our analysis of health care claims in that case involved claims by a patient against a health care provider, not, as in this case, claims brought by a non-patient employee against his employer.

The definition for "health care" suggests that claims brought under this prong of the HCLC definition must involve a patient-physician relationship. *See id.* § 74.001(a)(10). "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)(emphases added); *see also, e.g., Omaha Healthcare Ctr*., 344 S.W.3d at 395 (pointing to the "any act" language in the "health care" definition as necessarily implicating more than acts of physical care and medical diagnosis and treatment); *Diversicare*, 185 S.W.3d at 847 (noting the "broad[]" nature of the "health care" definition). While the "any act" language of the "health care" definition is certainly expansive, it is limited by the requirement that health care be rendered "for, to, or on behalf of a *patient* during the *patient's* medical care, treatment, or confinement." TEX. CIV. PRAC. & REM. CODE § 74.001(a)(10) (emphases added). Because a claim

under the health care prong of section 74.001(a)(13) incorporates the definition of "health care," such a claim must involve a patient-physician relationship.

The requirement that a claim arising under the health care prong of section 74.001(a)(13) involve a patient-physician relationship could be viewed as in tension with the term "claimant," defined in terms of a person. *See id*. § 74.001(a)(2). We consider all the relevant provisions of the TMLA together and follow the rule that specific statutory provisions prevail over more general provisions. *See Jackson v. State Office of Admin. Hearings*, 351 S.W.3d 290, 297 (Tex. 2011) (reiterating the rule that "a specific statutory provision prevails as an exception over a conflicting general provision") (citing *Tex. Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 637 (Tex. 2010)); *see also* TEX. GOV'T CODE § 311.026(b) (same). However, the specific wording of the "health care" definition, that health care be an act involving treatment rendered for, to or on behalf of a patient, acts as a limitation on the general provision that an HCLC need only be pursued by a "claimant." While other categories of HCLCs need only be pursued by claimants, by specific statutory directive health care claims must involve a patient-physician relationship.

Claims based on departures from accepted standards of health care therefore involve a nexus between the standard departed from and the alleged injury. Such a nexus exists in this case. Williams, a health care provider for Vidaurre, was assaulted by Vidaurre, who was a West Oaks patient. *See* TEX. CIV. PRAC. & REM. CODE § 74.001(a)(12) (defining "health care provider" to include employees of facilities licensed to provide health care). Williams was acting on orders to provide one-on-one supervision for Vidaurre. That directive was made by a West Oaks physician exercising professional judgment about the schizophrenic patient's care and treatment, including, specifically, heightened supervision in light of recent aggressive and violent behavior. Additional

professional judgments about the safety protocols for such patients were put in place by West Oaks to care for its mental patients. Williams alleges that these judgments, concerning his training and psychiatric institutional protocols, departed from accepted standards of care and caused his injury. We previously reasoned in *Diversicare* that the health care facility's "training and staffing policies and supervision and protection of [a patient] and other residents are integral components of [the facility's] rendition of health care services." 185 S.W.3d at 850. Williams' similar allegations constitute HCLCs based on claimed departures from accepted standards of health care.

Texas mental health statutes and regulations bolster this conclusion. West Oaks is a state-licensed, private mental health facility. The law requires that an inpatient mental health facility "provide adequate medical and psychiatric care and treatment to every patient in accordance with the highest standards accepted in *medical practice*." TEXAS HEALTH AND SAFETY CODE § 576.022(a)(emphasis added). Mental health hospitals may not operate in Texas unless licensed by the Texas Department of Health and operated in accordance with the rules and standards of the Texas Board of Mental Health and Mental Retardation to ensure the proper care and treatment of patients. *Id*. § 577.001(a), 577.005(b), 577.010(a).

The necessity of expert testimony to support or refute the allegations at issue is a factor in assessing the nature of a claim against a health care provider or physician. *Diversicare*, 185 S.W.3d at 848. Here, the court of appeals considered the need for expert testimony in Williams' case and concluded that "even if medical expert testimony is necessary to establish Williams' claims, the need for expert testimony is not dispositive as to whether a claim is a health care liability claim." 322 S.W.3d at 353. We have indicated that even when expert medical testimony is not necessary, the claim may still be an HCLC. *Murphy v. Russell*, 167 S.W.3d 835, 838 (Tex. 2005) ("The fact that

in the final analysis, expert testimony may not be necessary to support a verdict does not mean the claim is not a health care liability claim."). We have not previously addressed the court of appeals' reasoning, and we now hold that if expert medical or health care testimony is necessary to prove or refute the merits of the claim against a physician or health care provider, the claim is a health care liability claim.

Expert testimony in the health care field is necessary to support Williams' claims. Those claims require evidence on proper training, supervision, and protocols to prevent, control, and defuse aggressive behavior and altercations in a mental hospital between psychiatric patients and employed professional counselors who treat and supervise them. The provision of emergency notification devices, warning of dangers associated with psychiatric patients, providing a safe workplace, and properly training the caregiver at a psychiatric facility are integral to the patient's care and confinement. Acts or treatment that are integral to a "patient's medical care, treatment, or confinement" constitute "health care." TEX. CIV. PRAC. & REM. CODE § 74.001(a)(10). Claims for injuries arising from departures from proper "treatment performed or furnished, or that should have been performed or furnished" are health care claims. *Id.* § 74.001(a)(10). Contrary to Williams' argument, this dispute concerns more than simply determining whether a person should be protected from a known aggressive person. The dispute between Williams and West Oaks is, at its core, over the appropriate standards of care owed to this mental health professional in treating and supervising a psychiatric patient at the mental hospital, what services, protocols, supervision, monitoring and equipment were necessary to satisfy the standard, and whether such specialized standards were breached. *See Diversicare*, 185 S.W.3d at 850. The allegedly missing or insufficient protocols and standards were for a mental patient in a mental hospital. It would blink reality to conclude that no

professional mental health judgment is required to decide what those should be, and whether they were in place at the time of Williams' injury.[5]

Williams' argument that any security officer could have performed the oversight and supervision of a psychiatric patient at the mental health hospital is overly simplistic. Perhaps a security officer could have protected Williams, and Vidaurre himself, from harm, or lessened the severity of the injuries suffered, but security is only one aspect of the matter. Williams' position at West Oaks involved professional, health-care-related judgments different from the tasks typically associated with a law enforcement officer, security guard, or bouncer. Treatment of a mental patient subject to psychotic and aggressive outbursts requires health care, not simply protection from bodily harm, to control, defuse, or prevent mental processes leading to aggression, and professional techniques to do so. Patients at West Oaks are there not merely for shelter, but also for care and treatment. *See Charrin v. Methodist Hosp.*, 432 S.W.2d 572, 574 (Tex. Civ. App.—Houston [1st Dist.] 1968, no writ) (holding that the hospital-patient relationship is different from that of a landlord-tenant). Williams' self-described role at West Oaks was that of a "counselor" and "caregiver," not a security guard. One of Vidaurre's experts characterizes psychiatric technicians

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[5] As we discussed in *Diversicare*, a number of other states also recognize that providing supervision and a safe environment at a health care facility are matters of professional health care judgment. 185 S.W.3d at 852–54 (citing *Dorris v. Detroit Osteopathic Hosp.*, 594 N.W.2d 455, 466 (Mich. 1999) (concluding that claims for assault in a psychiatric hospital implicated medical or health care under Michigan's medical malpractice statute and noting that "[t]he ordinary layman does not know the type of supervision or monitoring that is required for psychiatric patients in a psychiatric ward."); *Smith v. Four Corners Mental Health Ctr.*, 70 P.3d 904, 914 (Utah 2003) (holding that an assaulted child's lawsuit against the outpatient mental health care provider was a health care malpractice claim because the plaintiff's "allegations arise out of the fact that [a health care provider] provided mental health services directly to him . . . .")); *see also D.P. v. Wrangell Gen. Hosp.*, 5 P.3d 225, 229 n. 17 (Alaska 2000) ("[I]n so far as [plaintiff] intends to argue issues that involve specialized medical decisions—such as the appropriate level of physical restraints or medication—she can do so only through expert testimony."); *Bell v. Sharp Cabrillo Hosp.*, 260 Cal. Rptr. 886, 896 (Cal. Ct. App. 1989) ("[T]he competent selection and review of medical staff is precisely the type of professional service a hospital is licensed and expected to provide, for it is in the business of providing medical care to patients and protecting them from an unreasonable risk of harm while receiving medical treatment. . . . [T]he competent performance of this responsibility is 'inextricably interwoven' with delivering competent quality medical care to hospital patients.").

as a "valuable and indispensable part of psychiatric hospital care." Vidaurre's expert also notes that the role of psychiatric technician involves appropriately observing and evaluating potentially assaultive mentally ill patients and assessing the potential for violent eruptions. Thus, the very deficiencies in training and protocols Williams complains of underscore the health-related nature of his role.

We do not conclude, as West Oaks would have us, that Williams' claims should be considered HCLCs on the bare basis that they mirror those of the patient and stem from the same fact pattern. Williams and the patient stand as separate claimants. We analyze the applicability of the TMLA and its attendant procedural requirements on the gist of the claimant's allegations. *See Diversicare*, 185 S.W.3d at 847–48.

2. Claimed Departures from Accepted Standards of Safety

We also examine whether Williams' claims may be characterized as HCLCs under the definition's "safety" prong. We have not decided whether safety claims must be "directly related to health care." The TMLA's HCLC definition includes, among the different types of covered claims, "claimed departure[s] from accepted standards of . . . safety . . . ." TEX. CIV. PRAC. & REM. CODE § 74.001(a)(13).

Williams was injured during an altercation with Vidaurre in a smoking area at the hospital, and he contends his injuries would have been avoided if West Oaks had instituted proper safety protocols and monitoring devices. Williams' claims, predicated upon the monitoring and restraint of violent, schizophrenic patients, implicate the safety, as commonly understood, of employees and patients. Safety is not defined in the TMLA. This Court has construed the term, under principles of statutory construction, according to its commonly understood meaning as the condition of being

"untouched by danger; not exposed to danger; secure from danger, harm or loss." *Diversicare*, 185 S.W.3d at 855 (quoting the definition of "safe" in Black's Law Dictionary (6th ed. 1990) to construe the meaning of "safety" under predecessor statute). Logically, the inclusion of safety "expand[ed] the scope of the statute beyond what it would be if it only covered medical and health care" and included the claims in that case, and it was not necessary to define the precise boundaries of the safety prong. *Diversicare*, 185 S.W.3d at 855; *see also Marks,* 319 S.W.3d at 662–63.

In 2003, the Legislature modified the definition of HCLCs. It changed "patient" to "claimant," and also added the italicized phrase to the relevant portion of the pre-2003 definition: HCLC means a cause of action for a "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 . . . ." TEX. CIV. PRAC. & REM. CODE § 74.001(a)(13)(emphasis added). The dissent argues that the 2003 amendment was intended to narrow the existing scope of the safety prong of HCLCs by requiring that safety be "directly related to health care."[6] *See id*. We disagree for several reasons.

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[6] Texas appellate courts construing the TMLA have diverged on whether "directly related" applies to safety claims or only to other claims in the definition's list of departures from accepted standards. *Compare St. David's Healthcare P'ship, L.P. v. Esparza,* 315 S.W.3d 601, 604 (Tex. App.—Austin 2010), *rev'd on other grounds*, 348 S.W.3d 904 (Tex. 2011) ("directly related to health care" modifies "safety"); *Appell v. Muguerza*, 329 S.W.3d 104, 115 (Tex. App.—Houston [14th Dist.] 2010, pet. filed) (same); *Dual D Healthcare Operations, Inc. v. Kenyon*, 291 S.W.3d 486, 489–90 (Tex. App.—Dallas 2009, no pet.) (same); *Omaha Healthcare Ctr., L.L.C. v. Johnson*, 246 S.W.3d 278, 284 (Tex. App.—Texarkana 2008), *rev'd on other grounds*, 344 S.W.3d 392 (Tex. 2011) (same); *Harris Methodist Ft. Worth v. Ollie*, 270 S.W.3d 720, 723 (Tex. App.—Fort Worth 2008), *rev'd on other grounds*, 342 S.W.3d 525 (Tex. 2011) (same); *Christus Health v. Beal*, 240 S.W.3d 282, 289 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (same); *Valley Baptist Med. Ctr. v. Stradley*, 210 S.W.3d 770, 774–75 (Tex. App.—Corpus Christi 2006, pet. denied) (same), *with Holguin v. Laredo Reg'l Med. Ctr., L.P.*, 256 S.W.3d 349, 354–55 (Tex. App.—San Antonio 2008, no pet.) (safety claim need not be directly related to health care); *Emeritus Corp. v. Highsmith*, 211 S.W.3d 321, 328 (Tex. App.—San Antonio 2006, pet. denied) ("[A] claim may be a 'health care liability claim' under the safety definition even if it does not "directly relate[] to healthcare.'").

Safety was in the Act prior to the 2003 amendments and this Court construed it according to its common meaning as being secure from danger, harm or loss. *Diversicare*, 185 S.W.3d at 855. The phrase "directly related to health care" was added to the definition of HCLCs in 2003 to modify "professional or administrative services." *Compare* TEX. REV. CIV. STAT. art 4590i, § 1.03(a)(4) (repealed 2003), *with* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.01, 2003 Tex. Gen. Laws 847, 865.

Scrutinizing grammar in interpreting statutes, we are cognizant of the rule that "[m]odifiers should come, if possible, next to the words they modify." William Strunk, Jr. & E.B. White, THE ELEMENTS OF STYLE R. 30 (4th ed. 2000); *see also* Bryan A. Garner, GARNER'S MODERN AMERICAN USAGE 523 (2003) (noting that "[w]hen modifying words are separated from the words they modify, readers have a hard time processing the information," and adding that "the true referent should generally be the closest appropriate word."). This rule is related to the last antecedent doctrine of statutory interpretation commonly applied to ambiguous legislative texts. 82 C.J.S. STATUTES § 443 (2011) (footnotes omitted). Under that tenet, a qualifying phrase should be applied only to the portion of the sentence "immediately preceding it." *City of Dallas v. Stewart*, 361 S.W.3d 562, 571 n.14 (Tex. 2012) (applying the doctrine); *Spradlin v. Jim Walter Homes, Inc.*, 34 S.W.3d 578, 580 (Tex. 2000) (same). Accordingly, the phrase "directly related to health care" modifies the terms immediately before it—"professional or administrative services." Under the dissent's logic, the phrase "directly related to health care" should be applied to modify each term in the HCLC definition, including professional or administrative services, safety, health care, and medical care. This construction is nonsensical, as it would be entirely redundant as to health care and medical care, unsupported by the text in the attempted application to safety, and render safety

largely repetitive of health care. *See Marks,* 319 S.W.3d at 673 (Johnson, J., concurring) (pointing out that safety and health care are separate). We explained in *Diversicare*, a patient-assault case also involving training and staffing policies and monitoring and protection of patients, that "[p]rofessional supervision, monitoring, and protection of the patient population necessarily implicate the accepted standards of safety." *Diversicare*, 185 S.W.3d at 855. Williams' similar complaints here concerning his protection from danger at the hands of a mental patient also implicate safety.[7]

Moreover, a majority of the members of this Court have opined in written opinions or joined written opinions reasoning that safety is not constricted by the subsequent addition to the statute of the phrase "professional or administrative services directly related to health care." Concurring and dissenting in *Diversicare*, Chief Justice Jefferson wrote that safety, undefined in the statute, is commonly understood to mean protection from danger and that the "specific source of that danger . . . is without limitation." 185 S.W.3d at 860–61 (Jefferson, C.J., concurring and dissenting) (also noting that "[i]n defining health care liability claims as it did, the Legislature created a statute with a broad scope. Complaints about the breadth of [the TMLIIA] should be directed to the Legislature, not to this Court, for the courts must 'take statutes as they find them.'" (citation omitted)). Concurring in *Marks*, Justice Johnson agreed with Chief Justice Jefferson's analysis of safety in his

[7] We explained in *Diversicare* that the claimant's allegations of deficient monitoring and training are distinct from hypothetical claims for injuries arising out of an intruder assaulting a claimant due to an unlocked window or a claimant falling from a rickety staircase. 185 S.W.3d at 854. These examples, however, did not concern our analysis of HCLCs that were alleged departures from accepted standards of safety. They were instead provided as examples of claims that would be separable from health care under the health care prong of the HCLC definition. *Id*. (construing the TMLIIA). *Diversicare*'s only holding as to the scope of claims based on alleged departures from accepted standards of safety was that inclusion of the term safety in the HCLC definition expanded the reach of the statute and that it was broad enough to include the claimants' claim in that case. *Marks v. St. Luke's Episcopal Hosp.*, No. 07-0783, 52 Tex. Sup. Ct. J. 1184, 2009 Lexis 636, at *39 (Tex. August 28, 2009) (Wainwright, J., dissenting), *opinion withdrawn and substituted on rehearing,* 319 S.W.3d 658 (Tex. 2010).

concurrence and dissent in *Diversicare*. Justice Johnson reasoned that making safety contingent on a direct connection between it and health care would "effectively read[] safety out of the statute instead of properly giving it meaning as an additional category of claims." *Marks,* 319 S.W.3d at 673 (Johnson, J., concurring, joined by Justice Willett, Justice Hecht, and Justice Wainwright).[8] Chief Justice Jefferson wrote again in *Marks*, quoting his concurrence and dissent in *Diversicare*, noting that a reasonable construction of "safety" is to give the term its "common meaning," which could therefore encompass premises liability claims. *Id*. at 674 (Jefferson, C.J., concurring and dissenting, joined by Justices Green, Guzman and Lehrmann).

We agree with West Oaks that Williams' claims are indeed for departures from accepted standards of safety. We conclude that the safety component of HCLCs need not be directly related to the provision of health care and that Williams' claims against West Oaks implicate this prong of HCLCs.

E. Relationship with the Texas Workers' Compensation Act

Williams also contends that interpreting the TMLA to encompass his claims will conflict with the procedural and substantive litigation rights granted to employee plaintiffs under the TWCA. *See* TEX. LAB. CODE §§ 406.001 *et seq*. He argues that his personal injury claims against his employer should not be characterized as HCLCs because the Legislature did not intend for employee claims against a health care provider employer to fall under the rubric of the Act. Williams also contends that an employee's personal injury claim against his employer would not have constituted a medical malpractice claim prior to the enactment of the medical liability statutes in 1977.

[8] Justices Hecht and Wainwright joined Justice Johnson's concurrence in *Marks,* except for the discussion of "safety." 319. S.W.3d at 667.

We see no conflict between the TMLA and the TWCA, whether the claim at issue is asserted against an employer subscribing to workers' compensation insurance or, as here, against a nonsubscriber. The TWCA is unique in permitting private Texas employers to elect to subscribe to workers' compensation insurance. *Id*. § 406.002(a); *Lawrence v. CBD Servs., Inc.*, 44 S.W.3d 544, 552 (Tex. 2001); *see also Casados*, 358 S.W.3d at 241. If they so elect, and their employees do not opt out of the workers' compensation coverage, then their employees are generally precluded from filing suit against them and must instead pursue their claims through an administrative agency against the employer's insurance carrier for benefits provided for in the TWCA. *See* TEX. LAB. CODE § 406.031(a) (noting that an employer's insurance carrier is liable for compensation of an employee's injury if the employee is subject to the Act and the injury arises out of the course and scope of the employment). But employees need not prove the employer's negligence for workers' compensation recovery, just that they were injured in the course and scope of employment. *See id.* ("An insurance carrier is liable for compensation for an employee's injury without regard to fault or negligence . . . ."); *id.* § 406.002(b) (stating that a subscribing employer is subject to the TWCA). As part of the legislated policy trade-off underlying the workers' compensation system, employees are also limited in their recovery to indemnity and medical expenses, absent intentional conduct. *See id.* § 408.001(a) ("Recovery of workers' compensation benefits is the exclusive remedy of an employee covered by workers' compensation insurance coverage . . . ."); *but see id*. § 408.001(b) (allowing recovery of exemplary damages for death caused by an intentional act or omission or the employer's gross negligence).

However, if an employer forgoes workers' compensation coverage, and is a nonsubscriber to the workers' compensation system, it is subject to suits at common law for damages. With the

exception of certain employer defenses abrogated by the statute, a suit by an employee of a nonsubscribing employer is largely outside the limitations imposed by the TWCA. *See id.* § 406.033(a), (d) (discussing limited defenses and employee burden of proof in establishing negligence). Employees of a nonsubscriber, injured on the job, must prove the elements of a common law negligence claim, absent intentional misconduct. *Id*. § 406.033(d). An employee may also elect to waive workers' compensation coverage and "retain the common-law right of action to recover damages for personal injuries or death" if certain notification requirements are met. *Id*. § 406.034(a), (b).

Thus, the workers' compensation construct contemplates two systems, one in which covered employees may recover relatively quickly and without litigation from subscribing employers and the other in which nonsubscribing employers, or the employers of employees who have opted not to accept workers' compensation coverage, are subject to suit by injured employees to recover for their on-the-job injuries. "In providing the worker a form of prompt remuneration for loss of earning capacity, the statutory [workers' compensation] scheme is in lieu of common law liability based on negligence." *Paradissis v. Royal Indem. Co.*, 507 S.W.2d 526, 529 (Tex. 1974); *see also Reed Tool Co. v. Copelin*, 689 S.W.2d 404, 407 (Tex. 1985) ("The system balances the advantage to employers of immunity from negligence and potentially larger recovery in common law actions against the advantage to employees of relatively swift and certain compensation without proof of fault.").

Just as the workers' compensation system treats employees of subscribing versus nonsubscribing employees differently, the treatment of those two differently situated employees under the TMLA for on-the-job injuries is also distinct. The employee of a subscriber that is a health care provider must pursue an administrative remedy under the TWCA for on-the-job injuries.

However, the employee of a nonsubscribing employer that is a health care provider must file suit against the nonsubscriber and follow the rules that govern that suit. In this case, the governing rules include the TMLA's requirements for a claimant suing a health care provider. Other proceedings to recover against nonsubscribing employers would similarly be governed by applicable statutes and rules, e.g., proof of negligence and causation, notice requirements under the Texas Tort Claims Act, or the common pleading and service requirements in the Texas Rules of Civil Procedure for all lawsuits.

Williams invites us to read into the TMLA an exception for claimants happening to be employees of nonsubscriber health care provider employers who sue their employers for claims that come under the TMLA umbrella. Williams' case is against a nonsubscriber, outside of the workers' compensation system, yet he implores the Court to except him from the TMLA's requirements without any express statutory exception. He seeks a common law exemption from the TMLA's mandate that we are not willing to create.

As explained, the TWCA and the TMLA do not conflict in this case. But even if they did, the Legislature has already designated the victor—the TMLA would prevail. Section 74.002(a) of the TMLA states:

> In 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 a conflict.

TEX. CIV. PRAC. & REM. CODE § 74.002(a). This provision was added as part of the 2003 amendments and replaced an earlier, more cabined conflicts provision. *See* TEX. REV. CIV. STAT. art. 4590i, § 11.05 (repealed) (entitled "Subchapter's Application Prevails Over Certain Other Laws" and stating that "[t]he provisions of this subchapter shall apply notwithstanding the provisions contained in Article 4671, Revised Civil Statutes of Texas, 1925, as amended, and the provisions

of Article 5525, Revised Civil Statutes of Texas, 1925, as amended" (pertaining to injuries resulting in death and survival of cause of action, respectively)).[9]

Here, Williams must establish the medical negligence of West Oaks to recover under the TMLA. The statute requires expert reports to support his claims.

III. Response to Dissent

At base, the dissent's position is that, notwithstanding the Legislature's substitution of the term "claimant" for "patient" in the TMLA's HCLC definition, HCLCs are only those in which the defendant has a patient-physician or "patient-health-care-provider" relationship with the plaintiff. In spite of the Act's words, the dissent proffers that the Court strays from the language of the Act and undermines its purpose. *See* __ S.W.3d at __ (Lehrmann, J., dissenting). The chart below vividly illustrates the Legislature's broad intention and refutes the dissent's position.

TEX. REV. CIV. STAT. art. 4590i, § 1.03(a)(4) (repealed 2003) (emphases added)	TEX. CIV. PRAC. & REM. CODE § 74.001(a)(13) (amended 2003) (emphases added)
"Health care liability claim" means a cause of action against a health care provider or physician for treatment, lack of treatment, or other claimed departure from accepted standards of medical care or health care or safety which proximately results in injury to or death <u>of the patient</u>, whether the <u>patient's claim or cause of action</u> sounds in tort or contract.	"Health care liability claim" means 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 <u>of a claimant</u>, whether the <u>claimant's claim or cause of action</u> sounds in tort or contract.

As explained in Parts II.B and C above, in 2003 the Legislature modified the scope of HCLCs when it deleted "patient" and inserted the broader term "claimant" in the definition.

[9] Articles 4671 and 5525 were both repealed prior to the 2003 amendments as part of the Legislature's 1985 adoption of the Texas Civil Practice and Remedies Code. TEX. REV. CIV. STAT. arts. 4671 and 5525, repealed by Act of June 16, 1985, 69th Leg., R.S., ch. 959, § 9(1), 1985 Tex. Gen. Laws 3242, 3322.

Compare TEX. CIV. PRAC. & REM. CODE § 74.001(a)(13), *with* TEX. REV. CIV. STAT. art. 4590i, § 1.03(a)(4) (repealed 2003). A claimant need not be the patient in all HCLCs.

As discussed above, two of the different types of HCLCs have specific definitions. The "medical care" and "health care" definitions both refer to services rendered for, to, or on behalf of a *patient* during the *patient's* care,[10] treatment, or confinement. TEX. CIV. PRAC. & REM. CODE § 74.001(a)(10), (a)(19); *see id.* at § 74.001(a)(13). Although HCLCs, as defined, include causes of action against health care providers brought by "claimants," the specific incorporation of the patient relationship for health care and medical care claims governs the HCLC for departures from accepted standards of medical care and health care. *See Jackson*, 351 S.W.3d at 297 (holding that specific statutory provisions override general provisions). However, that limitation does not apply to claims of safety, which is not defined with reference to a patient.[11] TEX. CIV. PRAC. & REM. CODE § 74.001(a)(13). Contending that only patients' claims may be considered HCLCs, the dissent argues, in essence, that the 2003 amendment is a nullity and seeks to have the Court rewrite section 74.001(a)(13). We decline to do so.

This is a statutory construction case. Our role "is to determine and give effect to the Legislature's [expressed] intent." *McIntyre*, 109 S.W.3d at 745. Such cases may offer the temptation to shoehorn a desired legislative result. But the Legislature changed "patient" to "claimant," and "claimant" is broader than "patient." Aside from claims alleging negligent medical care or health care, a claim need not involve a patient-physician relationship for it to be an HCLC.

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[10] There is a slight variance between the definitions for "health care" and "medical care." The "health care" definition features the word "medical" between the words "patient's" and "care." The "medical care" definition does not feature this word. TEX. CIV. PRAC. & REM. CODE § 74.001(a)(10), (a)(19).

[11] The scope of claims for "professional or administrative services directly related to health care" in the HCLC definition is not at issue in this case.

The dissent argues several other points which we address briefly. The dissent contends that other provisions of the TMLA should trump the definition of HCLCs.

(1) *Notice of suit and medical records release provisions.* The dissent similarly notes that inclusion of non-patients as claimants would render the notice of suit to health care providers, and accompanying medical-records releases, to health care providers, questionable. __ S.W.3d at __ (Lehrmann, J., dissenting) (citing TEX. CIV. PRAC. & REM. CODE § 74.051, .052). The Act requires "any person" asserting an HCLC to provide notice to the defendant physician or health care provider. TEX. CIV. PRAC. & REM. CODE § 74.051(a). This notice must be accompanied by the medical-records release form detailed in section 74.052. *Id*. § 74.052; *Jose Carreras, M.D., P.A., v. Marroquin*, 339 S.W.3d 68, 73 (Tex. 2011). Further, all parties are entitled to "complete and unaltered copies of the patient's medical records." TEX. CIV. PRAC. & REM. CODE §74.051(d). The form of notice provides a release including the name of the "patient." *Id.* § 74.052(c)(A), (B). As the dissent correctly observes, the Legislature's purpose for the notice and disclosure requirements was to encourage the parties to negotiate and settle disputes prior to suit. ___ S.W.3d at __ (Lehrmann, J., dissenting); *Carreras*, 339 S.W.3d at 73 (citing *Garcia v. Gomez*, 319 S.W.3d 638, 643 (Tex. 2010)). However, nothing in the language of the notice and disclosure provisions or in their purpose of encouraging pre-suit negotiation and settlement indicates a legislative intent that in all cases a claimant must be a patient or her representative.

The dissent contends that the parties' right to medical records cannot be applied against a third-party patient, such as Vidaurre. Specifically, the dissent points out that medical-privacy laws may prevent the parties from compelling a person such as Vidaurre, who is not a party to this case pursuing a claim under the TMLA, from supplying his medical records. __ S.W.3d at __ (Lehrmann,

J., dissenting). JUSTICE LEHRMANN's point is well taken, but not in this case. Williams is the claimant in this case and these requirements should be applied to him. For purposes of his own medical records, Williams would be the "patient" referenced in the authorization form. *See* TEX. CIV. PRAC. & REM. CODE § 74.052(c)(A). In alignment with the broadly defined "claimant," the notice provision makes clear at the outset that it applies to "any person" asserting an HCLC, as opposed to a "patient" or representative. *Id*. § 74.001(a)(2), .051(a). In turn, the disclosure requirements allow not only for the release of records of a patient-plaintiff, but also the pre- and post-injury records of non-patient plaintiffs seeking recovery for her post-injury damages. *See id.* § 74.052 (predicating the disclosure requirements on the applicability of section 74.051(a)). Such records would bear directly in assessing the extent of damages and would streamline settlement negotiations, regardless of whether the claimant was a patient of the health care provider being sued.

(2) *Expert report provisions.* The dissent similarly asserts that the Act's definition of "expert report" and discussion of expert qualifications means that HCLCs must be based on a patient-physician relationship because those provisions contain references to departures from accepted standards by physicians or health care providers and knowledge of accepted standards for diagnosing, caring, or treating the illness, injury, or condition at issue in the claim. __ S.W.3d at __ (Lehrmann, J., dissenting) (discussing TEX. CIV. PRAC. & REM. CODE § 74.351(r)(6), .401(a)(2), .402(a)(2)). The fact that experts submitting reports have knowledge of the alleged standards at issue does not logically lead to a conclusion that only a patient's suit against a health care provider can constitute an HCLC, especially when such a conclusion conflicts with the Legislature's substitution of "claimant" for "patient" in the TMLA's definition of HCLCs. Similarly, the dissent's point that the "expert report" definition calls for a discussion of the manner in which the care rendered by the

physician or health care provider failed to meet standards does not lead to the conclusion that only the patient at the receiving end of that care can be a "claimant" under the Act. *Id*. § 74.351(r)(6); *see also id*. § 74.001(a)(2). An expert report detailing the departure from standards would still be relevant in a case, such as this, where a non-patient alleges that the health care provider's deviations from accepted standards led to his injury. As explained, expert testimony is necessary to specify the departure from accepted standards leading to the injury. *Id*. § 74.351(r)(6). The Act's requirement that an expert be qualified to give an opinion on the standards at issue does not, as the dissent contends, indicate that the condition at issue must be sustained by a patient. The expert report requirement is intended to effectuate the TMLA's objective that only meritorious causes of action proceed, not define the scope of HCLCs. *See Samlowski v. Wooten*, 332 S.W.3d 404, 416 (Tex. 2011) (Wainwright, J., dissenting in part).

(3) *Jury instructions*. The dissent observes that one of the jury instructions required by the Act in jury trials includes a caution that a finding of negligence may not be based solely on evidence of a "bad result" to the claimant, but a bad result may be considered in determining negligence. __ S.W.3d at __ (Lehrmann, J., dissenting) (citing TEX. CIV. PRAC. & REM. CODE § 74.303(e)(2)). Drifting again from the statutory text directly at issue, the dissent argues that this instruction "only makes sense" in the context of a patient dissatisfied with medical or health care services delivered by a health care provider. We fail to see the logic in this argument. "Bad result" is not defined, making it difficult to limit its meaning exclusively to health care or medical care, as the dissent would do. The Act indicates that a "bad result" is merely a fact that may be considered in a negligence finding. To conclude from this provision that the Legislature intended to include only patients under the Act,

when it expressly broadened the HCLC definition, is not logical and would render the revisions to the more relevant HCLC definition meaningless.

(4) *Re-interpretation of* Diversicare. Our opinion today is consistent with our earlier construction of the HCLC definition in *Diversicare*. 185 S.W.3d at 847 (noting that "we examine the underlying nature of the claim and are not bound by the form of the pleading"). The dissent contends that we stray from *Diversicare* and its progeny by centering our analysis on the nature of the claims at issue. __ S.W.3d at __ (Lehrmann, J., dissenting). The dissent erroneously argues that *Diversicare* requires courts to place equivalent emphasis on the relationship between the parties. Specifically, the dissent contends that in *Diversicare* we attached "equal" importance to the "claimant's status as a patient" at a health care facility. *Id.*; *see Diversicare*, 185 S.W.3d at 850. However, in *Diversicare* we discussed that relationship, not because it was determinative in the scope of HCLCs generally, but because those were the facts of the case we were deciding. *Diversicare*, 185 S.W.3d at 850. The standards for the conduct at issue, rather than the form of pleadings or identity of parties, are paramount in classifying HCLCs. *See Yamada v. Friend*, 335 S.W.3d 192, 196 (Tex. 2010) ("Artful pleading does not alter [the nature of the underlying claim]."); *Omaha Healthcare*, 344 S.W.3d at 394 (similar).

(5) *Importance of the 2003 amendments*. Incredibly, the dissent contends that the Court places "undue importance" on the Legislature's modification of the HCLC definition in 2003, substituting the broader term "claimant" for "patient" in identifying who may bring a claim. __ S.W.3d at __ (Lehrmann, J., dissenting); TEX. CIV. PRAC. & REM. CODE § 74.001(a)(13). The dissent would interpret that modification as referring to the estate or direct representatives of a patient-plaintiff, parties that have always been permitted to make a claim, even prior to the 2003

amendment. *See* __ S.W.3d at __ (Lehrmann, J., dissenting); *see also* TEX. REV. CIV. STAT. art. 4590i, § 1.03(a)(9), 4.01 (repealed 2003). First, focusing on the language of the statutory definition at the center of this case does not give it "undue importance." Second, the dissent's construction is contrary to established rules of statutory construction. As we note in Parts II. B and C, "claimant" is defined as "a person, including a decedent's estate, seeking or who has sought recovery of damages in a health care liability claim." TEX. CIV. PRAC. & REM. CODE § 74.001(a)(2). Thus, aside from claims involving health care or medical care and claims based on treatment, a direct health-care-provider-to-patient relationship is not required for claims to constitute HCLCs.

(6) *Construction of "safety."* The dissent argues that this issue has not been properly raised. __ S.W.3d at __ (Lehrmann, J., dissenting). However, West Oaks presents the safety-related nature of its claims in its briefing, and the court of appeals analyzed Williams' claims as safety claims. 322 S.W.3d 349, 352. Contrary to the dissent's assertions, our construction of "safety" is based not only on established canons of textual construction, but also on our interpretation of safety based on its commonly understood meaning. *See Diversicare*, 185 S.W.3d at 855. Further, following principles of statutory construction, our construction of "safety" prevents the term from becoming meaningless surplusage, subsumed into claims based on departures from accepted standards of "health care." *See* TEX. CIV. PRAC. & REM. CODE § 74.001(a)(13).

(7) *Balance between the TMLA and TWCA*. Contending that our assessment of Williams' claims as HCLCs "forc[es]" them into the HCLC "mold" and "significantly disrupts the delicate balance between employee and employer interests" motivating the TWCA, the dissent argues that our reasoning alters the incentive structure in the TWCA intended to penalize nonsubscribing employers. __ S.W.3d at __ (Lehrmann, J., dissenting). However, contrary to the implication of the

dissent, the TWCA does not create an especially punitive litigation regime for nonsubscribing employers. Rather, as noted above, nonsubscribing employers are divested of several common law defenses. *See* TEX. LAB. CODE § 406.033(a); *see also Kroger Co. v. Keng*, 23 S.W.3d 347, 349–50 (Tex. 2000) (describing the limitation of defenses of nonsubscribers as a "penalty" meant as an incentive for employers to subscribe to workers' compensation insurance). However, the plaintiff must prove the negligence of the nonsubscribing employer or the employer's agent. TEX. LAB. CODE § 406.033(d). As part of the negligence claim against a health care provider employer, an employee asserting a claim that is otherwise an HCLC must adhere to the expert report requirements of the TMLA. The dissent also argues that our reasoning will discourage small claims and implies that fewer employers will subscribe to workers' compensation insurance. __ S.W.3d at __ (Lehrmann, J., dissenting). However, because no information concerning workers' compensation policies is in the record before us, the dissent's concerns are speculative at best. As described above, while we see no conflict between the TMLA and TWCA, the Legislature signaled its intent that the TMLA should control over contradictory statutory provisions. *See* TEX. CIV. PRAC. & REM. CODE § 74.002(a).

(8) *Legislative purpose of the TMLA*. Noting that one of the stated purposes of the Act is to reduce the frequency and cost of medical malpractice claims, the dissent concludes that our holding will result in a larger number of total HCLC claims, contrary to the Legislature's purpose. __ S.W.3d at __ (Lehrmann, J., dissenting). Given the number of claims filed against health care providers, many will be HCLCs and some may not be. The dissent would shift the balance so that many more are not HCLCs, which is contrary to the Legislature's change of "patient" to "claimant." We refuse to trump explicit statutory language with the dissent's view of the TMLA's purpose.

Finally, our conclusion that the Act covers claims by non-patients against health care providers is not new territory. The Fifth Court of Appeals has concluded that a non-patient hospital visitor's personal injury claim resulting from an on-premises patient assault was an HCLC. *Ammons*, 266 S.W.3d at 64. The court, citing *Diversicare*, concluded that the supervision and restraint of patients was at issue and constituted health care under the facts of that case. *Id*. The *Ammons* court correctly reasoned that no language in the Act required that a "claimant" also necessarily be a "patient." *Id.* at 60–62.

IV. Conclusion

Williams claims that West Oaks failed to properly train, warn and supervise him to work with potentially violent psychiatric patients and, as a result, failed to provide a safe workplace. In 2003, the Legislature broadened the definition of health care liability claims under the Texas Medical Liability Act by adding new types of claims under the HCLC definition and expanding the scope of persons included within the Act's purview. *Compare* TEX. CIV. PRAC. & REM. CODE § 74.001(a)(13), *with* TEX. REV. CIV. STAT. art. 4590i, § 1.03(a)(4) (repealed 2003). We conclude that Williams' claims against West Oaks are properly characterized as health care liability claims based on claimed departures from accepted standards of health care and safety. Williams failed to provide an expert report in accordance with section 74.351(a). TEX. CIV. PRAC. & REM. CODE § 74.351(a). We therefore reverse the judgment of the court of appeals affirming the trial court's order denying West Oaks' motion to dismiss all of Williams' claims. Because West Oaks requested its attorney's fees and costs in the trial court pursuant to Texas Civil Practice and Remedies Code section 74.351(b)(1), we remand to that court with instructions to dismiss Williams' claims against West Oaks and consider West Oaks' request for attorney's fees and costs.

_____

Dale Wainwright
Justice

OPINION DELIVERED: June 29, 2012

IN THE SUPREME COURT OF TEXAS

NO. 10-0603

TEXAS WEST OAKS HOSPITAL, LP AND TEXAS HOSPITAL HOLDINGS, LLC, PETITIONERS,

v.

FREDERICK WILLIAMS, RESPONDENT

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

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

"A whole new world [of health care liability claims], hinted by opinions in the last few years, is here." *In re McAllen Med. Ctr., Inc.*, 275 S.W.3d 458, 470 (Tex. 2008) (Wainwright, J. dissenting). Interpreting a law designed to *reduce* the number of medical malpractice suits, the Court holds that an employee's claims against his employer for providing an unsafe workplace and inadequate training are health care liability claims. The Court's strained reading of the statute runs counter to express statutory language, the Legislature's stated purposes in enacting the current version of chapter 74, and common sense. Further, the Court's decision undermines the balance struck by the Legislature to encourage employers to become subscribers under the Workers Compensation Act. For these reasons, I am compelled to respectfully express my dissent.

I. The Medical Liability Act Contemplates a Patient/Physician Relationship Between the Parties

A. The Act's plain language indicates that it applies to claims alleging a breach of a health care provider's duty to a patient.

Our primary objective in construing a statute "is to ascertain and give effect to the Legislature's intent by first looking at the statute's plain and common meaning." *Tex. Natural Res. Conservation Comm'n v. Lakeshore Util. Co.*, 164 S.W.3d 368, 378 (Tex. 2005). We divine that intent by reading the statute as a whole, and we interpret the legislation to give effect to the entire act. *Id.* (citing *City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 25 (Tex. 2003)). Furthermore, we may look to the statutory context to determine a term's meaning. *City of Boerne*, 111 S.W.3d at 25. All of those tools lead to the conclusion that Williams's claims are not health care liability claims.

Under the Medical Liability Act, § 74.001 *et seq.*, a health care liability claim 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). The Court concludes that Williams's suit against his employer for providing an unsafe workplace and inadequate training alleges health care liability claims, despite the lack of any physician-patient relationship between the health care provider and the claimant. ____ S.W.3d at ___. The Court first determines that Williams's claims are for a departure from health care standards because they "involve a patient-physician relationship." ____ S.W.3d at ___. Although that determination is more than enough to decide the case, the Court then

reaches out to further expand the Act's scope by deciding that a claim under the "safety" prong of the health care liability claim definition need not be directly related to health care — even though Williams's claim *is*, in the Court's view — directly related to health care. Both conclusions are inconsistent with plain statutory language and sound statutory construction. The Act is replete with provisions indicating that a health care liability claim must be founded on a health care provider's alleged breach of a professional duty towards a patient. *See Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 851, 854 (Tex. 2005). The Court's interpretation renders some of those provisions meaningless or nonsensical.

1. Williams's claims are not "health care" claims, as the Court concludes.

The Act defines "health care" 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*." TEX. CIV. PRAC. & REM. CODE § 74.001(a)(10) (emphasis added). Plainly, the Legislature contemplated that a health care liability claim based upon a departure from standards of health care would stem from medical treatment directed toward a particular patient — "the patient" whose care, treatment, or confinement is the subject of the lawsuit.

Based largely on the Legislature's use of the term "claimant" rather than "patient" in the health care liability claim definition, the Court determines that a claim falls under the health care prong of the definition even absent a physician-patient relationship so long as a physician-patient relationship is "involved." ____ S.W.3d at ____. As set out in section I.B. below, the Court's analysis of the significance of the Legislature's use of "claimant" in the definition flows from an

erroneous premise and is deeply flawed; the Court's reliance on the change ignores the fact that the Legislature used the term throughout the Act's predecessor, including in its statement of legislative purpose. More importantly, the Legislature did not say that a health care claim must "involve" a patient. Indeed, the word is found nowhere in the definition of health care or health care liability claim. Instead, health care claims arise from "act[s] or treatment furnished or that should have been furnished for, to, or on behalf of a patient during the patient's medical care, treatment, or confinement." TEX. CIV. PRAC. & REM. CODE § 74.001(a)(10) (emphasis added). Williams's claims allege that West Oaks failed to provide *him*, not the patient, adequate training and a safe work place.

Section 74.051 of the Act highlights the Court's error in concluding that the mere peripheral involvement of a patient transforms an ordinary negligence claim into a health care claim. That section requires health care liability claimants to provide notice by certified mail to any health care provider against whom the claim is asserted sixty days before the claim is filed. TEX. CIV. PRAC. & REM. CODE § 74.051(a). The notice must be accompanied by a form authorizing the release of the medical records of *"the patient*" whose treatment is the subject of the claim. *Id.* §§ 74.051(d)("All parties shall be entitled to obtain complete and unaltered copies of the patient's medical records . . . ."); 74.052(c)A, B. Under the Court's reading of the statute, Williams would be required to authorize or obtain authorization for the release of Vidaurre's medical records to pursue his suit against his employer. Obviously, medical privacy laws prevent Williams from authorizing the release of Vidaurre's medical records. 45 C.F.R. § 164.502(f) (providing that Health Insurance Privacy and Portability Act restrictions apply to deceased individuals). While the Legislature sought to reduce frivolous claims against health care providers, it sought to do so without unduly restricting

claims with merit. It is inconceivable that the Legislature intended to require health care claimants with meritorious claims to be blocked by the refusal of third parties (the patients "involved") to authorize release of their medical records.

Moreover, even if Williams were somehow able to obtain authorization from Vidaurre's estate, the records would not serve the purpose sections 74.051 and 74.052 were designed to serve: to "'provide[ ] an opportunity for health care providers to investigate claims and possibly settle those with merit at an early stage.'" *Jose Carreras, M.D., P.A. v. Marroquin*, 339 S.W.3d 68, 73 (Tex. 2011) (quoting *In re Collins,* 286 S.W.3d 911, 916–17 (Tex. 2009)). Vidaurre's psychiatric diagnosis and violent tendencies are undisputed, and the records would have no bearing on the merits of Williams's claims against West Oaks for allegedly providing an unsafe workplace and inadequate training.

The Court discounts the import of these sections, finding no language to suggest that employee/employer disputes like this case are not health care liability claims. But section 74.052, which describes the statutory authorization form that must accompany the statutory notice provides:

> (c) The medical authorization required by this section shall be in the following form[]:
>
> (A) I, _____ (name of *patient* [*not* claimant] or authorized representative), hereby authorize _____ (name of physician or other health care provider to whom the notice of health care claim is directed) to obtain and disclose . . . the protected health information described below . . . .

Other provisions of the Act, which provide the relevant statutory context, *see City of Boerne*, 111 S.W.3d at 25, shore up the conclusion that health care liability claims arise from a health care provider's breach of a duty toward a particular patient. I examine several below.

2. The Court's interpretation is inconsistent with provisions governing the expert reports and the qualifications of experts.

The Court reverses the court of appeals' judgment and remands to the trial court, instructing it to dismiss because Williams failed to comply with the expert report requirement of section 74.351. But the very definition of "expert report" belies the Court's conclusion that Williams's allegations state claims for health care liability. An "expert report" is defined as

> 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)(emphasis added). The emphasized language clearly contemplates that the defendant health care provider has delivered health care services to a patient, who has allegedly been injured by the provider's departure from applicable standards. The Court minimizes the definition's significance by noting that "[t]he fact that experts submitting reports have knowledge of the alleged standards deviated from does not logically lead to a conclusion that only a patient's suit against a health care provider can constitute an HCLC . . . ." ___ S.W.3d at ___. That suggestion, however, overlooks the provision's reference to the health care provider's rendition of care.

The sections of the Act governing the qualifications of experts who may author reports similarly show that a health care liability claim arises only from a patient/health care provider relationship. Section 74.041 establishes the necessary qualifications for an expert in a suit against a physician. Among other qualifications, the expert must "ha[ve] knowledge of accepted standards

of medical care for the *diagnosis, care, or treatment of the illness, injury, or condition involved in the claim*." TEX. CIV. PRAC. & REM. CODE § 74.401(a)(2)(emphasis added). The definitions thus contemplates that the lawsuit will center on a physician's treatment of a patient's illness, injury, or condition, not on the adequacy of a workplace or the training provided to an employee.

3. The jury instruction mandated by the Legislature contemplates that the claim arises from a health care provider's treatment of a patient.

In section 74.303(e) of the Act, the Legislature mandated the inclusion of two express jury instructions "[i]n any action on a health care liability claim that is tried by a jury in any court in this state." The second of those is:

> A finding of negligence may not be based solely on *evidence of a bad result* to the claimant in question, but *a bad result may be considered* by you, along with other evidence, in determining the issue of negligence. You are the sole judges of the weight, if any, to be given to this kind of evidence.

Id. § 74.303(e)(2). This instruction reflects the long-recognized principle that a physician who exercises ordinary care, within his school or specialty, is not liable to a patient for a bad outcome. *See Bowles v. Bourdon*, 219 S.W.2d 779, 782 (Tex. 1949). Clearly, the instruction only makes sense where a patient or the patient's proxy is dissatisfied by health care services delivered by a health care provider. In the context of the present case, in which the health care provider acted as an employer, the instruction becomes nonsensical.

B. The Court's Interpretation Is Contrary to Our Prior Interpretations and Attaches Undue Importance to the Alteration of the Definition of "Health Care Liability Claim."

Noting that "our focus . . . is not the status of the claimant," ___ S.W.3d at ___, the Court rejects out of hand Williams's contention that the lack of a patient-physician relationship between him

and West Oaks places his suit outside of the Act. It is true, as the Court asserts, that in *Diversicare* we placed great importance upon the essence of the claims, "the alleged wrongful conduct and the duties allegedly breached." 185 S.W.3d at 851. But in rejecting Rubio's contention that her claim for a sexual assault by another patient should be treated as an ordinary premises liability claim, we attached equal importance to the claimant's status as a patient between the parties: "There is an important distinction in the relationship between premises owners and invitees on one hand and health care facilities and their patients on the other. The latter involves health care." *Id.* at 850. And we emphasized that, were we to agree with Rubio's position, "our decision would have the effect of lowering the standard from professional to ordinary care." *Id.* at 854. The presence of a doctor-patient relationship was undeniably important to our determination that Rubio's allegations amounted to health care liability claims.

The Court attaches much significance to the Legislature's alteration in 2003 of the definition of "health care liability claim." The Act's predecessor, the Medical Liability and Insurance Improvement Act, former article 4590i, defined the term as

> a cause of action against a health care provider or physician for treatment, lack of treatment, or other claimed departure from accepted standards of medical care or health care or safety which proximately results in injury or death of the *patient*, whether the *patient*'s claim or cause of action sounds in tort or contract.

Act of May 30, 1977, 65th Leg., R.S., ch. 817, § 1.03(a)(4), 1997 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 (emphasis added). In 2003, the Legislature replaced the word "patient" with the term "claimant." TEX. CIV. PRAC. & REM. CODE § 74.001(13). Without regard to the abundant indicia to the contrary

throughout the Act, the Court concludes that this change contemplated health care liability claims that do not arise from the physician-patient relationship.

While claimant is a new term in the definition of health care liability claim, the word was used throughout the MLIIA before the Legislature made that change. In fact, the Legislature used the term in describing the Act's very purpose: to alleviate a perceived health care crisis "in a manner that will not unduly restrict a *claimant's* rights any more than necessary to deal with the crisis." Act of May 30, 1977, 65th Leg., R.S., ch. 817, § 1.02(13)(3), 1977 Tex. Gen. Laws 2039, 2040, *repealed by* Act of June 2, 2003, 78th Leg., R.S., ch 204, § 10.09 2003 Tex. Gen. Laws 847, 884 The term was also used and defined in section 13 of article 4590i. That section, the precursor of sections 74.351 and 74.352 of the current act, among other things, required a claimant in a health care liability claim to file an expert report within 180 days. Act of May 1, 1995, 74th Leg., R.S., ch. 971, § 1, sec. 13.01(d), (e), 1995 Tex. Gen Laws 985, 985-986, *repealed by* Act of June 2, 2003, 78th Leg., R.S., ch 204, § 10.09, 2003 Tex. Gen. Laws 847, 884. "Claimant" was defined as

> a party who files a pleading asserting a claim. All plaintiffs claiming to have sustained damages as the result of the bodily injury or death of a single person are considered to be a single claimant.

Act of May 1, 1995, 74th Leg., R.S., ch. 971, § 1, sec. 13.01(d), (e), 1995 Tex. Gen Laws 985, 985-986, *repealed by* Act of June 2, 2003, 78th Leg., R.S., ch 204, § 10.09 2003 Tex. Gen. Laws 847, 884. Accordingly, even though "health care liability claim" referred to injury to or the death of a patient, the statute contemplated that others could pursue claims under article 4590i. And what parties could claim to have damages as the result of the injury or death of a patient but spouses or relatives with their own claims for loss of support or consortium or mental anguish, or others acting in a

representative capacity, such as an estate or next friend? In light of that history, it seems fairly obvious that the Legislature broadened the definition of "health care liability claim" in 2003 to harmonize the definition with its previous recognition that parties other than patients might suffer injuries as the result of a health care provider's departure from accepted standards in rendering health care services to a patient.[1]

II. Safety Under the Act

Although its holding that Williams has asserted a claim for breach of a health care standard is dispositive, the Court reaches out to decide an issue that isn't even presented: whether a claim for safety under the Act must be directly related to health care. That issue isn't presented because, at least in the Court's view, Williams's claim *is* directly related to health care. West Oaks itself argued that Willams's claims "are inextricably interwoven with the rendition of health care services." Even if the question were properly before us, though, I would reach a different conclusion than the Court. I would hold that a claim for safety under the Health Care Liability Act must arise from a breach of a health care provider's duty to adequately ensure a patient's safety in providing health care services.

The Court's conclusion that a health care liability claim for breach of a safety standard depends entirely on the last antecedent doctrine, ___ S.W.3d at ____, or the notion that "'[m]odifiers should come, if possible, next to the words they modify.'" ___ S.W.3d at ___ (quoting William

[1] The Court also makes much of the Act's definition of "representative," a term used in the Act's medical records disclosure provision. TEX. CIV. PRAC. & REM. CODE § 74.001(a)(25), .052. "Representative" is defined as the "agent of the patient *or* claimant." The Court concludes this "indicat[es] that patient and claimant do not necessarily refer to the same category of persons." I agree, but my conclusion that "claimant" refers to parties with claims derived from a health care provider's breach of a duty toward a particular patient, such as guardians, executors, survivors, and next friends, is far more consistent with other provisions of the Act than the Court's.

Strunk, Jr. & E.B. White, THE ELEMENTS OF STYLE R. 20 (4th ed. 2000)). In the Court's view, then, the Legislature would have had to frame the definition 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 . . . safety *directly related to health care* 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. Neither Strunk and White's instructions nor the last antecedent doctrine are so absolute as to require such redundancy. *See City of Dallas v. Stewart,* 361 S.W.3d 562, 571 n.14 (Tex. 2012). Instead, we should read the word in harmony with the other provisions I have discussed, and in conjunction with the words surrounding "safety," which all clearly implicate claims arising from a health care provider's delivery of medical care to a patient. *See City of Boerne*, 111 S.W.3d at 29 (citing *Cty. of Harris v. Eaton*, 573 S.W.2d 177, 179 (Tex. 1978)).

The Court's reading of the term "safety" — "untouched by danger, not exposed to danger; secure from danger, harm or loss" — is so broad that almost any claim against a health care provider can now be deemed a health care liability claim. If a hospital cook leaves an unlit gas burner on and causes an explosion, claims for any resulting injuries might be health care liability claims. If a nurse's deranged spouse arrives at a clinic and shoots her, her claim that the facility provided inadequate security will also fall under the statute. Surely the Legislature did not intend to make professional liability insurers responsible for such claims in order to solve an insurance availability crisis.

III. The Court's Holding Undermines the Balance Struck by the Legislature in the Workers Compensation Act

I dissent also because, by forcing an employee's negligence suit against his employer for on-the-job injuries into the health-care-liability-claim mold, the Court significantly disrupts the delicate balance between employee and employer interests the Legislature sought to implement when it enacted the Texas Workers Compensation Act (TWCA). The TWCA permits an employee to bring a negligence action against a nonsubscriber like West Oaks. *See* TEX. LAB. CODE § 406.033. By making the common law defenses of assumption of the risk, negligence of a fellow employee, and contributory negligence unavailable to a nonsubscribing employer under the TWCA, *id.* at § 406.033(a), it is clear that the Legislature intended to "penalize[] nonsubscribers" and make it easier for their employees to recover. *Kroger Co. v. Keng*, 23 S.W.3d 347, 349, 352 (Tex. 2000) (noting that "[t]o encourage employers to obtain workers' compensation insurance, [the TWCA] penalizes nonsubscribers by precluding them from asserting certain common-law defenses in their employees' personal injury actions" and that the "Legislature intended that an employee's fault would neither defeat nor diminish his or her recovery"). Under the Court's holding, employees of nonsubscribing healthcare providers will encounter procedural hurdles, such as the Act's notice and expert report requirements, that the TWCA does not contemplate. *See* TEX. CIV. PRAC. & REM. CODE §§ 74.051, 74.351. Failure to comply with these special requirements can result in harsh consequences, including dismissal of a claim with prejudice and assessment of attorneys fees against the plaintiff. *Id.* § 74.351(b). Rather than the health care provider being penalized for not subscribing to workers' compensation insurance, the Court's decision increases the burden and cost of pursuing negligence claims against nonsubscribers for employees of health care institutions. This will likely discourage healthcare workers from bringing smaller claims.

More importantly, the Act places strict limits on damages that may be recovered from health care providers. TEX. CIV. PRAC. & REM CODE §§ 74.301–.303. By conferring the benefit of the Act's statutory damages cap on nonsubscribing health care providers, the Court gives health care provider nonsubscribers a benefit that is at odds with the measures the Legislature implemented to penalize employers who opt not to participate in the workers compensation system. "In enacting section 406.033 and its predecessors, the Legislature intended to delineate explicitly the structure of an employee's personal-injury action against his or her nonsubscribing employer." *Kroger v. Keng*, 23 S.W.3d at 350–351. Today's decision redraws that delineation.

IV. The Court's Holding Undermines the Legislature's Stated Purposes

In enacting chapter 74, the Legislature found that "the number of health care liability claims [had] increased since 1995 inordinately[,] caus[ing] a serious public problem in availability and affordability of adequate medical professional liability insurance." Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.11(a)(1), (4), 2003 Tex. Gen. Laws 847, 884. It adopted the Act to reduce the frequency and decrease the costs of those claims. *Id.* at § 10.11(b)(1), (2). By sweeping a whole new class of claims — negligence claims of employees of health care institutions — into chapter 74, the Court *increases* the number of health care liability claims and thwarts that purpose. Mystifyingly, the Court proclaims that its decision is "in harmony" with the Act's purposes because this new class of health care claimants will be required to file expert reports. __ S.W.3d at ___, n.5. To be sure, Williams's claim will be dismissed in the wake of today's decision — one claim will go away. But, in the future, employees in Williams's position will be forewarned that they must provide an expert

report and undoubtedly will do so. The upshot of the Court's decision is that medical professional liability insurers will be responsible for claims that normally would have fallen under a health care employer's workers compensation or comprehensive liability coverage.

The Court has previously declined to construe provisions of the Act in a way that would lead to absurd results. *Jose Carreras, M.D., P.A. v. Marroquin*, 339 S.W.3d 68, 72-73 (Tex. 2011). It should do so here.

V. Conclusion

The Court's conclusion that Williams's claim against his employer for providing inadequate training and an unsafe workplace is a health care liability claim is not only counterintuitive, it is inconsistent with the Act's express language and its underlying purposes. Furthermore, it alters the contours of employees' claims against nonsubscribing health care providers established in the Workers Compensation Act. For these reasons, I respectfully dissent.

_____

Debra H. Lehrmann
Justice

OPINION DELIVERED: June 29, 2012

IN THE SUPREME COURT OF TEXAS

NO. 10-0605

IN RE COMMITMENT OF MICHAEL BOHANNAN

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

Argued November 8, 2011

JUSTICE HECHT delivered the opinion of the Court.

We consider in this case what qualifications an expert must have to testify regarding whether a person is a sexually violent predator and therefore subject to civil commitment for outpatient treatment and supervision. Like the court of appeals,[1] though for different reasons, we conclude that the exclusion of expert testimony in this case requires a new trial.

I

A

The Texas Civil Commitment of Sexually Violent Predators Act of 1999 defines a sexually violent predator ("SVP") as "a repeat sexually violent offender [who] suffers from a behavioral abnormality that makes the person likely to engage in a predatory act of sexual violence."[2] The Act

[1] ___ S.W.3d ___ (Tex. App.–Beaumont 2010).

[2] TEX. HEALTH & SAFETY CODE § 841.003(a).

defines "behavioral abnormality" as "a congenital or acquired condition that, by affecting a person's emotional or volitional capacity, predisposes the person to commit a sexually violent offense, to the extent that the person becomes a menace to the health and safety of another person."[3] A person found to be an SVP in a civil court proceeding must be ordered committed to outpatient treatment and supervision.[4]

Before the State files suit, a person must be administratively determined to be an SVP.[5] The Act requires that determination to be informed by an expert's "clinical assessment based on testing for psychopathy, a clinical interview, and other appropriate assessments and techniques".[6] Once suit is filed, the Act gives both the State and the person the right to a further expert examination.[7] If the person is indigent, and the trial court determines that expert services are necessary, the court must appoint an expert and approve reasonable compensation to be paid by the State.[8]

The Act does not prescribe the qualifications for experts to testify whether a person has the behavioral abnormality required for an SVP. It does provide that "[a] person who suffers from a behavioral abnormality as determined under this chapter is not because of that abnormality a person

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[3] *Id.* § 841.002(2).

[4] *Id.* § 841.081(a).

[5] The determination must be made, at the recommendation of a multidisciplinary team, by either the Texas Department of Criminal Justice for an inmate, or by the Department of State Health Services for someone adjudged not guilty by reason of insanity. *Id.* §§ 841.021-.023.

[6] *Id.* § 841.023(a).

[7] *Id.* §§ 841.061(c), 841.145(a).

[8] *Id.* §§ 841.145(b)-(d), 841.146(c).

of unsound mind for purposes of Section 15-a, Article I, Texas Constitution."[9] Section 15-a provides in part that "[n]o person shall be committed as a person of unsound mind except on competent medical or psychiatric testimony."[10] Thus, in the Legislature's view, an expert used to assess whether a person is an SVP is not constitutionally required to be a physician.

The State must bring SVP commitment proceedings in "a Montgomery County district court other than a family district court".[11] There are seven district courts in Montgomery County.[12] One is required to give preference to family cases.[13] One other, the 435th District Court, is required to give preference to SVP commitment proceedings.[14] At present, most such proceedings are assigned to that court.

B

In September 1982, Michael Wayne Bohannan, then 26, married, and employed as a machinist, rode his bicycle past K.C.'s home several times and watched her inside through a window. One evening, he donned a ski mask and carrying a large knife, entered the home through the rear door, walked down the hallway past a room in which a child was sleeping, and entered

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[9] *Id*. § 841.1461; *see also id*. § 841.001 ("The legislature finds that a small but extremely dangerous group of sexually violent predators exists and that those predators have a behavioral abnormality that is not amenable to traditional mental illness treatment modalities . . . . The legislature further finds that treatment modalities for sexually violent predators are different from the traditional treatment modalities for persons appropriate for involuntary commitment under [the Texas Mental Health Code].").

[10] TEX. CONST. art. I, § 15-a.

[11] TEX. HEALTH & SAFETY CODE § 841.041(a).

[12] TEX. GOV'T CODE §§ 24.109, 24.110, 24.399, 24.461, 24.505, 24.562, and 24.579.

[13] *Id*. § 24.562.

[14] *Id*. § 24.579.

K.C.'s bedroom. She was lying on the bed, reading a newspaper. Bohannan forced her to perform oral and vaginal sex, then left. Looking back on it, Bohannan testified in this case that he thought he would get some satisfaction or self-fulfillment out of raping K.C., and in some way, he expected K.C., 27, to "like being raped".

Some three weeks later, Bohannan was driving around on his lunch break when he saw P.H., 27, enter her home. He stopped, put on his ski mask, picked up his knife, and walked through the front door. P.H. was with a group of children, whom Bohannan made her move to another room. He then took P.H. to her bedroom and forced her to perform oral and vaginal sex. He now recalls, as before, he thought he would get some satisfaction from raping P.H., "maybe . . . feel more of a man".

Bohannan was apprehended and in 1983 pleaded guilty to two counts of aggravated rape with a deadly weapon, and was sentenced to 25 years' imprisonment. Court papers suggest that he committed a third rape for which he was not charged, but Bohannan denies it.

In 1991, Bohannan was released on mandatory supervision. In April 1992, he was charged with attempting to kidnap a nine-year-old girl in a K-Mart, and in February 1993, he pleaded guilty, though he now denies he committed any crime. His mandatory supervision was revoked and he was returned to prison.

In 1998, Bohannan was again released on mandatory supervision, and in 2000 he moved to South Carolina to live with his mother. While there, he was convicted of exposing his genitals to an eight-year-old girl in a toy store and sentenced to three years' imprisonment. Bohannan denies that the allegations were true. In 2002, he was returned to prison in Texas.

In 2004, Bohannan was released on mandatory supervision a third time. But in 2006, his release was again revoked, this time for viewing child pornography on a computer in a county law library. He was enrolled in sex offender therapy at the time. Bohannan denies that the charges were true.

Bohannan testified that he now knows that the rapes were wrong and devastating to the lives affected.

C

After receiving from the Texas Department of Criminal Justice a psychologist's report that Bohannan is an SVP, the State petitioned for his commitment. The State designated two experts to testify at trial: Dr. Jack Randall Price, a board-certified forensic psychologist, and Dr. Michael R. Arambula, a board-certified forensic psychiatrist. Bohannan designated Dr. Anna Shursen, whose doctoral degree is in family sciences and family therapy. Shursen is licensed in Texas as a professional counselor[15] and as a sex offender treatment provider.[16]

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[15] *See* TEX. OCC. CODE § 503.302(a) ("A person qualifies for a license [as a professional counselor] if the person: (1) is at least 18 years old; (2) has a master's or doctoral degree in counseling or a related field; (3) has successfully completed a graduate degree at a regionally accredited institution of higher education and the number of graduate semester hours required by board rule, which may not be less than 48 hours and must include 300 clock hours of supervised practicum that: (A) is primarily counseling in nature; and (B) meets the specific academic course content and training standards established by the board; (4) has completed the number of supervised experience hours required by board rule, which may not be less than 3,000 hours working in a counseling setting that meets the requirements established by the board after the completion of the graduate program described by Subdivision (3); (5) except as provided by Subsection (b), passes the license examination and jurisprudence examination required by this chapter; (6) submits an application as required by the board, accompanied by the required application fee; and (7) meets any other requirement prescribed by the board.").

[16] To be licensed as a sex offender treatment provider, a person: must be licensed to practice in Texas as a physician, psychologist, counselor, or one of several other specified professionals; must have 1,000 hours of clinical experience in the areas of assessment and treatment of sex offenders within a seven-year period; and must have 40 hours of continuing education training within three years. *See* 22 Tex. Admin. Code § 810.3(c).

Trial in the case was set for January 16, 2009, in the 435th District Court. On December 15, 2008, a visiting judge in that court refused to allow Shursen to testify as an expert in another SVP commitment proceeding, *In re Dodson*. Though Shursen had testified a dozen times in other such cases, the judge stated on the record that she was "not qualified to present an opinion" on whether someone is an SVP. On December 24, the State moved to exclude Shursen's testimony in this case for the same reason, having previously moved for an extension of time to file such a motion past the deadline set by the court's docket control order. On January 8, the regular judge of the 435th District Court granted an extension and ordered the motion to exclude to be heard the first day of trial. On January 20, after a jury was impaneled and sworn, the judge conducted a lengthy hearing on the State's motion, and at the end of the day, announced that he would take the matter under advisement overnight. The next morning the court granted the motion, finding that "Shursen lacks the forensic training and experience to answer the ultimate question", viz, "whether [Bohannan] suffers from a behavioral abnormality that predisposes him to commit predatory acts of sexual violence." Bohannan moved for a continuance for want of evidence, which the court denied, and the State proceeded to present its case.

Price testified that he entered practice in 1983 and turned to forensic work in 1990. He teaches at the University of Texas Southwestern Medical Center at Dallas, the Southern Methodist University Dedman School of Law, and Richland College, and has written extensively on professional subjects. He stated that he has made from 25 to 30 SVP assessments, and in three to five of them, found that the individuals did not have the requisite behavioral abnormality. Based on prison records and a two-hour personal interview, Price concluded that Bohannan does have a

behavioral abnormality. Using the Diagnostic and Statistical Manual of Mental Disorders ("DSM"), he diagnosed Bohannan as having "paraphilia not otherwise specified" — in lay terms, sexual deviance — and "personality disorder not otherwise specified". Price applied two actuarial tests widely used to evaluate a sexual offender's risk of recidivism: the Static-99 and the Minnesota Sex Offender Screening Technique ("MnSOST"). Price scored Bohannan a "5" — moderately high risk — on the Static-99 and a "10" — high risk — on the MnSOST.

Arambula testified that he graduated from medical school, began training in general psychiatry, and applied for a license to practice in the late 1980s. He teaches at the University of Texas Health Science Center at San Antonio. He stated that he has done 16 or 17 SVP assessments in the last three years, and in two of them, found that the individuals did not have a behavioral abnormality. Based on available records and a three-hour personal interview, he concluded that Bohannan does have a behavioral abnormality. He diagnosed Bohannan with "paraphilia not otherwise specified with features of pedophilia, sadism, and exhibition" and with "personality disorder not otherwise specified with features of antisocial conduct". Arambula did not use actuarial tests in evaluating Bohannan but concluded that he was at a high risk of reoffending in part because his sexual misconduct has continued since the rapes, despite the therapy he has received, and has involved children.

Shursen testified outside the presence of the jury that she has been in private practice since 2000, providing behavioral therapy treatment for sex offenders. She stated that she has received more than a 1,000 hours of training, sees more than 100 clients each week, and has made 18 SVP

assessments.[17] Like Price and Arambula, she reviewed all of Bohannan's records and interviewed him personally. She scored him a "5" on the Static-99, the same as Price, and an "8", a little lower, on the MnSOST. She also determined from another diagnostic protocol, the Hare Psychopathy Checklist, that Bohannan is not psychopathic. Shursen testified that in her opinion, based on Bohannan's records, her interviews with him, the actuarial tests, and her experience in the field, Bohannan does not have a behavioral abnormality "at this time". She was not asked to elaborate on the qualification.

The jury found that Bohannan suffers from a behavioral abnormality, as defined by statute, that predisposes him to engage in a predatory act of sexual violence. The trial court issued an order of civil commitment.[18]

Bohannan appealed, as Dodson had in the other case in which Shursen's testimony had been excluded. The court of appeals decided *Dodson* first.[19] It held that the statutory definition of behavioral abnormality[20] has two separate components: an acquired or congenital condition, and a predisposition to commit a sexually violent offense.[21] The second element, the court noted, was also

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[17] She testified that she found a behavioral abnormality in 20 to 30% of these cases, though the record does not reflect a specific number.

[18] Bohannan was ordered to reside in supervised housing, not to contact his victims, not to possess alcohol or other drugs, to participate in treatment, to submit to tracking by a GPS monitor, not to change his residence or leave the State without court approval, not to be in the presence of children, to notify his case manager of any changes in status, and to provide blood and hair samples for the State's DNA Data Bank. *See* TEX. HEALTH & SAFETY CODE §§ 841.081-.083.

[19] *In re Dodson*, 311 S.W.3d 194 (Tex. App.–Beaumont 2010, pet. denied).

[20] TEX. HEALTH & SAFETY CODE § 841.002(2).

[21] *Dodson*, 311 S.W.3d at 199.

part of the definition of an SVP — someone "likely to engage in a predatory act of sexual violence."[22] The court concluded in *Dodson* that while medical evidence is necessary to prove the existence of a condition, it is not necessary to prove a predisposition to sexually violent behavior.[23] Someone like Shursen, trained in applying actuarial tests evaluating the risk of recidivism, and experienced in recognizing that risk among her patients, is qualified to testify whether a person satisfied that part of the definition of behavioral abnormality.[24] The court determined that the exclusion of Shursen's testimony was harmful error and remanded the case for a new trial.[25] In the present case, the court reached the same result for the same reasons.[26]

We granted the State's petition for review.[27]

II

To begin with, we do not agree with the court of appeals' bisection of the statutory definition of behavioral abnormality. The definition, again, is this:

> "Behavioral abnormality" means a congenital or acquired condition that, by affecting a person's emotional or volitional capacity, predisposes the person to commit a sexually violent offense, to the extent that the person becomes a menace to the health and safety of another person.[28]

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[22] TEX. HEALTH & SAFETY CODE § 841.003(a).

[23] *Dodson*, 311 S.W.3d at 199-200.

[24] *Id*. at 200.

[25] *Id*. at 202-204.

[26] ___ S.W.3d ___ (Tex. App.–Beaumont 2010).

[27] Tex. Sup. Ct. J. (June 10, 2010).

[28] TEX. HEALTH & SAFETY CODE § 841.002(2).

Boiling it down, a behavioral abnormality is "a . . . condition that . . . predisposes" sexually violent conduct. The modifier, "predisposes", qualifies and describes "condition". The required condition *is* the predisposition. The condition has no other qualities, other than that it can be congenital or acquired. The condition and predisposition are one and the same. The definition might more clearly be written:

> "Behavioral abnormality" means a congenital or acquired predisposition, due to one's emotional or volitional capacity, to commit a sexually violent offense, to the extent that the person becomes a menace to the health and safety of another person.

The condition and predisposition cannot be separate things, as the court of appeals tried to make them.

The concern regarding the predisposition is, of course, the heightened risk of offense. That concern is reiterated in the statutory definition of an SVP as "a repeat sexually violent offender [who] suffers from a behavioral abnormality *that makes the person likely to engage in a predatory act of sexual violence*."[29] The court of appeals in *Dodson* took this reiteration as further indication that the predisposition (or risk) and the condition required for a behavioral abnormality are separate things. We think a careful analysis of the definition of an SVP does not support the court's position.

Substituting the definition of "behavioral abnormality" for that term in the definition of an SVP yields this:

> A person is a sexually violent predator . . . if the person . . . suffers from [a congenital or acquired condition

[29] *Id*. § 841.003(a) (emphasis added).

> {Qualifier A} that, by affecting a person's emotional or volitional capacity, predisposes the person to commit a sexually violent offense, to the extent that the person becomes a menace to the health and safety of another person]
>
> {Qualifier B} that makes the person likely to engage in a predatory act of sexual violence.

We see only two possible differences in the two qualifiers. One is that a predisposition to misconduct may not make a person likely to engage in it, or vice versa, that a person may be likely to engage in misconduct though not predisposed to do so. We think the import of predisposition and likelihood is exactly the same: increased risk. An increased likelihood of misconduct indicates a predisposition, and a predisposition threatens increased likelihood. In this regard, the two qualifiers are the same. The other possible difference between them is that a menacing offender may not be predatory, or vice versa, that a predator may not be a menace. If such a distinction were possible, and we do not think it is, nothing in the Act suggests that it is intended. Thus, Qualifier B simply explains or restates Qualifier A. Its inclusion in the definition of an SVP certainly does not suggest that Qualifier A is a separate element of the definition of behavioral abnormality.

Accordingly, we conclude that whether a person "suffers from a behavioral abnormality that makes the person likely to engage in a predatory act of sexual violence"[30] is a single, unified issue.

III

As already noted, the Act does not prescribe the qualifications an expert must have to opine on whether a person is an SVP, and it contains only two provisions relevant to the issue.

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[30] TEX. HEALTH & SAFETY CODE § 841.003(a)(2).

One is the statement that "[a] person who suffers from a behavioral abnormality . . . is not because of that abnormality a person of unsound mind".[31] The obvious purpose of this provision, entitled "Certain Expert Testimony Not Required", is to express the Legislature's view that medical and psychiatric testimony, a constitutional prerequisite for committing a person of unsound mind,[32] is unnecessary in SVP proceedings. The statutory provision was added to the Act after, and perhaps in response to, the court of appeals' decision to the contrary in an early case.[33] Bohannan argues that the statute overrules the court's decision, but while the Legislature may certainly state its view of a constitutional provision, an authoritative construction is a matter for the courts.[34] The State does not address the issue but obviously takes the position by its trial conduct — relying on the opinion of a psychologist — that irrespective of whether the constitution requires medical evidence for commitment of an SVP, it does not render other expert testimony inadmissible. Thus, both parties agree that the constitution does not preclude evidence in an SVP commitment proceeding from an expert who is not a physician. Accordingly, we assume without deciding that the constitution is no impediment to the admission of non-medical expert testimony in an SVP commitment proceeding.[35]

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[31] *Id*. § 841.1461.

[32] TEX. CONST. art. I, § 15-a.

[33] *Beasley v. Molett*, 95 S.W.3d 590, 598 (Tex. App.–Beaumont 2002, pet. denied); *but cf. Dudley v. State*, 730 S.W.2d 51, 54 (Tex. App.–Houston [14th Dist.] 1987, no writ) ("We do not interpret the [constitutional] phrase 'committed as a person of unsound mind' as including a person committed as an alcoholic. Rather, we view the constitutional provision as pertaining to a person suffering from mental illness . . . .").

[34] *W. Orange-Cove Consol. Indep. Sch. Dist. v. Alanis*, 107 S.W.3d 558, 563 (Tex. 2003) ("The final authority to determine adherence to the Constitution resides with the Judiciary.") (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-178 (1803), and *Love v. Wilcox*, 28 S.W.2d 515, 520 (Tex. 1930)).

[35] And we express no view on whether the constitution requires that commitment be based on medical or psychiatric testimony.

The other provision of the Act relevant to expert qualifications states that at the administrative stage, an "expert shall make a clinical assessment based on testing for psychopathy, a clinical interview, and other appropriate assessments and techniques".[36] Obviously, the expert must have the training and experience necessary to perform as required — to test for psychopathy, to conduct a clinical interview, and to employ other appropriate evaluative procedures. The Act gives no reason to think that the qualifications of trial experts should be any different.

Absent more specific statutory direction, we apply the general rule, which is that an expert must be qualified "by knowledge, skill, experience, training, or education" to "assist the trier of fact to understand the evidence or to determine a fact in issue".[37] That a witness has knowledge, skill, expertise, or training does not necessarily mean that the witness can assist the trier-of-fact. Expert testimony assists the trier-of-fact when the expert's knowledge and experience on a relevant issue are beyond that of the average juror and the testimony helps the trier-of-fact understand the evidence or determine a fact issue.[38]

Credentials are important, but credentials alone do not qualify an expert to testify. We have observed, for example, that "a medical license does not automatically qualify the holder 'to testify as an expert on every medical question.'"[39] "Trial courts must 'ensur[e] that those who purport to

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[36] TEX. HEALTH & SAFETY CODE § 841.023(a).

[37] TEX. R. EVID. 702.

[38] *K-Mart Corp. v. Honeycutt*, 24 S.W.3d 357, 360 (Tex. 2000) (citations omitted).

[39] *Roberts v. Williamson*, 111 S.W.3d 113, 121 (Tex. 2003) (quoting *Broders v. Heise*, 924 S.W.2d 148, 152 (Tex. 1996)); *see also Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 719 (Tex. 1998) ("Just as not every physician is qualified to testify as an expert in every medical malpractice case, not every mechanical engineer is qualified to testify as an expert in every products liability case.").

be experts truly have expertise concerning the actual subject about which they are offering an opinion.'"[40] The test is "whether 'the offering party [has] establish[ed] that the expert has "knowledge, skill, experience, training, or education" regarding the specific issue before the court which would qualify the expert to give an opinion on that particular subject.'"[41]

In evaluating an expert's qualifications, it is important to keep in mind that expert testimony must be relevant and reliable.[42] "To be relevant, the proposed testimony must be sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute."[43] Determining whether an expert's theory or technique is reliable requires consideration of all pertinent factors, including

(1) the extent to which the theory has been or can be tested;

(2) the extent to which the technique relies upon the subjective interpretation of the expert;

(3) whether the theory has been subjected to peer review and/or publication;

(4) the technique's potential rate of error;

(5) whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and

(6) the non-judicial uses which have been made of the theory or technique.

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[40] *Gammill*, 972 S.W.2d at 719 (quoting *Broders*, 924 S.W.2d at 152).

[41] *Roberts*, 111 S.W.3d at 121 (quoting *Broders*, 924 S.W.2d at 153).

[42] *State v. Cent. Expressway Sign Assocs.*, 302 S.W.3d 866, 870 (Tex. 2009).

[43] *E. I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 556 (Tex. 1995) (internal quotations omitted).

These factors may be difficult to apply to an opinion that is based heavily on an expert's individual skill, experience, or training. In no case, however, may expert testimony be admitted when "'there is simply too great an analytical gap between the data and the opinion proffered.'"[44]

In SVP commitment proceedings, the only fact issue to be resolved by the trier-of-fact is whether a person has the behavioral abnormality required for an SVP. The approach of all three experts in this case was consistent with the little guidance provided by the Act. All agreed that in assessing whether a person has the behavioral abnormality for an SVP, all available information should be considered, and that the person should be interviewed. They also suggest that a medical diagnosis should be made and actuarial risk tests should be applied. Still, "[o]pinions about behavior . . . and psychology depend largely on the subjective interpretation of the expert",[45] and opinions "too dependent upon [an expert's] subjective guesswork" must be excluded.[46] The expert's experience, knowledge, and training are crucial in determining whether the expert's opinions are admissible.

A medical diagnosis of a person's mental health may certainly inform an assessment of whether he has an SVP's behavioral abnormality, but the principal issue in a commitment proceeding is not a person's mental health but whether he is predisposed to sexually violent conduct. And in deciding that issue, as this case makes clear, the kind of evaluation done by a psychologist may be at least as important as a medical diagnosis. The usefulness of the expert's opinion in assisting the trier-of-fact rests not on the type of license the expert holds but on the expert's knowledge, training,

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[44] *Gammill*, 972 S.W.2d at 727 (quoting *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)).

[45] *S.V. v. R.V.*, 933 S.W.2d 1, 42 (Tex. 1996) (Cornyn, J., concurring).

[46] *Transcon. Ins. Co. v. Crump*, 330 S.W.3d 211, 217 (Tex. 2010).

and experience in dealing with sexual offenders. A person's training and experience in clinical interviews and actuarial tests is no less helpful merely because the person is not licensed as a psychologist.

We see no basis for limiting the experts who can testify in SVP commitment proceedings to physicians and psychologists. The purpose of the Act is to reduce the risk of those who are behaviorally predisposed to sexually violent conduct. An expert thoroughly acquainted with sexual offenders' behavior may be qualified to assess the risk a person poses to others. Accordingly, we hold that a person is not disqualified from testifying as an expert in an SVP commitment proceeding merely because the person is not licensed as a physician or psychologist.[47]

IV

We turn finally to whether the exclusion of Shursen's testimony was harmful error.

Though Shursen lacks medical or psychological training, she has broad experience in dealing with sexual offenders. She is licensed by the State to provide treatment for sexual offenders, and while that license may not in itself qualify her as an expert on SVPs, she has also spent more than 1,000 hours in that work to obtain her license and continues to see more than a 100 patients a week. She testified that she receives continuing instruction, some of which is geared to applying and interpreting actuarial tests and to commitment assessments. She is qualified to apply such tests and has testified repeatedly in commitment proceedings.

[47] We need not exclude all possibility that a medical diagnosis might be important in making a risk assessment in a particular case because the State did not object to Bohannan's evidence on that basis.

The State argues that Shursen is qualified to assess the risk that a person will engage in sexually violent conduct only for the purpose of providing treatment, and not for the purpose of commitment proceedings. The State notes that by statute, experts on incompetency and insanity in criminal proceedings must be licensed physicians or psychologists.[48] But the absence of any such statutory requirement in SVP commitment proceedings tends to contradict the State's argument. While the Legislature has discretion to set requirements for expert testimony on specific issues, when the Legislature has not done so, the State's attempted distinction between between risk assessments for purposes of treatment and those for purposes of civil commitment is unfounded.

Risk assessments are to a degree subjective, and in evaluating an expert's qualifications to make them, it is important to know what training and experience an expert has in minimizing that subjectivity. Here, Shursen used the same well-recognized actuarial tests that Price used and was prepared to defend her scoring, based on Bohannan's records and her interview with him. Furthermore, Arambula testified that the risk assessments he uses in SVP proceedings are the same as those he uses in treating sex offenders.

The trial court's discretion in determining whether an expert is qualified to testify on a matter is broad[49] but not unbounded. A trial court abuses its discretion when it excludes relevant and reliable evidence.[50] Most SVP commitment proceedings are conducted in a single district court before a few judges, and appeals are almost always heard by one court of appeals. From the record

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[48] TEX. CODE CRIM. PROC. arts. 46B.022, 46C.102.

[49] *Broders v. Heise*, 924 S.W.2d 148, 151 (Tex. 1996).

[50] *State v. Cent. Expressway Sign Assocs.*, 302 S.W.3d 866, 870 (Tex. 2009).

before us, the trial court appears to have determined that Shursen is unqualified to testify, not for reasons peculiar to her experience and training, but because she is not a physician or psychologist. In this context, we think a more careful review of the trial court's ruling is warranted.

We conclude that the trial court abused its discretion in excluding Shursen's testimony. The State does not challenge the court of appeals' holding that the exclusion was harmful, and therefore we do not consider the issue.

* * *

For the reasons given, the judgment of the court of appeals is

Affirmed.

Nathan L. Hecht
Justice

Opinion delivered: August 31, 2012

IN THE SUPREME COURT OF TEXAS

NO. 10-0609

COMMISSION FOR LAWYER DISCIPLINE, PETITIONER,

v.

HEATHER SCHAEFER, RESPONDENT

ON APPEAL FROM THE BOARD OF DISCIPLINARY APPEALS

PER CURIAM

District Grievance Committees appoint evidentiary panels for attorney disciplinary actions, and quorums of the evidentiary panels hear and decide the actions. This case raises the question of whether a properly constituted quorum of an improperly constituted evidentiary panel has the authority to act in an attorney disciplinary matter. Following a unanimous finding of misconduct by an evidentiary panel quorum, an attorney appealed the panel's order of disbarment to the Board of Disciplinary Appeals (BODA) on the ground that the evidentiary panel was not composed of the required ratio of public to attorney members.

The attorney failed to attend her hearing and filed no post-judgment motions with the evidentiary panel. BODA vacated the panel's judgment and remanded for a new hearing because the evidentiary panel was improperly composed, even though the quorum of panelists present for the hearing met the required ratio of lawyers to non-lawyers. BODA concluded the panel-composition error voided the panel's judgment for lack of capacity. We agree with BODA that the composition

of evidentiary panels, a mandatory requirement, was not met here. However, we conclude that requirement is not jurisdictional and the evidentiary panel's order was voidable, not void. Therefore, because no objection was lodged to the evidentiary panel's composition, we reverse BODA's judgment.

Complaints of attorney misconduct are assessed by the Office of the Chief Disciplinary Counsel (CDC) of the State Bar of Texas, which administers the attorney disciplinary system at the investigatory and trial levels. TEX. R. DISCIPLINARY P. 1.06(C), 5.01, .02. CDC investigates complaints to determine whether there is just cause that an attorney committed professional misconduct. *Id*. at 1.06(U) & (V), 2.12, 5.02(C). Upon a determination of just cause by CDC, the accused attorney may have her case heard in (1) district court, upon election, with or without a jury or (2) in an administrative proceeding by an evidentiary panel of a State Bar of Texas District Grievance Committee (Grievance Committee) within the relevant geographic district. *Id.* at 2.14, .15. The respondent attorney must be notified of the names and addresses of the evidentiary panel members assigned to adjudicate the complaint. *Id*. at 2.06.

Grievance Committees "must consist of no fewer than nine members," *id*. at 2.02, and "shall act through panels," as assigned by the Grievance Committee chairs. *Id*. at 2.07. "No panel may consist of more than one-half of all members of the [Grievance] Committee or fewer than three members." *Id*. The evidentiary panel hears evidence and adjudicates the grievance against an attorney accused of professional misconduct. *Id*. at 2.17. A quorum consists of "a majority of the membership of the panel," *id*. at 2.07, and also must have "at least one public member for every two attorney members present." *Id*.; *see also In re Allison*, 288 S.W.3d 413, 417 (Tex. 2009).

In these administrative proceedings, the Commission for Lawyer Discipline (Commission), a permanent committee of the State Bar, is the litigant opposing the accused attorney. *Id*. at 4.01, .06(A). The Commission is the client of the CDC in complaint proceedings not dismissed at summary disposition. *Id*. at 2.14(A), 5.02(G).

All panels of a Grievance Committee "must be composed of two-thirds attorneys and one-third public members." *Id*. at 2.02; *see also id.* at 2.07 (specifying that panels "must be composed of two attorney members for each public member."). Rule 2.17 repeats this standard specifically for evidentiary panels: "Each Evidentiary Panel must have a ratio of two attorney members for every public member . . . ." *Id*. at 2.17. The rules therefore clearly, and repeatedly, mandate a two-to-one ratio of attorneys to public members on evidentiary panels.

CDC investigated three grievances filed against attorney Heather Schaefer and found just cause to have the grievances adjudicated. *See* TEX. R. DISCIPLINARY P. 5.02(C), (G), (I) & (M) (laying out in relevant part the duties of the CDC in disciplinary proceedings). As Schaefer did not elect to have the grievances heard in district court, CDC assigned them to an evidentiary panel. *Id*. at 2.14, .15. The Chair of the relevant Grievance Committee, District 01A (Collin County, Texas), appointed a six-person evidentiary panel to hear the case. Schaefer filed an eve-of-trial "emergency continuance" on the basis of work conflicts, which the evidentiary panel denied. Schaefer did not attend her hearing. At the hearing in Schaefer's absence, a quorum of evidentiary panel members unanimously found that Schaefer committed misconduct, and disbarred her in its judgment.

Although the pre-hearing notices Schaefer received from the CDC showed a properly constituted evidentiary panel, the panel's "Evidentiary Hearing Report" (hearing report), summarizing basic information about the hearing, including the identity of the panelists present,

listed the second public-member position on the six-person panel as "vacant." The hearing was held February 20, 2009; the hearing report was sent to Schaefer on March 2, 2009; and the evidentiary panel's judgment was signed on March 3, 2009. The hearing report indicated that a quorum of four panel members, three attorneys and one public member, were actually present to hear Schaefer's case. Schaefer did not object to the panel's composition at the hearing or subsequently in any post-judgment motion. *See* TEX. R. DISCIPLINARY P. 2.22 (describing post-judgment motions).

Schaefer appealed to BODA, challenging the evidentiary panel's composition. On appeal, BODA vacated the disbarment judgment and remanded for a new hearing, in part on the basis that the evidentiary panel did not have the capacity to act because the panel was improperly composed.[1] BODA found that the evidentiary panel lacked the appropriate ratio of attorney members to public members and, reasoning that such error was fundamental, concluded that evidentiary panels not satisfying this requirement lack capacity to act as a court. *Schaefer v. Comm'n for Lawyer Discipline of the State Bar of Tex.*, Bd. of Disciplinary Appeals Case No. 44292 (Jan. 28, 2011) at 8, 14. The Commission appealed to this Court, challenging BODA's interpretation of the Texas Rules of Disciplinary Procedure governing evidentiary-panel composition. We issued a summary affirmance of BODA's judgment and later granted the Commission's motion for rehearing.

Appeals from determinations of BODA are generally reviewed under a substantial evidence standard. TEX. R. DISCIPLINARY P. 7.11. Because the issue before us involves the interpretation of the Texas Rules of Disciplinary Procedure, we review BODA's legal conclusions on the construction

[1] The other bases for BODA's judgment were "issues of statewide public interest": i.e., that (1) the attorney discipline system exists to protect the public, and (2) CDC's adherence to disciplinary rules is essential and must avoid even the appearance of impropriety. *Schaefer v. Comm'n for Lawyer Discipline of the State Bar of Tex.*, Bd. of Disciplinary Appeals Case No. 44292 (Jan. 28, 2011) at 8–11. We do not reach these issues.

of the rules de novo. *See In re Caballero*, 272 S.W.3d 595, 599 (Tex. 2008) (citing *O'Quinn v. State Bar of Tex*., 763 S.W.2d 397, 399 (Tex. 1988) (observing that "our disciplinary rules should be treated like statutes")); *MCI Sales & Serv., Inc. v. Hinton*, 329 S.W.3d 475, 500 (Tex. 2010) (noting that a "question of statutory construction is a legal one which we review de novo").

In *In re Allison* we recently addressed the public- and attorney-member ratio requirements in disciplinary hearings. 288 S.W.3d 413 at 415-17. In *Allison*, which focused on the quorum requirements of Rule 2.07, the evidentiary panel was properly constituted with four attorney members and two public members, but the quorum hearing Allison's case consisted of three attorneys and one public member. *Id*. at 414. Under the wording of 2.07, different from 2.02 and 2.17, we held that the quorum that heard the disciplinary action satisfied the ratio requirement that it "'include one public member for each two attorney members.'" *Id*. at 417 (quoting TEX. GOV'T CODE § 81.072(j)); *see also* TEX. R. DISCIPLINARY P. 2.07. Schaefer's case is different from *Allison* in that the evidentiary panel from which the quorum was drawn included only one public member and four attorney members, although the quorum satisfied *Allison'*s three-attorney-to-one-public-member ratio under 2.07. *See* 288 S.W.3d at 417. Schaefer challenges the composition of the evidentiary panel.

As observed above,"[e]ach Evidentiary Panel must have a ratio of two attorney members for every public member . . . ." TEX. R. DISCIPLINARY P. 2.17; *see also* 2.02 (requiring two-thirds of Grievance Committees be attorneys and one-third be public members). This is compulsory language. One of the two public-member positions on the six-member evidentiary panel was vacant. The evidentiary panel's composition therefore violated the ratio requirement of one public member for

each two attorney members. With four attorney members on the evidentiary panel, two public members would be required. *Allison*, 288 S.W.3d at 417. In *Allison*, we explained:

> [T]he factor-of-two rule applies only when there is an even number of attorneys. Thus, if there are four attorney members (two sets of two) a quorum would require two public members.

Id. The evidentiary panel failed to meet this requirement. BODA and the Commission disagree over whether this improper panel composition deprived the evidentiary panel of capacity to act on the complaints, and consequently rendered the evidentiary panel's judgment void, or merely voidable.

BODA concluded in its opinion that two of our precedents, *Mapco, Inc. v. Forrest*, 795 S.W.2d 700 (Tex. 1990), and *Tesco American, Inc. v. Strong Industries, Inc.*, 221 S.W.3d 550 (Tex. 2006), "affirm that, when a court rendering judgment has no capacity to act as a court, the resulting judgment is void." *Schaefer* at 14. The Commission argues, however, that the Grievance Committee's failure to abide by the panel composition requirements did not deprive the evidentiary panel of capacity, but merely rendered the judgment voidable. Because Schaefer, who was not present at the hearing, did not object to the composition of the evidentiary panel or file a post-judgment motion challenging its composition, the Commission also contends that any error was waived.

We construe the analogous precedents differently. *Mapco* concerned an appellate ruling in which one justice of a three-justice panel retired before an opinion was issued, resulting in a one-one opinion and judgment, a departure from both statutory and constitutional provisions requiring a "majority" of a panel for a decision on a case. *Mapco*, 795 S.W.2d at 702–03. We declined to issue a general rule that a violation of a procedural rule, statute, or even a constitutional requirement rendered an appellate judgment "void." *Id*. at 703. Instead, such violations generally only result in

a "voidable" or erroneous judgment. *Id*. Describing the "rare circumstances" that would void a judgment, we observed that "[a] judgment is void only when it is apparent that the court rendering the judgment had no jurisdiction of the parties, no jurisdiction of the subject matter, no jurisdiction to enter the judgment, or no capacity to act as a court." *Id*. (citations omitted).

Tesco concerned a judicial-disqualification challenge to a court of appeals decision. *Tesco*, 221 S.W.3d at 552–53. We held that the justice authoring the unanimous opinion for the three-justice panel was disqualified due to an imputed conflict of interest. *Id*. at 554. We also noted that the orders or judgments of disqualified trial judges are void. *Id*. at 555 (citing *In re Union Pac. Res. Co.*, 969 S.W.2d 427, 428 (Tex. 1998); *Buckholts Indep. Sch. Dist. v. Glaser*, 632 S.W.2d 146, 148 (Tex. 1982); *Fry v. Tucker*, 202 S.W.2d 218, 221 (Tex. 1947); *Postal Mut. Indem. Co. v. Ellis*, 169 S.W.2d 482, 484 (Tex. 1943); *State v. Burks*, 18 S.W. 662, 662–63 (Tex. 1891); *Templeton v. Giddings*, 12 S.W. 851, 852 (Tex. 1889)). However, we held that, in the appellate context, where multiple judges are empaneled, a judgment is merely voidable unless every judge on the panel is disqualified. *Id.* at 555–56. We explained that, "'[i]n general, as long as the court entering a judgment has jurisdiction of the parties and the subject matter and does not act outside its capacity as a court, the judgment is not void.'" *Id*. at 556 (quoting *Reiss v. Reiss*, 118 S.W.3d 439, 443 (Tex. 2003)). We concluded that the judgment at issue was not void as the appellate court had "jurisdiction of the parties and the subject matter, jurisdiction to enter judgment, and capacity to act as a court." *Id*.

BODA's opinion distinguished *Mapco* and *Tesco* as involving appellate panels and analogized the evidentiary panel at issue here to a trial court. *Schaefer*, at 14. For purposes of the applicable composition rules, the multi-member nature of an evidentiary panel makes it analogous

to the appellate courts in *Mapco* and *Tesco*. Accordingly, the evidentiary panel's judgment was not void for lack of capacity. We therefore reverse BODA's judgment.

As the attorney-to-public-member composition requirement does not undermine the capacity of an evidentiary panel or otherwise deprive it of jurisdiction to hear evidence and issue disciplinary orders, error must be preserved by timely objection. *See* TEX. R. APP. P. 33.1(a); *cf. State Dep't of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235, 241 (Tex. 1992) (error preservation generally requires that the party make the trial court aware of the complaint, timely and plainly, and obtain a ruling). BODA's opinion noted there is "some evidence" that Schaefer may not have been able to object to the panel's composition, even had she appeared at the hearing. *Schaefer* at 10. BODA observed that "the [evidentiary panel] chair introduced only the members present on the record and did not name the absent members of the panel," thus creating uncertainty as to whether the evidentiary panel lacked a necessary public member. *Id*. The Grievance Committee should timely advise respondent attorneys of the composition of the evidentiary panel from which the quorum was drawn to hear the case. But generally speaking, reasonable diligence by the attorney requires more than occurred here. Faced with an incomplete evidentiary panel, the respondent attorney must inquire as to panel composition and object if the composition requirements are not satisfied. Should an attorney fail to appear at an evidentiary hearing, she makes her task more difficult and should obtain the hearing report and preserve error through a timely post-judgment motion. *See* TEX. R. DISCIPLINARY P. 2.22.

The evidentiary panel's composition violated the requirements of Rules 2.07 and 2.17 of the Texas Rules of Disciplinary Procedure. That violation, however, did not deprive the evidentiary panel of its capacity to select a quorum, hear evidence, and issue a judgment. Therefore, in the

absence of a timely objection, error was waived. Accordingly, without hearing oral argument, we reverse the Board of Disciplinary Appeals' judgment and reinstate the evidentiary panel's judgment of disbarment. *See* TEX. R. DISCIPLINARY P. 7.11; TEX. R. APP. P. 60.2(c).

OPINION DELIVERED: April 20, 2012

IN THE SUPREME COURT OF TEXAS

NO. 10-0615

ASHFORD PARTNERS, LTD., PETITIONER,

v.

ECO RESOURCES, INC., RESPONDENT

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

Argued February 8, 2012

JUSTICE MEDINA delivered the opinion of the Court.

This appeal is from a judgment awarding a tenant damages for a landlord's breach of a construction-related duty under a build-to-suit lease agreement. The tenant sued asserting that the landlord's failure to adhere to construction plans resulted in a substandard building, diminishing the value of its leasehold. At trial, the parties disagreed about the appropriate measure of damages for the landlord's breach. The tenant maintained that damages should be measured by the diminished value of the leasehold. The landlord contended that the appropriate measure should be the cost to repair the building. The court of appeals sided with the tenant, concluding that diminished value was the appropriate measure of damages for the landlord's breach of a construction-related duty under the lease. ___ S.W.3d ___ (Tex. App.—Houston [1st Dist.] 2010) (mem. op.). We, however, agree

with the landlord that the cost of repair is the appropriate measure under the circumstances of this case. Because under the appropriate measure there is no evidence that the tenant has been damaged, we reverse and render.

I

In March 2001, ECO Resources, Inc., a provider of water and wastewater treatment services, signed a lease agreement with TA/Sugar Land-ECO, Ltd. (TASL) for the construction of a 32,000 square foot office building and laboratory. While the building was under construction, TASL agreed to sell the property to Ashford Partners, Ltd. The Ashford/TASL earnest money contract provided that the ECO lease would be assigned to Ashford within thirty days after it commenced.

ECO's lease was to begin when the building was substantially complete and a certificate of occupancy issued. The lease defined "substantially completed" to "mean that such improvements have been substantially completed in accordance with the Plans, subject only to completion of minor punch list items." The tenant was responsible for inspecting the construction and providing the punch list. The lease further provided that:

> Subject to Lessor's completion of such punch list items, the taking of possession by Lessee shall be deemed to conclusively establish that the buildings and other improvements had been completed in accordance with the Plans, that the Premises are in good and satisfactory condition as of when possession was taken, and that Lessee has accepted such buildings and other improvements.

Finally, the lease directed the landlord to use reasonable efforts to complete the tasks on the tenant's punch list within thirty days of receipt.

On September 28, 2001, ECO accepted the building as substantially complete, submitting an eight-page punch list of items in need of repair to TASL. About this same time, ECO received

formal notice of the property's pending sale in a document entitled "Notice of Assignment of Lease and Estoppel Certificate." ECO promptly executed the estoppel certificate, as its lease required,[1] and returned it a mere twelve days after submitting its punch list to TASL. Two weeks later, Ashford became ECO's landlord. Four days after that, the deadline for completing ECO's punch list expired. At least one repair on the punch list, a requirement for caulking between the tilt wall panels under grade, had not been performed.

Two years passed, and ECO began to have problems with the building. Ashford hired engineers to investigate, and they determined that water had collected under the foundation. The cause for this was traced to the failure to caulk between the tilt wall panels below grade, the omitted repair on ECO's punch list.

Ashford spent over $313,000 to make repairs and correct the problem and then sued the construction contractor that TASL had used on the project. Ashford also joined ECO as a defendant, seeking a declaratory judgment that the building was structurally sound and that ECO was not entitled a reduction in rent. ECO counterclaimed for breach of the lease, asserting that Ashford as successor landlord assumed the original lessor's obligations under the lease, including the duty to construct the building according to plans.

Ashford subsequently settled with the construction contractor and also dismissed its suit against ECO. ECO did not abandon its claim, however, and the case proceeded to trial. At this trial, a jury was asked the following three questions:

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[1] The lease required ECO to execute an estoppel certificate, verifying the lease's validity and other matters, within ten days of the landlord's request.

> 1. Did Ashford fail to comply with the Lease by failing to cause the Leased Space to be constructed pursuant to the Plans?
>
> 2. Did Ashford fail to comply with the Lease by failing to maintain the foundation of the Leased Space in good repair?
>
> 3. What sum of money, if any, if paid now in cash would fairly and reasonably compensate ECO Resources for the damages, if any, that resulted from Ashford's failure to comply with the Lease?

The jury answered "Yes" to the first question and "No" to the second, finding Ashford had breached a construction-related duty under the lease but not its duty to maintain the foundation in good repair.[2]

In the third question on damages, the jury was instructed to base its award, if any, on the difference "between the rent required under the Lease and the rental value of the Leased Space in its actual condition." The jury found the diminished value of the lease to be $1,027,704. Adding interest and attorney's fees,[3] the trial court rendered a total judgment of $1,494,462.25 in favor of ECO. Ashford appealed.

The court of appeals concluded that Ashford had assumed a duty to oversee the completion of the punch list and bore responsibility for the omitted repair because it was ECO's landlord when the punch-list repairs came due. ___ S.W.3d at ___. The court further found the diminished value of the lease to be an appropriate measure for Ashford's breach of this assumed construction-related duty. *Id.* at ___. The court of appeals accordingly affirmed the trial court's judgment.

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[2] The lease obligated the landlord to keep the building's foundation, walls, and roof in good repair.

[3] The parties stipulated to $407,046.20 as a reasonable and necessary attorney's fee in this case.

II

Ashford complains that the judgment in ECO's favor is erroneous because there is neither evidence that Ashford breached any duty under the lease nor that ECO suffered any damages as a consequence. Ashford argues that it did not breach any construction-related duty because the building's construction was complete before it became ECO's landlord. Even assuming that construction-related duties remained to be performed under the lease, Ashford next contends that the assignment of the lease in conjunction with ECO's estoppel certificate cut off any such duties. Finally, even if the estoppel certificate did not cut off all remaining construction-related duties, Ashford maintains there is no evidence that ECO suffered any damages when the appropriate measure of damages is applied to its case.

A

Ashford's first two arguments rely primarily on ECO's estoppel certificate, which Ashford obtained before taking the lease assignment. Ashford submits that ECO represented in this document that the building's construction had been completed to its satisfaction. As pertinent here, the document recited that ECO was in possession of the premises, that the 25-year lease term had begun on October 1, 2001, and that:

> Tenant has accepted the Premises without exception, except for undisclosed defects, and all requirements for the commencement and validity of the Lease, including all construction work, if any, required of the Landlord under the terms of the Lease have been satisfied.

Because ECO "accepted the Premises without exception, except for undisclosed defects" and the items on its punch list were not undisclosed defects, Ashford concludes that it did not assume responsibility for completing ECO's punch list.

ECO responds that Ashford's reading of the estoppel certificate is contradicted by the document's express disclaimer of any intent to "impair or diminish any of Landlord's obligations to Tenant under the Lease." Ashford's interpretation clearly diminishes ECO's rights under the lease. Moreover, ECO submits that the estoppel certificate is not inconsistent with its rights under the lease because the punch list's completion was not a prerequisite to the commencement and validity of the lease nor was the landlord in breach of its punch-list obligations when ECO executed the document. ECO contends that the certificate's purpose was merely to facilitate the sale of the property by confirming the validity of its lease and that the document did not otherwise affect its rights under the lease.

Ashford's interpretation of the estoppel certificate is indeed difficult to reconcile with the document's disclaimer of any intent to "impair or diminish" the landlord's obligations under the lease. But even were we to accept Ashford's interpretation as a reasonable alternative, it would gain nothing. It would merely mean that the document was ambiguous, making its ultimate meaning a fact question, which the fact finder has already implicitly decided in ECO's favor. *See J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 229 (Tex. 2003) (noting that an agreement that is susceptible to more than one reasonable interpretation "is ambiguous, creating a fact issue on the parties' intent"). Accordingly, we reject Ashford's first two complaints regarding its construction duties under the lease and the effect of the estoppel certificate on those duties.

B

Ashford also complains that the jury instruction in Question 3 submitted an erroneous measure of damages. Ashford argues that ECO's damages should be measured as in other cases involving construction deficiencies, since it has been held to have breached a construction-related duty. A contractor who has substantially performed its contract, but whose performance is deficient in some respect, is generally responsible for the cost of repair. Similarly, Ashford argues that the appropriate damages measure for a substantially-completed building under a build-to-suit lease is the cost to cure a remedial defect.

The court of appeals, however, disagreed. Focusing on the basic nature of the landlord-tenant relationship, it concluded that the usual measure of damages for the breach of a real estate rental agreement is "'the difference between the agreed rental and the reasonable cash market value of the leasehold.'" ___ S.W.3d at ___ (quoting *Rainwater v. McGrew*, 181 S.W.2d 103, 105-06 (Tex. Civ. App.–Waco 1944, writ ref'd w.o.m.)). The court reasoned that cost of repair would only benefit the property owner, Ashford, and that the difference-in-value measure was therefore necessary to compensate ECO for its loss. *Id.*

Under a build-to-suit lease, the lessor wears two hats, functioning as both the tenant's construction contractor and landlord. Under this arrangement, the property owner agrees to construct a building to the tenant's specifications, and the tenant agrees to lease the building for a term sufficient to permit the owner a profit. Although Ashford apparently intended to assume only the latter role, the assignment and estoppel certificate failed to eliminate some lingering construction-related issues.

Recognizing that discrepancies inevitably arise during construction, the doctrine of substantial completion generally controls the measure of damages for failure to make repairs or complete construction. *See Warren v. Denison*, 563 S.W.2d 299, 303 (Tex. Civ. App.—Amarillo 1978, no writ) (citing *Linch v. Paris Lumber & Grain Elevator Co.*, 15 S.W. 208 (Tex. 1891)). Substantial completion has been described as the "legal equivalent of full compliance less any offsets for remediable defects." *Uhlir v. Golden Triangle Dev. Corp.*, 763 S.W.2d 512, 515 (Tex. App.—Fort Worth 1988, writ denied). Once a construction project has been substantially completed, the damages for errors or defects in construction "is the cost of completing the job or of remedying those defects that are remediable" without impairing the building as a whole. *Vance v. My Apartment Steak House of San Antonio, Inc*., 677 S.W.2d 480, 482 (Tex. 1984). On the other hand, a difference-in-value measure of damages may apply when the contractor has failed to substantially comply with the contract or when repairs will impair the structure or materially damage it. *Turner, Collie & Braden, Inc. v. Brookhollow, Inc.*, 642 S.W.2d 160, 164 (Tex. 1982); *Hutson v. Chambless*, 300 S.W.2d 943, 945 (Tex. 1957). Substantial completion, however, implies that the parties have been given the object of their contract and that any omissions or deviations can be remedied. *Turner, Collie & Braden*, 642 S.W.2d at 164–65.

The question then is whether the construction of ECO's build-to-suit lease was ever substantially completed. When Ashford assumed ownership, ECO was already in possession of the premises and had ostensibly accepted the building as substantially complete. Its acceptance was, of course, subject to the exceptions contained in its punch list, but if those exceptions were capable of

repair, then that cost would be the appropriate measure of ECO's damage for this construction-related breach.

ECO argues, however, that Ashford's repair efforts failed to fix the problem—that even after repairs, the foundation remained unstable and continued to heave and fall. It submits that the jury's award of past and future damages for the diminished value of the leasehold is recognition of the ongoing nature of these foundation problems.

The jury, however, did not find Ashford's repairs ineffective. In fact, when asked whether Ashford failed to maintain the foundation in good repair, the jury answered, "No". Although we agree that Ashford, as ECO's landlord, had a continuing contractual duty to maintain the foundation, the damages awarded by the jury here are the product of an erroneous instruction regarding the appropriate measure rather than the recognition of the problem's continuing nature.

ECO also alluded to business disruptions caused by the foundation problems during oral argument. Such consequential damages might be recoverable in an appropriate case if caused by the breach of a construction-related duty under a build-to-suit lease. ECO, however, did not attempt to prove such damages at trial. Its theory was instead that it did not get the building it bargained for and that its damages should therefore be measured by the building it got, that is, the difference in value. But this theory presumes that the defect could not be remedied. The doctrine of substantial completion, on the other hand, presumes that deficiencies can be repaired.

Under the lease, it was substantial completion that triggered ECO's obligation to submit its punch list of remediable defects. Substantial completion likewise entitled ECO to obtain a certificate of occupancy and commence the lease's 25-year term. The court of appeals concluded that

Ashford's liability rested "exclusively" on its failure to complete a single punch list item on a substantially completed building and that the diminished value of the leasehold was the appropriate measure of ECO's damages. ___ S.W.3d at ___. We conclude, however, that cost of repair is the appropriate measure of damages to remedy an omitted item on a substantially-completed building. Because Ashford made these repairs at no cost to ECO, we further conclude that ECO has suffered no damages under the appropriate measure.

III

ECO also obtained an award of attorney's fees under Chapter 38 of the Civil Practice and Remedies Code. The chapter pertains to the recovery of attorney's fees in breach-of-contract cases. It provides that: "A person may recover reasonable attorney's fees . . . in addition to the amount of a valid claim and costs, if the claim is for . . . an oral or written contract." TEX. CIV. PRAC. & REM. CODE § 38.001(8).

Ashford submits that ECO cannot recover attorney's fees under this statute in the absence of a valid claim or in the absence of recoverable damages. Indeed, we have said that to qualify for fees under the statute, a litigant must prevail on a breach of contract claim and recover damages. *MBM Fin. Corp. v. Woodlands Operating Co.*, 292 S.W.3d 660, 666 (Tex. 2009) (citing *Mustang Pipeline Co. v. Driver Pipeline Co.,* 134 S.W.3d 195, 201 (Tex. 2004) (per curiam)). As ECO has not done this, we agree that it is not entitled to attorney's fees.

Ashford further argues that it should be awarded the attorney's fees that ECO got in the trial court. The parties stipulated below that $407,046.20 was a reasonable and necessary attorney's fee in the case. In rendering judgment on the jury's verdict, the trial court incorporated the stipulated

amount into ECO's judgment. Because we must reverse ECO's underlying judgment, Ashford contends that the stipulated attorney's fees should now be awarded to it.

The stipulation, however, is merely an agreement as to the amount of reasonable and necessary attorney's fees in the case.[4] It was not the basis for the award of attorney's fees, nor has Ashford otherwise briefed its entitlement to such fees in this case other than to state that it too prayed for attorney's fees in the trial court. As a general rule, litigants in Texas are responsible for their own attorney's fees and expenses in litigation. *See MBM Fin. Corp.*, 292 S.W.3d at 669 (noting the prohibition on fee awards unless specifically provided by contract or statute). Because Ashford's briefing provides no basis for an exception to the general rule, its request for attorney's fees is denied.

* * *

The court of appeals' judgment is reversed and judgment is rendered that ECO Resources, Inc. take nothing.

_____
David M. Medina
Justice

Opinion delivered: April 20, 2012

[4] The stipulation clearly applied to ECO's attorney's fees. Whether it was also intended to apply to Ashford's attorney's fees is not entirely clear since there was no basis for such an award at the time of the stipulation and no contingency expressed for any future entitlement.

IN THE SUPREME COURT OF TEXAS

NO. 10-0669

H.E. BARNES, PETITIONER,

v.

LEE ROY MATHIS, RESPONDENT.

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

PER CURIAM

At issue in this case is whether the court of appeals erred in rendering judgment for a plaintiff who received an adverse verdict and take-nothing judgment after a jury trial. When a party with the burden of proof loses at trial and asks an appellate court to render judgment in his favor, that party must show that the evidence conclusively established his entitlement to judgment. Because the court of appeals incorrectly applied this standard and Mathis did not conclusively prove his nuisance and trespass claims, we reverse in part its judgment and remand the case to the court of appeals to determine factual sufficiency issues raised below.

Dr. Lee Roy Mathis and H.E. "Buster" Barnes own adjoining property in Anderson County. Lake Creek runs through both tracts, and Mathis's 1,254 acre property is located upstream from Barnes's. Mathis maintained a wetlands complex on much of his land, which attracted beavers,

waterfowl, and other wildlife. Barnes's tract was used predominantly as a pasture. In September 2006, Barnes constructed an earthen road across the creek to more easily access his back pasture. To accommodate water flow in the creek, Barnes installed two twenty-eight-inch culverts, or drainage pipes, into the structure. In October 2006, Mathis noticed an elevated water level in the creek, which he suspected was caused by Barnes's road. By November, Mathis noticed that creek water encroached onto his property, and he asked Barnes to modify the road. Barnes later installed an additional culvert into the structure. In December 2006, Mathis returned to his property after a twelve-day absence to discover that Barnes's road was washed away. The flooding—and subsequent drainage—also affected over four hundred acres of Mathis's property, damaging beaver dams, affecting the wildlife population, and draining the wetlands.

Mathis sued Barnes, alleging negligence, gross negligence, nuisance, and trespass. At trial, Mathis argued that Barnes's road acted as a dam, causing a large amount of water to accumulate, which eventually destroyed Barnes's road and damaged much of Mathis's land. Barnes countered that an upstream event caused the flooding and produced evidence that Mathis's property did not lose value and Mathis did not suffer non-economic damages. After a jury answered "No" as to each of Mathis's causes of action, the trial court entered a take-nothing judgment.

On appeal, Mathis argued that, despite the jury's verdict, the evidence conclusively established nuisance, trespass, and negligence.[1] The court of appeals reversed the trial court's judgment in part, holding that "the evidence is legally insufficient to support the jury's 'No'

[1] Mathis also asked for injunctive relief to prevent Barnes from further impounding the waters of Lake Creek. The court of appeals found that it lacked jurisdiction to issue such relief. 316 S.W.3d 795, 808–09. Mathis does not challenge that determination here.

answer[s]" to the nuisance and trespass issues. 316 S.W.3d at 802–04. The court nevertheless remanded the case for trial because, when "liability is contested, we cannot order a separate trial solely on damages. *See* TEX. R. APP. P. 44.1(b)." *Id*. at 809.

The court of appeals concluded that the following material facts were established as a matter of law: (1) Barnes constructed the road across Lake Creek, (2) the road disrupted the creek's flow, and (3) water from the creek crossed the parties' property line, flooding Mathis's land. *Id*. at 802. Regarding the nuisance claim, the court pointed to evidence that Mathis maintained some of his property as a wetlands area and that after the large flood, the property retained much less water. *Id*. Thus, the court held that Mathis had conclusively established nuisance. *Id*. As to the trespass claim, the court observed that Barnes was aware that water encroached on Mathis's property after Barnes built the road. *Id*. at 803. The court held that because damage is presumed after a trespass, that claim, too, was established conclusively. *Id*. (citing *Johnson v. Phillips Petroleum Co.*, 93 S.W.2d 556, 558–59 (Tex. Civ. App.—Amarillo 1936, no writ)).

Barnes contends that the court of appeals erred by focusing on evidence that failed to persuade the jury. We agree. Uncontested evidence may establish a fact as a matter of law—as when scientific proof yields only one conclusion—even if a jury disagrees. *See, e.g.*, *City of Keller v. Wilson*, 168 S.W.3d 802, 816 (Tex. 2005) (citing *Murdock v. Murdock*, 811 S.W.2d 557, 560 (Tex. 1991) (holding that no evidence supported paternity verdict because blood test conclusively proved defendant was not the child's father)). In this case, however, the jury was required to evaluate the cause of an otherwise natural occurrence. Mathis stated the central issue appropriately: "the parties did contest whether the rush of floodwaters was caused by Barnes' structure breaking

or, as Barnes argued, some unknown, upstream event. Barnes also posited that the destruction of the beaver dams might have been caused by wild hogs rooting around at their base."

As the plaintiff, Mathis was required to prove nuisance and trespass. A nuisance is a condition that substantially interferes with the use and enjoyment of land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities.[2] *Schneider Nat'l Carriers, Inc. v. Bates*, 147 S.W.3d 264, 269 (Tex. 2004); *see also Burditt v. Swenson*, 17 Tex. 489 (1856). The jury refused to find that Barnes created a nuisance that damaged Mathis's land. In order to have judgment rendered for him despite the jury's verdict, Mathis must show that the evidence establishes conclusively that Barnes substantially interfered with his land and caused unreasonable discomfort. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001) (per curiam); *see also* Robert W. Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 TEX. L. REV. 361, 364 (1960) ("Before a party is entitled to have a judgment based on [a jury's failure to find a vital fact] reversed and judgment rendered in his favor it must appear that the evidence establishes conclusively that the act *was* committed." (emphasis in original)). We conclude that Mathis did not do so.

The parties agree that Barnes's road caused water to enter Mathis's land in October. However, Barnes disputed that the water substantially interfered with Mathis's property use or that it caused unreasonable discomfort or annoyance. Mathis's property is located in a floodplain. The property is within the watershed of Lake Creek, which is a major creek. At times, significant water

[2] A similar definition of nuisance was provided in the jury charge.

comes down Lake Creek, creating river-like conditions on the property. The part of the tract maintained as a wetlands consistently retained water, and the bottomlands experienced fluctuations in water levels. Some of Mathis's land is in a swamp condition. The size of Mathis's marsh could increase by 20 or 25 acres with rain, and the area experienced some flooding even before Barnes built his road. A jury could decide, on this record, that the road-caused flooding—one of many other examples of elevated water level on the land—was insufficient to cause Mathis "unreasonable discomfort." Because the evidence presented to the jury was conflicting, Mathis did not conclusively prove nuisance liability for damages for the initial flooding.

An unprecedented flooding event (as occurred in December) may qualify as a nuisance, but here the parties debated its cause. Mathis was absent from his property when the flood occurred, and could not say how much water was in the creek when he left his property on December 16. Mathis also testified that he was unsure whether the December flooding was the result of Barnes's road, as opposed to some other upstream occurrence. Further, Mathis admitted that heavy rains can inundate Lake Creek, creating river-like conditions whether or not the road had been built. As the court of appeals noted, there was also evidence that the volume of water that inundated Mathis's land had never occurred prior to Barnes's construction of the road.

The conflicting theories, each supported by evidence, presented a classic case for a jury's resolution. A jury could reasonably have found that Mathis did not prove Barnes's road caused a flooding event unique from natural circumstances. We therefore conclude the court of appeals erred in holding that liability was established as a matter of law as to Mathis's nuisance claim.

A similar inquiry must be made as to whether Mathis conclusively proved trespass. The jury answered "No" to the question: "Did H.E. 'Buster' Barnes cause damage to Dr. Mathis'[s] land by trespassing on Dr. Lee Roy Mathis'[s] land?" Trespass to real property is an unauthorized entry upon the land of another, and may occur when one enters—or causes something to enter—another's property. *See Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1, 11 n.29 (Tex. 2008); *Glade v. Dietert*, 295 S.W.2d 642, 645 (Tex. 1956). "[E]very unauthorized entry upon land of another is a trespass even if no damage is done or injury is slight." *Coastal Oil*, 268 S.W.3d at 12 n.36 (quoting *McDaniel Bros. v. Wilson*, 70 S.W.2d 618, 621 (Tex. Civ. App.—Beaumont 1934, writ ref'd) (alteration in original)). As stated above, the parties agreed that Barnes's road initially caused water to enter Mathis's property. Mathis argues that this conclusively establishes trespass.

However, we must measure the sufficiency of the evidence based on the jury charge. *See Romero v. KPH Consol., Inc.*, 166 S.W.3d 212, 221 (Tex. 2005). Barnes contends he presented evidence to show that Mathis did not suffer additional damage, such as loss of property value or diminished use of his land. Mathis argues that Barnes confuses *damage*, a legal element of trespass, with *damages*, a quantitative valuation of harm. Thus, Mathis asserts the violation of his exclusive right to possess his property—Barnes's trespass—constitutes damage, conclusively proving that the initial flood was a trespass. We conclude that the law supports Barnes's position.

The jury was instructed to follow the jury charge, which specified, "[w]hen words are used in this charge in a sense that varies from the meaning commonly understood, you are given a proper

legal definition, which you are bound to accept in place of any other meaning."[3] We presume the jury followed these instructions. *See Columbia Rio Grande Healthcare, L.P. v. Hawley*, 284 S.W.3d 851, 862 (Tex. 2009). The question provided a definition of trespass. But it neither defined damage nor instructed that damage is a legal element of trespass.[4] The common definition of *damage* is "loss due to injury: injury or harm to person, property, or reputation." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 571 (2002). Thus, the jury was entitled to believe that an affirmative answer to the trespass question must be based on a finding of trespass *and* additional loss or injury.[5]

Mathis argues the court of appeals correctly found that damage is presumed in every trespass. *See* 316 S.W.3d at 803 (citing *Johnson*, 93 S.W.2d at 558–59). He asserts that because Barnes caused initial flooding, trespass was established as a matter of law. However, we reject Mathis's narrow reading of the question, which renders the term *damage* superfluous. Under Mathis's interpretation, the question essentially asks whether Barnes caused a presumed element of trespass by committing the tort itself.

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[3] A similar instruction is included in Texas Rule of Civil Procedure 226a as an approved jury instruction. *See* Amendments to Texas Rules of Civil Procedure 281 and 284 and to the Jury Instructions Under Texas Rule of Civil Procedure 226A, Supreme Court of Texas, No. 11-9047, Mar. 15, 2011, at 9.

[4] The charge defined "trespass" as "any unauthorized intrusion or invasion of private premises or land of another, committed when a person enters another's land without consent; or alternatively, unauthorized entry upon land of another. For purposes of a trespass claim, entry need not be in person, but may be made by causing or permitting something to cross the boundary of the property of another."

[5] The term *damage* also appears in three other questions of the jury charge: "QUESTION 1: Did the negligence, if any, of [Barnes] proximately cause the damage, if any, to [Mathis's] land? . . . QUESTION 2: Did [Barnes] create a nuisance which caused damage to [Mathis's] land? . . . QUESTION 4: Do you find by clear and convincing evidence that the damage, if any, to [Mathis's] land resulted from gross negligence?" The fact that the term was not defined anywhere in the charge lends further support to Barnes's argument.

And although Mathis presented evidence that the flooding permanently damaged his land, Barnes's witness, a real estate appraiser, testified that the value of the property was unchanged by the flow. There was also evidence that there was no non-economic damage. Several witnesses testified that the wildlife Mathis complained had left his property naturally comes and goes and was in fact returning. Given the charge and the conflicting evidence of damage, Mathis failed to conclusively prove trespass. *See Francis*, 46 S.W.3d at 241. The court of appeals erred in holding otherwise.

In the court of appeals, Mathis also asserted that the evidence was factually insufficient to support the jury's verdict, an issue the court of appeals declined to reach. Accordingly, without hearing oral argument, TEX. R. APP. P. 59.1, we grant Barnes's petition for review, reverse in part the court of appeals' judgment, and remand the case to the court of appeals to consider Mathis's argument that the jury's failure to find nuisance and trespass was against the great weight of the evidence.

Opinion Delivered: October 21, 2011

IN THE SUPREME COURT OF TEXAS

NO. 10-0671

KERRY HECKMAN, ET AL., ON BEHALF OF THEMSELVES AND ALL OTHER PERSONS SIMILARLY SITUATED, PETITIONERS,

v.

WILLIAMSON COUNTY, ET AL., RESPONDENTS

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

Argued November 9, 2011

JUSTICE WILLETT delivered the opinion of the Court.

A criminal defendant's right to counsel—enshrined in both the United States and Texas Constitutions—ranks among the most important and fundamental rights in a free society. The plaintiffs in this civil action assert that they, and other similarly situated indigent criminal defendants, have been deprived of that right. The court of appeals dismissed their suit, concluding that the trial court lacked jurisdiction. We disagree. While our Constitution requires vigilance lest courts overstep their jurisdictional bounds, courts also must dutifully exercise jurisdiction rightly theirs. Here, the court of appeals erred in concluding that the plaintiffs lacked standing and that their claims are moot. We reverse the court of appeals' judgment and remand to the trial court for further proceedings.

I. Background

In 2006, petitioners Kerry Heckman, Monica Maisenbacher, Sylvia Peterson, and Tammy Newberry each faced misdemeanor charges in Williamson County—charges that could lead to up to a year in prison. Each claimed to be unable to afford legal representation. And each claimed that he or she had been, or soon would be, denied his or her right to court-appointed counsel.

They sought relief by initiating this lawsuit pursuant to section 1983 of the Civil Rights Act of 1871. In addition to suing Williamson County, they sued its constitutional county judge,[1] three of its county court at law judges,[2] and its magistrate judge[3]—all in their official capacities.

Heckman, Maisenbacher, Peterson, and Newberry claimed that these defendants ("defendants") had deprived, conspired to deprive, and allowed others to deprive them of two constitutionally protected rights: the right to counsel and the right to self-representation. Petitioner Jessica Stempko, whose minor daughter was then facing misdemeanor charges in Williamson County, joined them in a third claim: that defendants had deprived them of their constitutionally protected right to open-court proceedings.

These five plaintiffs ("plaintiffs" or "named plaintiffs") brought these claims not just on their own behalf but for the putative class of all individuals accused of a misdemeanor crime in Williamson County who faced the possibility of confinement and could not afford legal counsel.

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[1] The Honorable John Christian Doerfler, who has been substituted as a defendant in this case by the Honorable Dan A. Gattis, his successor in office. *See* TEX. R. APP. P. 7.2(a).

[2] The Honorable Judges Suzanne Brooks, Tim Wright, and Donald Higginbotham (substituted as a defendant here by the Honorable Doug Arnold, his successor in office).

[3] The Honorable William Eastes.

They sought injunctive and declaratory relief "[t]o stop Defendants' unconstitutional and unfair practices."

Defendants filed a plea to the jurisdiction. First, they asserted that the trial court lacked jurisdiction to intervene in equity into pending criminal proceedings. Second, they argued that Heckman, Maisenbacher, and Peterson all lacked standing to bring their claims and that their claims were moot. They introduced undisputed evidence that since joining this suit, those three plaintiffs had each been appointed counsel and, further, that their criminal cases had concluded. Defendants also introduced undisputed evidence that a visiting judge[4] had been the one who refused to provide appointed counsel to Heckman, Maisenbacher, and Peterson—not any of the defendant county court at law judges. Third, defendants argued that Newberry's claims and Stempko's claim were not ripe because they were based on events that had not yet happened (that is, they were not yet far enough along in the pretrial process to have any grounds to make these claims).

The trial court denied the plea to the jurisdiction. Defendants promptly filed an interlocutory appeal,[5] leading the trial court to stay further proceedings. Consequently, the trial court did not rule on plaintiffs' petition for class certification—it neither certified the class nor denied certification.

On appeal, defendants renewed their jurisdictional arguments. They also moved to dismiss and filed supplemental briefing, noting that all of plaintiffs' criminal cases had been resolved and that, beforehand, all of them had been appointed counsel. (In the case of Jessica Stempko, who did

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[4] The Honorable Bob Jones, who was visiting from Travis County and who is not a party to this lawsuit.

[5] *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8); *Harris Cnty. v. Sykes*, 136 S.W.3d 635, 638–39 (Tex. 2009).

not face criminal charges, defendants asserted the same with regard to her daughter.) Finally, they asserted that a number of subsequent developments had mooted the claims of the putative class—Williamson County had revised its policies for appointing legal counsel for indigent misdemeanor defendants, and had hired additional personnel to ensure that those defendants who needed a lawyer received one.

The court of appeals held that none of the named plaintiffs ever had standing to pursue all of the purported class's claims; for this reason, the court held that none of the named plaintiffs had standing to litigate whether the putative class should be certified. The court held that, for this reason, the claims were moot, as was the suit itself.[6] It vacated the trial court's denial of defendants' plea to the jurisdiction and dismissed the suit for want of subject-matter jurisdiction.

Thereafter, we granted plaintiffs' petition for review.[7]

II. Appellate Jurisdiction of this Court

Defendants argue that this appeal falls outside the constitutional and statutory scope of our appellate jurisdiction. Because these issues may be dispositive, we consider them first.

A. Interlocutory Appeals

Ordinarily, this Court lacks jurisdiction over an appeal from an interlocutory order.[8] Here, however, we have jurisdiction over this case because the court of appeals' decision conflicts with

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[6] __ S.W.3d __, __.

[7] 54 TEX. SUP. CT. J. 1012 (May 27, 2011).

[8] *See* TEX. GOV'T CODE § 22.225(b).

prior decisions of this Court.[9] The court of appeals held that, because no named plaintiff had standing on all of the class's claims, no named plaintiff had standing at all.[10] Previously, we have held that a plaintiff's lack of standing to bring some, but not all, of his claims just deprives the court of jurisdiction over those discrete claims.[11] Given this conflict, we conclude that this case does not fall outside the statutory scope of our appellate jurisdiction over interlocutory appeals.

B. "Criminal Law Matters"

We next consider whether this case falls outside the scope of our appellate jurisdiction as delineated by the Texas Constitution. Defendants assert that it does, arguing that Heckman's case amounts to a "criminal law matter." We disagree.

1.

The jurisdiction of this Court—like that of all Texas courts—derives from Texas's Constitution and statutes.[12] Under our Constitution, this Court's appellate jurisdiction "extend[s]

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[9] *See id.* § 22.225(c).

[10] __ S.W.3d at __.

[11] *E.g.*, *Williams v. Lara*, 52 S.W.3d 171, 184–85 (Tex. 2001); *see Thomas v. Long*, 207 S.W.3d 334, 338 (Tex. 2006).

[12] *In re Allcat Claims Serv., L.P.*, 356 S.W.3d 455, 459–60 (Tex. 2011).

to all cases except in criminal law matters."[13] Thus, if defendants are correct and this appeal constitutes a criminal law matter, then we lack the authority to decide it.[14]

No one rule clearly defines the content or contours of "criminal law matters." We do not write on an entirely blank slate, however. To determine whether a case is a criminal law matter, we look to the essence of the case to determine whether the issues it entails are more substantively criminal or civil.[15] Criminal law matters include disputes where "criminal law is the subject of the litigation;" such cases include those "which arise over the enforcement of statutes governed by the Texas Code of Criminal Procedure."[16] Criminal law matters also include disputes "which arise as a result of or incident to a criminal prosecution."[17]

In addition to the principles announced in our own caselaw, we find guidance in the decisions of the Court of Criminal Appeals.[18] The Texas Constitution gives that court the authority to issue a variety of writs, including the writ of mandamus, "in criminal law matters."[19] Thus, the Constitution uses the same term to demarcate the end of our appellate jurisdiction and the beginning

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[13] TEX. CONST. art. V, § 3(a) ("[The Court's] jurisdiction shall be co-extensive with the limits of the State and its determinations shall be final *except in criminal law matters*. Its appellate jurisdiction shall be final and shall extend to all cases *except in criminal law matters*." (emphasis added)).

[14] *Harrell v. State*, 286 S.W.3d 315, 317 (Tex. 2009). However, we necessarily have jurisdiction to decide whether this appeal falls within the category of "criminal law matters," because "[c]ourts always have jurisdiction to determine their own jurisdiction." *Id.*; *see Campbell v. State*, 85 S.W.3d 176, 180 (Tex. 2002).

[15] *See Harrell*, 286 S.W.3d at 318–19.

[16] *Id.* at 318.

[17] *Id.*

[18] *See, e.g.*, *id.* (citing opinions from the Court of Criminal Appeals for the definition of "criminal law matters").

[19] TEX. CONST. art. V, § 5(c).

of our sister court's mandamus jurisdiction. When interpreting "criminal law matters" for purposes of our own jurisdiction, "we should be mindful of the potential effect of our construction" upon the jurisdiction of the Court of Criminal Appeals.[20] By declaring that our appellate jurisdiction reaches a certain matter, we thereby define, and potentially limit, the jurisdiction of our constitutional sibling.[21]

2.

In this case, we are asked to consider the issues first raised by defendants' plea to the jurisdiction:

- Did the named plaintiffs lack standing to sue?
- Were their claims not yet ripe?
- Did the mooting of their individual claims render this suit moot?

These are questions of justiciability—a doctrine rooted in the Separation of Powers provision[22] and the Open Courts provision[23] of the Texas Constitution.[24] These constitutional provisions—or, more specifically, the justiciability doctrines of standing, ripeness, and mootness that derive from

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[20] *See In re Johnson*, 280 S.W.3d 866, 872–73 (Tex. Crim. App. 2008).

[21] *See id.*; *State ex rel. Holmes v. Third Court of Appeals*, 885 S.W.2d 386, 410–11 (Tex. Crim. App. 1994) (Clinton, J., dissenting) (arguing that "criminal law matters," as that term is used in Article V, Section 3(a), and Article V, Section 5(c), should be interpreted in the same way to avoid jurisdictional conflicts); *see also Dearing v. Wright*, 653 S.W.2d 288, 289–90 (Tex. 1983) (noting that "[u]nder our dual appellate system, we must concede to those courts the exclusive jurisdictional prerogative in criminal law matters our constitution requires that they exercise").

[22] *See* TEX. CONST. art. II, § 1.

[23] *See id.* art. I, § 13.

[24] *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443–45 (Tex. 1993) (explaining basis for standing under Texas Constitution); *see Patterson v. Planned Parenthood of Houston & Se. Tex., Inc.*, 971 S.W.2d 439, 442–43 (Tex. 1998) (same).

them—are the subject of this appeal, "not any provision in the Code of Criminal Procedure nor any other criminal statute."[25] Nor must we provide any "construction of a criminal statute" to answer the justiciability questions here.[26] In other words, no "criminal law is the subject of the litigation."[27] Arguably for this reason alone, this case does not present a "criminal law matter."

But beyond this technical analysis, a more fundamental reason supports our conclusion. The Texas Constitution—the source of the requirements of justiciability in Texas—bars our courts from rendering advisory opinions and limits access to the courts to those individuals who have suffered an actual, concrete injury.[28] By raising the issue of justiciability, defendants ask for a determination of whether the named plaintiffs have suffered an actual injury, and whether there exists a live, non-abstract question of law that, if decided, would have a binding effect on the parties. In short, they ask this Court to determine whether this suit is appropriate for judicial review, or whether the courts should refrain from deciding it.[29]

Thus, the question raised by defendants' plea to the jurisdiction—and the constitutional and pragmatic concerns it engenders—goes to the heart of civil practice. Justiciability is a matter of

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[25] *See Harrell*, 286 S.W.3d at 318 (holding that a case involving the interpretation of section 501.014 of the Texas Government Code was not a "criminal law matter" because it presented the issue of how to interpret and enforce a civil statute); *In re Johnson*, 280 S.W.3d at 869–74 (same); *see also Smith v. Flack*, 728 S.W.2d 784, 788–89 (Tex. Crim. App. 1987) (holding a case, involving interpretation of article 26.05 of the Code of Criminal Procedure, was a "criminal law matter"); *Curry v. Wilson*, 853 S.W.2d 40, 43 (Tex. Crim. App. 1993) (same).

[26] *See Harrell*, 286 S.W.3d at 319.

[27] *See id.* at 318.

[28] *Tex. Ass'n of Bus.*, 825 S.W.2d at 444.

[29] *See Brown v. Todd*, 53 S.W.3d 297, 305 (Tex. 2001).

concern in every civil case,[30] and remains a live concern from the first filing through the final judgment.[31] Accordingly, the body of Texas jurisprudence on justiciability has developed primarily in this and other courts exercising civil jurisdiction.[32]

This is not to say that justiciability concerns never arise in "criminal law matters" or in cases decided by the Court of Criminal Appeals.[33] However, such concerns would seem to arise rarely, if ever, in classic "criminal proceedings" where a defendant's guilt, innocence, or punishment are at issue,[34] and the relationship between the State and the defendant is "solidly adversarial."[35]

The question here is not simply the justiciability of an individual plaintiff's claim, but whether multiple individual named plaintiffs have a justiciable interest in obtaining the use of a procedural device unique to civil law: the class action.[36] Questions about the justiciability of a party's motion for class certification do not fit neatly into any of the categories of "criminal law

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[30] *See, e.g.*, *Williams v. Lara*, 52 S.W.3d 171, 178 (Tex. 2001) (noting that the justiciability doctrine of standing "is a constitutional prerequisite to maintaining suit").

[31] *See, e.g.*, *Bd. of Adjustment v. Wende*, 92 S.W.3d 424, 427 (Tex. 2002) ("It is well settled that a controversy must exist between the parties at every stage of the legal proceedings, including the appeal.").

[32] The Court of Criminal Appeals has recognized as much: "In Texas, the law of standing has been developed mainly in the courts of civil jurisdiction." *Fuller v. State*, 829 S.W.2d 191, 201 (Tex. Crim. App. 1992), *abrogated on other grounds by Riley v. State*, 889 S.W.2d 290, 301 (Tex. Crim. App. 1993).

[33] *See, e.g.*, *State ex rel. Watkins v. Creuzot*, 352 S.W.3d 493, 504–06 (Tex. Crim. App. 2011) (considering ripeness of criminal defendant's pretrial declaratory judgment claim that the State could not execute him); *Ex parte Bohannan*, 350 S.W.3d 116, 119–20 (Tex. Crim. App. 2011) (analyzing justiciability of parolee's habeas claims); *Gallo v. State*, 239 S.W.3d 757, 780 (Tex. Crim. App. 2007) (assessing justiciability of habeas challenge to the manner of an impending execution); *Ex parte Nelson*, 815 S.W.2d 737, 738–39 (Tex. Crim. App. 1991) (per curiam) (determining applicability of an exception to mootness).

[34] *See Harrell*, 286 S.W.3d at 319 (identifying the "chief features of a criminal proceeding").

[35] *See Rothgery v. Gillespie Cnty.*, 554 U.S. 191, 202 (2008).

[36] *See* TEX. R. CIV. P. 42 (stating rules for suing as a class).

matters" identified by this Court or the Court of Criminal Appeals.[37] Indeed, neither party has identified precedent where the Court of Criminal Appeals even considered issues of justiciability in the class action context. Nor has either party identified precedent in which that court, or this one, held that questions about justiciability are "criminal law matters"—in the class-certification context or otherwise. Nor have we discovered any.

This Court, by contrast, has issued numerous opinions on justiciability generally and specifically in the context of class certification. Given the importance of the subject in civil practice, litigants will no doubt continue to call on us to do so—yet another reason against declaring this a "criminal law matter" and thereby placing it beyond the scope of our appellate jurisdiction. We conclude that, by holding this to be a civil law matter, we preserve our appellate jurisdiction over a fundamental area of civil law while not encroaching on the jurisdiction of our sister court.

3.

Defendants nevertheless contend that this is a "criminal law matter" as it arises from a criminal proceeding. Specifically, they assert that the appointment of legal counsel for indigent misdemeanor defendants is a criminal law matter; hence allegations about the constitutionality of such procedures are, themselves, necessarily "criminal law matters."

Defendants conflate the merits of the named plaintiffs' claims—which are *not* before this Court—with the justiciability issues which *are* before us. The only question we are asked to decide is whether the named plaintiffs have a justiciable interest in this case. The only relief they seek is

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[37] *See* 43B GEORGE B. DIX & JOHN M. SCHMOLESKY, TEXAS PRACTICE SERIES: CRIMINAL PRACTICE AND PROCEDURE §§ 61:6–8 (3d ed. 2011) (citing cases); 27 TEX. JUR. 3D *Criminal Procedure: Post-trial Proceedings* § 598 (2010) (same).

for us to reverse the court of appeals' dismissal for want of jurisdiction, and to remand the matter so the trial court can decide whether to certify the class. Indeed, given the procedural posture of this case, this is the only relief plaintiffs are able seek in this Court at this time. We are not asked to decide—nor could we decide—whether to certify the purported class, much less how to adjudicate the merits of plaintiffs' constitutional claims.

Admittedly, to answer the justiciability questions raised here, we must refer to some extent to criminal procedure law. But that fact does not render this case a criminal law matter. More than a century ago, this Court noted that "there are criminal cases which may incidentally involve a question of civil law, and civil cases in which in like manner points of criminal law call for solution."[38] The Court of Criminal Appeals appears to have arrived at the same conclusion.[39]

Nor is this the first time we have considered a challenge to a lower court's jurisdiction over what may be a "criminal law matter." In the past, we held that a trial court lacked jurisdiction to issue a declaratory judgment that a penal code provision was unconstitutional or to issue an injunction against its enforcement.[40] We exercised jurisdiction over the jurisdictional question in

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[38] *Comm'rs' Court v. Beall*, 81 S.W. 526, 528 (Tex. 1904); *see also Harrell*, 286 S.W.3d at 319 (concluding that case was "more civil than criminal").

[39] *See, e.g.*, *Armstrong v. State*, 340 S.W.3d 759, 765 (Tex. Crim. App. 2011) ("An issue does not cease to be a criminal law matter merely because elements of civil law must be addressed to resolve the issue."); *Lanford v. Fourteenth Court of Appeals*, 847 S.W.2d 581, 585 n.3 (Tex. Crim. App. 1993) ("In making th[e] determination [of what constitutes a 'criminal law matter'], we are not bound by the fact that there may be civil law facets to the issue at hand, anymore than the Texas Supreme Court, in determining whether a matter is civil in nature, is bound by the fact that the matter may be quasi-criminal."); *see also In re Johnson*, 280 S.W.3d at 870 ("[R]esolution of the question presented by this mandamus application requires us to scrutinize no criminal-law statute. So, the question arises: Is this a 'criminal law matter' that requires us, incidentally, to examine certain provisions of the civil law for resolution, or is it primarily a civil law matter that happens, incidentally, to emanate from a judgment in a criminal case, but is not otherwise related to criminal law at all?").

[40] *See State v. Morales*, 869 S.W.2d 941, 946–48 (Tex. 1994).

that appeal, regardless of the fact that the underlying merits question—whether the statute was constitutional—was no doubt itself a "criminal law matter" beyond our appellate jurisdiction.

For similar reasons, the fact that we can only answer the justiciability questions here by referring to criminal law cases does not deprive us of appellate jurisdiction. The matter before us deals with justiciability, and therefore falls squarely within our constitutional authority.

III. Standard and Scope of Review

Having determined this case falls within our appellate jurisdiction, we consider now the subject of the dispute: defendants' plea to the jurisdiction. A plea to the jurisdiction challenges the court's authority to decide a case.[41] Here, defendants challenge plaintiffs' standing as well as the ripeness of their claims, and further assert their claims are moot. These are questions of law we review *de novo*.[42]

The burden is on the plaintiff to affirmatively demonstrate the trial court's jurisdiction.[43] When assessing a plea to the jurisdiction, our analysis begins with the live pleadings.[44] We may also consider evidence submitted to negate the existence of jurisdiction—and we must consider such

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[41] *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 553–54 (Tex. 2000).

[42] *Tex. Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 646 (Tex. 2004) (standing); *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex. 1998) (ripeness); *see Speer v. Presbyterian Children's Home & Serv. Agency*, 847 S.W.2d 227, 229 (Tex. 1993) (mootness).

[43] *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004).

[44] *See id.*

evidence when necessary to resolve the jurisdictional issue.[45] We construe the plaintiff's pleadings liberally, taking all factual assertions as true, and look to the plaintiff's intent.[46]

We must grant the plea to the jurisdiction if the plaintiff's pleadings affirmatively negate the existence of jurisdiction.[47] And we must grant the plea if the defendant presents undisputed evidence that negates the existence of the court's jurisdiction.[48]

IV. Standing

The court of appeals held that not one of the named plaintiffs had standing to pursue *all* of the putative class's claims. The court therefore held that *none* of the named plaintiffs had standing to pursue *any* of the class's claims, or to litigate whether the class should be certified.

According to plaintiffs, the court of appeals has dramatically rewritten the rules of standing. Plaintiffs argue that the court's holding "make[s] pleading an all-or-nothing game where either all claims proceed or no claims proceed." And in any event, plaintiffs assert that several of the named plaintiffs did have standing to pursue each and every one of the class's claims.

Thus, the threshold standing question here is whether a named plaintiff must have standing on *all* of the class's claims in order to pursue *any* of them. We hold that he does not. We further hold, for each claim, that at least one named plaintiff in this case had standing to assert that claim. Thus, the court of appeals erred in dismissing this suit on standing grounds.

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[45] *Bland Indep. Sch. Dist.*, 34 S.W.3d at 555.

[46] *Miranda*, 133 S.W.3d at 226.

[47] *Id.* at 227.

[48] *See id.* at 226.

A. General Principles

Standing is a constitutional prerequisite to suit.[49] A court has no jurisdiction over a claim made by a plaintiff who lacks standing to assert it.[50] Thus, if a plaintiff lacks standing to assert one of his claims, the court lacks jurisdiction over that claim and must dismiss it.[51] Similarly, if the plaintiff lacks standing to bring *any* of his claims, the court must dismiss the whole action for want of jurisdiction.[52]

The standing requirements extend to class actions.[53] A plaintiff who brings a class action, rather than just suing on his own behalf, must still prove that he individually had standing to sue.[54] The court must consider this threshold question even before reaching the separate issue of whether it can certify the putative class.[55] Just as it must dismiss a case where the plaintiff lacks standing to bring any of his claims, a court must dismiss a class action for want of jurisdiction if the named plaintiff entirely lacked *individual* standing at the time he sued.[56]

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[49] *See Sw. Bell Tel. Co. v. Mktg. on Hold Inc.*, 308 S.W.3d 909, 915 (Tex. 2010).

[50] *DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 304 (Tex. 2008).

[51] *See Andrade v. NAACP of Austin*, 345 S.W.3d 1, 14 (Tex. 2011) ("[A] plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." (quoting *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008))).

[52] *See Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 392 (Tex. 2000) (holding that plaintiff had standing on some claims but not others, and dismissing only those claims for which it lacked standing).

[53] *Sw. Bell Tel. Co.*, 308 S.W.3d at 915.

[54] *M.D. Anderson Cancer Ctr. v. Novak*, 52 S.W.3d 704, 710 (Tex. 2001).

[55] *Id.*

[56] *Id.* at 711.

These principles provide a starting point for our analysis, but this case raises a further question: What happens if a named plaintiff has individual standing on some, but not all, of the putative class's claims? We turn to this question next.

B. Must a Plaintiff Have Standing on Each Claim of the Purported Class to Pursue Certification?

The court of appeals concluded that the named plaintiffs, "both individually and collectively, have never had standing to pursue the full claims of the putative class. . . . Thus, there is no plaintiff with standing to pursue the claims of the putative class, nor can there be."[57] Put simply, the court held that a plaintiff cannot seek class certification on *any* claim unless he has individual standing on *every* claim.[58]

We disagree. We see no reason why a plaintiff who seeks to represent a class, but lacks standing on some of the purported class's claims, completely lacks standing to bring *any* claims.

1.

The result we arrive at today is implicit in our earlier decisions. In the past, for example, we considered appeals where the trial court had already decided the question of certification and where the named plaintiffs brought similar but not identical claims—and thus had suffered similar but not identical injuries. The solution there, however, was not to dismiss the entire suit on standing

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[57] __ S.W.3d at __.

[58] *See id.* at __. For this reason, the court held that the named plaintiffs "lack standing to litigate whether that class should be certified." *See id.*

grounds; rather, the solution was for the trial court to certify subclasses to ensure that a named plaintiff had suffered the same injury as the class or subclass.[59]

Federal courts' decisions, too, support our conclusion today.[60] Defendants cite decisions from the U.S. Courts of Appeals for the Fifth and Eleventh Circuits to support their argument that standing is an all-or-nothing enterprise, but these decisions generally support our position, not theirs—and do so in explicit terms.[61] "For every claim, a named plaintiff with standing" appears to be the consensus rule from these federal decisions—a claim survives the initial standing inquiry so long as at least one named plaintiff has standing to bring it.[62] Then, after this inquiry, the court can

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[59] *See, e.g.*, *Bowden v. Phillips Petroleum Co.*, 247 S.W.3d 690, 698–709 (Tex. 2008).

[60] "Because standing is a constitutional prerequisite to maintaining a suit under both federal and Texas law, we look to the more extensive jurisprudential experience of the federal courts on this subject for any guidance it may yield." *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993); *see Brown v. Todd*, 53 S.W.3d 297, 305 (Tex. 2001).

[61] Defendants cite *Griffin v. Dugger*, 823 F.2d 1476, 1482 (11th Cir. 1987), but neglect to point out language particularly troubling for their position. There, the Eleventh Circuit stated that "each claim must be analyzed separately, and a claim cannot be asserted on behalf of a class unless at least one named plaintiff has suffered the injury that gives rise to that claim." *Id.* at 1483. The court quoted this rule in *Prado-Steiman v. Bush*, 221 F.3d 1266, 1279–80 (11th Cir. 2000), another case defendants cite. There, the court concluded that the named plaintiffs did not have standing to bring all of the class's legal claims. *Id.* at 1283. Rather than dismissing the entire suit on standing grounds, however, the court remanded for a reassessment of which plaintiffs satisfied the typicality requirement. *Id.*

In *James v. City of Dallas*, another case defendants cite, the Fifth Circuit stated that "at least one named Plaintiff must have standing to seek injunctive relief on each of the claims against [the defendants]." 254 F.3d at 563. However, the court could not possibly have meant that at least one plaintiff must have standing on each and every claim: It held that the two named plaintiffs had standing to bring some claims but not others, and so dismissed just those claims for which both the plaintiffs lacked standing. *Id.* at 573.

The single case defendants point to which appears to support their position is *Grant v. Gilbert*, 324 F.3d 383, 389–90 (5th Cir. 2003). However, we are unpersuaded by this lone case, especially in light of the authority going the other way.

[62] *See* 1 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 2:5, at 72–73 (5th ed. 2011).

consider whether the named plaintiff satisfies the requirements of "commonality," "typicality," "adequacy," and the other prerequisites for certifying a class action.[63]

2.

Indeed, our holding—that a plaintiff need not have standing on *all* claims of the purported class in order to seek class certification—is logically required by an implicit but fundamental principle of our standing jurisprudence. Whether considering the standing of one plaintiff or many, the court must analyze the standing of each individual plaintiff to bring each individual claim he or she alleges when that issue is before the court.[64] This principle flows from two sources. First, a plaintiff must demonstrate that the court has jurisdiction over (and the plaintiff has standing to bring) each of his claims;[65] the court must dismiss those claims (and only those claims) over which it lacks jurisdiction.[66] Second, a plaintiff must demonstrate that he, himself, has standing to present his

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[63] *Id.* § 2:1, at 59 ("[O]n the one hand, the presence of individual standing to raise issues generally, whether or not common to a class, is required from a constitutional perspective. On the other hand, the meeting of such individual standing tests does not automatically entitle the plaintiff to maintain a class action—she must independently satisfy the additional class representation requirements."); *see also* 7AA CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 1785.1, at 388–89 (3d ed. 2005) ("Representative parties who have a direct and substantial interest have standing; the question whether they may be allowed to present claims on behalf of others who have similar, but not identical, interests depends not on standing, but on an assessment of typicality and adequacy of representation.").

[64] An exception to this rule applies where there are multiple plaintiffs in a case, who seek injunctive or declaratory relief (or both), who sue individually, and who all seek the same relief. There, the court need not analyze the standing of more than one plaintiff—so long as that plaintiff has standing to pursue as much or more relief than any of the other plaintiffs. The reason behind this exception is that, if that plaintiff prevails on the merits, the same prospective relief would issue regardless of the standing of the other plaintiffs. *See, e.g.*, *Andrade*, 345 S.W.3d at 6–7.

[65] *See, e.g.*, *Am. Motorists Ins. Co. v. Fodge*, 63 S.W.3d 801, 805 (Tex. 2001) (noting that "[i]f a claim is not within a court's jurisdiction . . . then it must be dismissed," and concluding that while the trial court erred by dismissing all of the plaintiff's claims for lack of jurisdiction, the court of appeals also erred by reinstating them all).

[66] *Id.*; *see Thomas v. Long*, 207 S.W.3d 334, 338 (Tex. 2006) ("[I]t is proper for a trial court to dismiss claims over which it does not have subject matter jurisdiction but retain claims in the same case over which it has jurisdiction."); *Williams v. Lara*, 52 S.W.3d 171, 185 (Tex. 2001) (dismissing some claims for some parties, some claims for others, and one claim entirely since no one had standing to bring that claim).

claims; the court must dismiss a plaintiff who lacks standing.[67] Thus, each party must establish that he has standing to bring each of the claims he himself alleges—meaning the court must assess standing plaintiff by plaintiff, claim by claim.

The U.S. Supreme Court has analyzed the standing of multiple named plaintiffs in class actions on a plaintiff-by-plaintiff, claim-by-claim basis. It has concluded that such analysis is necessary for two reasons. First, *plaintiff-by-plaintiff* analysis is necessary to ensure that the court exercises jurisdiction only over plaintiffs who individually have standing.[68] "That a suit may be a class action . . . adds nothing to the question of standing."[69] That Court, like this one, has held that named plaintiffs who seek to represent a class "must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent."[70]

Second, *claim-by-claim* analysis is necessary to ensure that a particular plaintiff has standing to bring each of his particular claims. "[S]tanding is not dispensed in gross. . . . '[N]or does a plaintiff who has been subject to injurious conduct of one kind possess by virtue of that injury the

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[67] *See S. Tex. Water Auth. v. Lomas*, 223 S.W.3d 304, 307–08 (Tex. 2007) (per curiam).

[68] *Blum v. Yaretsky*, 457 U.S. 991, 999 (1982).

[69] *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 n.20 (1976).

[70] *Warth v. Seldin*, 422 U.S. 490, 502 (1975); *M.D. Anderson Cancer Ctr. v. Novak*, 52 S.W.3d 704, 708 (Tex. 2001).

necessary stake in litigating conduct of another kind, although similar, to which he has not been subject.'"[71] Other federal courts—including the Fifth Circuit—have come to the same conclusion.[72]

We see no reason why the rule should be different whether one plaintiff or many file suit, or whether that suit is brought as an individual or class action. A plaintiff's burden to establish standing does not decrease just because he brings his suit as a class action. He must still show that he has an individual, justiciable interest in the case; the named plaintiff cannot "borrow" standing from the class, nor does he otherwise get a "pass" on standing.[73] This is so because the motivating concern behind the standing inquiry is exactly the same regardless of the form of the suit: "A court that decides a claim over which it lacks jurisdiction violates the constitutional limitations on its authority, even if the claim is denied. . . . [T]he denial of a claim on the merits is not an alternative to dismissal for want of jurisdiction merely because the ultimate result is the same."[74] But this reasoning cuts the other way, too: The fact that a suit is brought as a class action should not *increase* the named plaintiff's burden to establish standing—say, by requiring him to establish standing on each and every one of the class's claims—any more than it *decreases* his burden. The motivating

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[71] *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996) (quoting *Blum*, 457 U.S. at 999).

[72] *See James*, 254 F.3d at 563–69 (noting that "standing . . . must be addressed on a claim-by-claim basis," concluding that the class representatives had standing to bring some claims but not others, and therefore dismissing only some claims); *see also Pagan v. Calderon*, 448 F.3d 16, 27–30 (1st Cir. 2006) (analyzing standing "plaintiff by plaintiff and claim by claim").

[73] *See M.D. Anderson Cancer Ctr.*, 52 S.W.3d at 710.

[74] *DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 307 (Tex. 2008).

concern remains the same: to determine whether the court has the constitutional authority to decide the case (or the claim) before it.[75] The burden thus remains the same, too.

3.

In short, we hold that where plaintiffs seek to represent a class, a plaintiff need not have standing on each and every one of the class's claims in order to satisfy the standing requirement. So long as an individual plaintiff has standing on *some* claim, he has standing to pursue class certification as to that claim.

C. Standing of the Parties

We now consider plaintiffs' individual standing. If at least one named plaintiff had individual standing to bring at least one claim, then the court of appeals erred in holding that none of the plaintiffs had standing to sue and therefore erred by dismissing the entire case on that basis.

1.

In Texas, the standing doctrine requires a concrete injury to the plaintiff and a real controversy between the parties that will be resolved by the court.[76] This parallels the federal test for Article III standing: "A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief."[77] Given the parallels

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[75] *See id.* at 304, 307.

[76] *Id.*; *see Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 774 (Tex. 2005) ("[S]tanding limits . . . jurisdiction to cases involving a distinct injury to the plaintiff and a real controversy between the parties, which . . . will be actually resolved by the judicial declaration sought." (internal quotation marks omitted)); *Brown v. Todd*, 53 S.W.3d 297, 305 (Tex. 2001) (same).

[77] *Allen v. Wright*, 468 U.S. 737, 751 (1984); *see also Todd*, 53 S.W.3d at 305 (repeating this test).

between that test and our own, we turn for guidance to precedent from the U.S. Supreme Court, which has elaborated on standing's three elements:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."[78]

Under Texas law, as under federal law, the standing inquiry begins with the plaintiff's alleged injury. The plaintiff must be *personally* injured—he must plead facts demonstrating that he, himself (rather than a third party or the public at large), suffered the injury.[79] After all, our Constitution opens the courthouse doors only to those who have or are suffering an injury.[80] As for the injury itself, it "must be concrete and particularized, actual or imminent, not hypothetical."[81] Constitutional harms—whether actual or imminent—are sufficient.[82]

The second element of the standing test requires that the plaintiff's alleged injury be "fairly traceable" to the defendant's conduct.[83] The Supreme Court has described this requirement as

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[78] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (citations omitted).

[79] *Lomas*, 223 S.W.3d at 307 ("[A]s a general rule, to have standing an individual must demonstrate a particularized interest in a conflict distinct from that sustained by the public at large.").

[80] *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993); *see* TEX. CONST. art. I, § 13 (Open Courts provision).

[81] *Inman*, 252 S.W.3d at 304–05 (citations omitted).

[82] *See, e.g.*, *Neeley*, 176 S.W.3d at 774.

[83] *Allen*, 468 U.S. at 751.

ensuring that a "court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court."[84] This Court, too, has previously looked to see whether a defendant's conduct has personally injured the plaintiff as part of the standing inquiry.[85] While it might not be intuitively obvious to think of "traceability" as a part of the standing analysis, "[t]he underlying concerns . . . are similar. Just as there must be a means of identifying proper plaintiffs, so there must be a means of identifying proper defendants."[86]

The third element of standing requires that the plaintiff's alleged injury be "likely to be redressed by the requested relief,"[87] and the plaintiff "must demonstrate standing separately for each form of relief sought."[88] The Supreme Court's description of this element is consonant with Texas law.[89] If, for example, a plaintiff suing in a Texas court requests injunctive relief as well as damages, but the injunction could not possibly remedy his situation, then he lacks standing to bring that claim.[90] To satisfy redressability, the plaintiff need not prove to a mathematical certainty that the

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[84] *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976).

[85] *See, e.g.*, *Austin Nursing Ctr., Inc. v. Lovato*, 171 S.W.3d 845, 850 (Tex. 2005).

[86] 13A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3531.5, at 385 (3d ed. 2008).

[87] *Allen*, 468 U.S. at 751.

[88] *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000).

[89] *See, e.g.*, *Wilson v. Andrews*, 10 S.W.3d 663, 669 (Tex. 1999).

[90] *See Williams v. Lara*, 52 S.W.3d 171, 184–85 (Tex. 2001).

requested relief will remedy his injury—he must simply establish a "substantial likelihood that the requested relief will remedy the alleged injury in fact."[91]

The standing inquiry "requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted."[92]

2.

In this case, four plaintiffs (Heckman, Maisenbacher, Peterson, and Newberry) sued six defendants (Williamson County, its constitutional county judge, three of its county court at law judges, and its magistrate judge, all in their official capacities), claiming that defendants violated three of their constitutional pretrial rights (counsel, self-representation, and open-court proceedings). A fifth plaintiff (Stempko) joins in this last claim.

Because they sued on behalf of themselves and a putative class, at least one named plaintiff must have had standing at the time he or she joined this suit.[93] We begin our standing analysis with Heckman and his claims.

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[91] *Vt. Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 771 (2000). Note that, under federal law, the plaintiff need not show that a favorable decision will relieve every single one of the plaintiff's alleged injuries—the plaintiff simply must show that "a favorable decision will relieve a discrete injury to himself." *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982).

[92] *Allen*, 468 U.S. at 752.

[93] *See M.D. Anderson Cancer Ctr. v. Novak*, 52 S.W.3d 704, 710–11 (Tex. 2001); *see also Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008) ("[T]he standing inquiry . . . focuse[s] on whether the party invoking jurisdiction had the requisite stake in the outcome when the suit was filed.").

a. Right-to-Counsel Claim

Heckman claims that defendants violated his right to counsel under the U.S. Constitution[94] and the Texas Constitution.[95] This right attaches when the criminal defendant first appears before a judicial officer.[96] Pleading under section 1983 of the Civil Rights Act of 1871,[97] Heckman asserts that defendants, "acting under color of the laws of the State of Texas, have deprived, and conspired to deprive, and have allowed to be deprived, indigent persons accused of crimes in Williamson County for which there is a possibility of imprisonment as punishment of their right to counsel." We conclude Heckman pleaded facts sufficient to establish that he had standing on this claim at the time of filing.

i. Injury

Heckman claims that at his first appearance,[98] he was not told about his right to a court-appointed attorney or the standards for determining eligibility for court-appointed counsel, or told how to apply for one. He asserts that he requested a court-appointed attorney, informed the court that he could not afford one on his own, and provided proof of his indigency; in response, the court

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[94] U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."). The Sixth Amendment right to counsel applies to the states via the Due Process Clause of the Fourteenth Amendment. *Gideon v. Wainwright*, 372 U.S. 335, 339–45 (1963).

[95] TEX. CONST. art. I, § 10 ("In all criminal prosecutions the accused . . . shall have the right of being heard by . . . counsel . . . .").

[96] *Rothgery v. Gillespie Cnty.*, 554 U.S. 191, 202 (2008).

[97] *See* 42 U.S.C. § 1983.

[98] At the "first appearance," the court fixes the identity of the accused and hears his plea. *See* TEX. CODE CRIM. PROC. art. 26.02.

allegedly implied that Heckman did not look like he would qualify for court-appointed counsel because he looked healthy enough to work and was wearing nice clothes. Heckman claims that the court did not ask him any questions about his ability to pay for an attorney. The court allegedly threatened Heckman that it would raise his bond if he did not have an attorney at his next appearance. Notwithstanding his request, at the time of filing Heckman had not been appointed an attorney and the charges against him were still pending.

Defendants have not offered any evidence to refute these jurisdictional facts. Rather, they contend that Heckman's right-to-counsel claims were rendered moot by subsequent events. But subsequent events have no effect on whether, at the time of filing, Heckman was suffering from an injury sufficient to give him standing to sue. That is our inquiry here.[99]

We conclude that Heckman has pleaded jurisdictional facts sufficient, for standing purposes, to establish that at the time he sued he was suffering from an injury-in-fact. The facts are sufficiently personal to him (rather than a third party or the general public);[100] they are concrete, particularized and definite because he already suffered them (and was continuing to suffer them);[101] and they are an invasion of a specific right—Heckman's individual, constitutional right to counsel.

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[99] *See M.D. Anderson Cancer Ctr.*, 52 S.W.3d at 710. In Section V, *infra*, we consider whether these subsequent events (and others) may have mooted plaintiffs' claims.

[100] *See S. Tex. Water Auth. v. Lomas*, 223 S.W.3d 304, 307 (Tex. 2007) (per curiam).

[101] *See DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 288, 304–05 (Tex. 2008).

ii. Traceability

Heckman levels his right-to-counsel claim against all six defendants. With regards to Williamson County, he asserts it "is responsible for the provision of indigent defense services within its borders." Heckman traces this responsibility to the Texas Fair Defense Act[102] which, according to Heckman, has delegated to the various counties the responsibility of providing effective counsel to indigent individuals who are entitled to it. Heckman asserts that "Williamson County has a policy, pattern, and practice of denying legal representation to poor individuals accused of misdemeanor offenses punishable by imprisonment."

We conclude that Heckman has pleaded facts sufficient, for standing purposes, to establish that his alleged injuries may be "fairly trace[d]" to Williamson County.[103] We note that Heckman has not shown exactly what responsibility Williamson County bears for his alleged injuries. But he is not required to do so at this stage in the litigation.[104] He must merely show that his injuries are "fairly traceable" to defendants. Heckman has done so here as to the County.[105]

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[102] *See* Act of June 14, 2001, 77th Leg., R.S., ch. 906, 2001 Tex. Gen. Laws 1800; *see also* TEX. GOV'T CODE §§ 71.061(a), .062.

[103] *See Allen*, 468 U.S. at 751.

[104] *See Inman*, 252 S.W.3d at 304 ("[A] plaintiff does not lack standing simply because he cannot prevail on the merits of his claim.").

[105] To that end, we note that the U.S. Supreme Court recently considered the merits of a section 1983 claim against another Texas county for violating a criminal defendant's constitutional right to counsel. *See generally Rothgery v. Gillespie Cnty.*, 554 U.S. 191 (2008). While the Court did not expressly consider the question of standing, it considered the merits of the question there: whether the right to counsel attaches at the "magistration" proceeding. *See id.*

With regards to the other defendants—Williamson County's constitutional county judge, three of its county court at law judges, and its magistrate judge—we note that they vigorously deny having personally committed any constitutional deprivations. They assert that, to the extent Heckman was denied counsel, this was attributable to the actions of a visiting judge from another county.[106] Plaintiffs respond that the alleged deprivations were the result of a custom or practice carried out in the courts of the named defendants.

Regardless of who is correct (both sides may be), we note that plaintiffs indisputably have sued the individual judges only in their official capacities. A suit under section 1983 against a government official in his official capacity "is not a suit against the official but rather is a suit against the official's office," although such a suit is treated as a suit against a "person" under section 1983 when the plaintiff seeks prospective injunctive relief, as plaintiffs seek in this suit.[107]

Finally, our decision today should not be read to suggest any opinion about whether plaintiffs' allegations against these particular judges have merit.

iii. Redressability

Heckman, like the other named plaintiffs, sought injunctive and declaratory relief to remedy the alleged injuries to his right to counsel.

We conclude that Heckman has pleaded sufficient facts to establish that, at least at the time of filing, his injuries were "likely to be redressed by the requested relief."[108] In fact, this is true of

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[106] That judge, the Honorable Bob Jones of Travis County, is not a party to this suit.

[107] *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71, 71 n.10 (1989).

[108] *Allen*, 468 U.S. at 751.

both forms of relief sought. As we noted above, Heckman asserts that at the time he joined this suit, he still had not been appointed an attorney—in other words, that defendants had violated and were continuing to violate his constitutional right to counsel. Heckman sought a declaration that defendants' practice of denying court-appointed counsel to a person who posts bond violated his rights.[109] He also sought an injunction which, in relevant part, would have required the court to fairly evaluate his request for court-appointed counsel and, if appropriate, to appoint a lawyer to represent him.[110] Each form of relief would have remedied, in some way, Heckman's alleged injury. Therefore, each independently satisfies the redressability requirement.

Because Heckman has established injury, traceability, and redressability, he had standing to claim that defendants violated his constitutional right to counsel at the time he sued.

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[109] The relevant portion of plaintiffs' request for declaratory relief is as follows:

> (C) that Defendants' practice of denying counsel to persons accused of crime for which a punishment of imprisonment is possible and who are able to post bond, or whose family members and friends post bond on their behalf, when such persons are not financially able to hire a lawyer violates the United States Constitution, the Texas Constitution, and the Texas Code of Criminal Procedure . . . .

[110] The relevant portion of plaintiffs' request for injunctive relief is as follows:

> (C) Defendants fairly evaluate the requests for appointment of counsel made by all persons accused of an offense for which a punishment of imprisonment is possible in Williamson County, following the guidelines and standards contained in Texas law and local rule, without reference to whether the accused person's family and/or friends are able to post bond or to whether the accused person is physically unable to work . . . .

b. Self-Representation Claim

Heckman claims that defendants "deprived and conspired to deprive" him of his constitutional right to represent himself. The U.S. Constitution implicitly protects this right,[111] and the Texas Constitution does so explicitly.[112]

In plaintiffs' second amended class action petition (their live pleading), Heckman claims that "court officials" pressured him to plead guilty or no contest to the charges against him and encouraged him to speak with a prosecutor without the aid of an attorney. His assertion appears to be that these actions, combined with defendants' ongoing violation of his right to counsel, violated his constitutional right to represent himself.

The legal theory behind this claim isn't exactly clear from the live pleadings, but plaintiffs' briefs provide some guidance. The argument appears premised on the rule that, while a criminal defendant has a right to represent himself, to do so he must first knowingly and voluntarily waive his right to counsel.[113] And, Heckman notes, a criminal defendant can make the requisite waiver only after having been informed of his constitutional right to an attorney—and all that right entails.[114]

We conclude that Heckman has pleaded facts sufficient to establish an injury-in-fact. As for "traceability," the analysis that applied to Heckman's right-to-counsel claim applies equally here,

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[111] *Faretta v. California*, 422 U.S. 806, 818–19 (1975); *see* U.S. CONST. amend. VI.

[112] TEX. CONST. art. I, § 10 ("In all criminal prosecutions the accused . . . shall have the right of being heard by himself . . . .").

[113] *See Faretta*, 422 U.S. at 835.

[114] *See Miranda v. Arizona*, 384 U.S. 436, 473 (1966); 3B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 733, at 70–71 (3d ed. 2004).

given that this claim is based in part on that one. Finally, redressability is satisfied as it appears reasonable to assume that the same relief analyzed above had a likelihood of remedying this alleged injury.[115]

Echoing the court of appeals, defendants argue that Heckman cannot claim a violation of his right to self-representation because he never asked to represent himself—rather, he requested court-appointed counsel.[116] But this misses the thrust of Heckman's argument. According to Heckman, defendants simultaneously misinformed (or under-informed) him of his right to counsel and denied his request for court-appointed counsel, yet encouraged or forced him to do certain acts (enter a plea, speak unrepresented with the prosecution) that constitute self-representation. The argument is that these actions—forcing Heckman to represent himself without first obtaining a knowing and voluntary waiver—constitute a violation of his right to self-representation.

Assuming as we must that all his factual assertions are true (unless disproven by defendants), and making all reasonable assumptions in his favor, we conclude that Heckman had standing to bring this claim when he filed suit.

c. Open-Courts Claim

Heckman claims that defendants violated his right to open-court proceedings. The U.S. Constitution explicitly guarantees public proceedings for a criminal defendant.[117] Heckman asserts

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[115] Heckman requests other injunctive and declaratory relief that may also have relieved his alleged injury.

[116] *See* __ S.W.3d at __.

[117] U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ."). This right applies to the states. *Presley v. Georgia*, 130 S. Ct. 721, 723 (2010).

that the Texas Constitution does the same.[118] Here, Heckman claims that defendants "routinely" deprive criminal misdemeanor defendants of these rights by "acquiescing in or condoning the prohibition or prevention of members of the public from entering and observing proceedings in which persons are accused of violating the criminal laws of the State of Texas."

We conclude that Heckman has failed to establish the requisite injury-in-fact: He has not alleged that he, personally, was suffering from a deprivation of his right to open-court proceedings at the time he filed suit, or that he faced an imminent deprivation of this right. In their live pleading, plaintiffs allege that such deprivations occur in Williamson County during magistration and during the first appearance docket.[119]

But Heckman had already undergone both of these proceedings by the time he filed suit, meaning he no longer suffered from this alleged injury. This in turn means that the alleged prior deprivations of his right to open-court proceedings cannot provide a basis for his claim for prospective relief: Because we do not assume recidivism, we cannot assume that he may undergo these alleged deprivations again in the future.[120] Further, Heckman did not attempt to demonstrate that he might be deprived of this right at any future proceeding—that is, any proceeding that comes

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[118] *See* TEX. CONST. art. I, § 13 ("All courts shall be open . . . .").

[119] For example, plaintiffs allege that when criminal defendants appear before the Williamson County magistrate, "[t]hese proceedings are held in a secure area within the jail and are not open to family members or members of the public." Plaintiffs allege similar facts about the first appearance docket: "A bailiff is standing at the door to the courtroom and tells people attempting to enter the courtroom that only persons with cases on the docket are allowed in the courtroom. . . . Bailiffs stationed inside the courtroom also repeatedly ask whether there are any family members or members of the public inside the courtroom, and order any person who does not have a case on the first appearance docket to leave the courtroom."

[120] *Williams v. Lara*, 52 S.W.3d 171, 184–85 (Tex. 2001).

after the first appearance docket. Under our standing jurisprudence, a plaintiff must plead facts sufficient to demonstrate that he, himself, has suffered or will imminently suffer an injury—not that other people did (or will).[121] Heckman's failure to do so deprives him of standing to bring this claim. Because he has failed to show the requisite injury-in-fact, we need not consider the other elements of the standing test.[122]

3.

In sum, we conclude that at the time he joined this suit, Heckman had standing to claim that Williamson County violated his right to counsel and his right to self-representation. In light of our holding that a named plaintiff need not have standing on every claim of the putative class, we hold that Heckman's standing on these claims gave him standing to pursue certification of the putative class.

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[121] *E.g.*, *S. Tex. Water Auth. v. Lomas*, 223 S.W.3d 304, 307 (Tex. 2007) (per curiam).

[122] We note that at least one named plaintiff appears to have demonstrated standing on this claim. At the time Jessica Stempko joined this suit, her daughter Kelsey stood accused of a misdemeanor offense. Her daughter had already appeared before a magistrate and was anticipating an imminent "first appearance." Jessica Stempko wanted to attend.

But at the time she joined this suit, Williamson County had a published policy of preventing any non-defendants from attending a first appearance. The record includes a printout from the county attorney's website announcing the following: "Due to the limited only [sic] space, only the defendant is allowed in the courtroom for the first appearance setting. (No children, spouses, parents, or friends.)"

In light of Williamson County's stated and published rule, Jessica Stempko alleged that she likely would be denied access to her daughter's first appearance. And the right to a public trial belongs to members of the public just as it does to the accused. *Presley*, 130 S. Ct. at 723.

Thus, Jessica Stempko has pleaded facts sufficient, for standing purposes, to establish that she faced an imminent deprivation of her constitutional right to open-court proceedings. *See Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008) ("[T]he injury required for standing need not be actualized. A party facing prospective injury has standing to sue where the threatened injury is real, immediate, and direct."); *Patterson v. Planned Parenthood of Houston & Se. Tex., Inc.*, 971 S.W.2d 439, 442 (Tex. 1998). Further, it seems reasonable to assume that this alleged injury is "fairly traceable" to Williamson County. And it seems that redressability is satisfied, too: Plaintiffs requested injunctive and declaratory relief that would require "defendants [to] allow members of the public access to court proceedings, including magistration and first appearance proceedings" and would declare that defendants' policy of doing otherwise "violates the United States Constitution and the Texas Constitution."

The court of appeals concluded that none of the named plaintiffs had individual standing to sue. The fact that Heckman did have standing on some claims is sufficient to conclude that the court of appeals erred. Therefore, we need not determine what claims, if any, the other named plaintiffs had standing to bring and whether those claims were ripe. We remand the remaining standing issues to the trial court, which must consider these issues before proceeding to the question of certification.[123]

V. Mootness

The court of appeals concluded that this suit is moot.[124] Defendants assume that position in this Court. They argue that plaintiffs' individual claims became moot once they were appointed counsel and certainly once their criminal cases ended. Defendants further argue that, in any event, the claims of the entire putative class are now moot in light of the changes Williamson County has made to its counsel-appointment policies. Finally, defendants argue that none of the exceptions to mootness apply here.

We disagree. While plaintiffs' individual claims are now moot, that does not dispose of this case. In the past, we have recognized—but have not adopted—exceptions to mootness in the class action context.[125] Today, we adopt and apply such an exception, applicable to claims that are inherently transitory.

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[123] *See M.D. Anderson Cancer Ctr. v. Novak*, 52 S.W.3d 704, 711 (Tex. 2001).

[124] __ S.W.3d at __.

[125] *See M.D. Anderson Cancer Ctr.*, 52 S.W.3d at 708–09.

However, we are unable to conclude whether these claims qualify for the exception in light of intervening events in Williamson County. Therefore, we remand to the trial court to determine whether there likely still exists a class of individuals suffering from the same alleged deprivations of constitutional rights.

A. General Principles

Just as the Texas Constitution bars our courts from deciding a case when the plaintiff lacks standing,[126] similarly, a court cannot not decide a case that has become moot during the pendency of the litigation.[127] A case becomes moot if, since the time of filing, there has ceased to exist a justiciable controversy between the parties—that is, if the issues presented are no longer "live," or if the parties lack a legally cognizable interest in the outcome.[128] Put simply, a case is moot when the court's action on the merits cannot affect the parties' rights or interests.[129] If a case is or becomes moot, the court must vacate any order or judgment previously issued and dismiss the case for want of jurisdiction.[130]

Here, defendants assert—and plaintiffs concede—that all of plaintiffs' individual claims have become moot since they joined this lawsuit. We agree. After joining this suit, each of the named plaintiffs was appointed counsel. Thus, they could no longer claim that defendants were still

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[126] *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443–45 (Tex. 1993).

[127] *Nat'l Collegiate Athletic Ass'n v. Jones*, 1 S.W.3d 83, 86 (Tex. 1999).

[128] *Williams v. Lara*, 52 S.W.3d 171, 184 (Tex. 2001).

[129] *VE Corp. v. Ernst & Young*, 860 S.W.2d 83, 84 (Tex. 1993) (per curiam).

[130] *See Speer v. Presbyterian Children's Home & Serv. Agency*, 847 S.W.2d 227, 229–30 (Tex. 1993).

violating their constitutional right to court-appointed counsel. Furthermore, in the years since plaintiffs filed this suit, all of the criminal cases against them have been resolved. As a result, they no longer have a cognizable interest in obtaining injunctive or declaratory relief from defendants' alleged violations of their, and the putative class's, criminal procedure rights.[131] And because the only relief plaintiffs sought was injunctive and declaratory in nature—that is, they did not seek damages—the individual named plaintiffs no longer have a cognizable interest in the outcome of the case.

Under normal circumstances, we would dismiss for want of jurisdiction.[132] In this case, however, plaintiffs sought class certification. They claim that despite the mooting of their *individual* claims, the relation-back exception saves the *lawsuit* itself from being moot. We turn to this question next.

B. Exceptions to Mootness in Class Actions

In a typical civil action, where a solo plaintiff brings a claim on his own behalf, the mootness analysis is usually straightforward: If the plaintiff's individual interest becomes moot, the entire suit ordinarily becomes moot. In a class action, however, the plaintiff brings a claim not just on his own behalf, but on behalf of an entire class of similarly-injured individuals. There, the named plaintiff's individual interest can become moot without necessarily affecting the class's interest in how the suit turns out. If a class of plaintiffs continues to have a live claim against the defendant notwithstanding the mooting of the named plaintiff's claim, then there will exist a tension between the mootness of

[131] *See Williams*, 52 S.W.3d at 184.

[132] *See id.*; *Speer*, 847 S.W.2d at 228.

the named plaintiff's individual interest on the one hand, and the continuing vitality of the class's claim on the other.[133]

The existence of that tension leads to the question of whether there should be an exception to mootness in such circumstances. Indeed, the mootness question in this case is a by-product of that tension: Should a class action lawsuit survive when the individual claim of the named plaintiff becomes moot? This appears to be a question of first impression in this Court. By contrast, federal courts have extensively explored mootness in the class action context and have developed a body of exceptions that alleviate some of this tension. We therefore turn to their decisions for guidance.[134]

1.

Federal caselaw draws a bright line between two categories of class actions: those where the named plaintiff's interest becomes moot *before* the court decides on certification, and those where that happens *afterwards*. While they treat the two categories somewhat differently,[135] federal courts have carved out exceptions to mootness in each. Where, as here, the individual claims of the named

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[133] 13C CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3533.9.1, at 523 (3d ed. 2008).

[134] *See Tex. Ass'n of Bus.*, 852 S.W.2d at 444.

[135] In the latter category of cases, the class action as a whole will generally not become moot, even if the named plaintiff's individual claims do. *See U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 404 (1980); *Sosna v. Iowa*, 419 U.S. 393, 399–402 (1975); ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 2.5.5, at 144–47 (5th ed. 2007).

But the Supreme Court has explicitly declined to extend this automatic "class action exception" to the former category of cases. *See* 1 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 2:11, at 110 (5th ed. 2011). Most federal appellate courts have done the same. *See id.* § 2:11, at 111 n.9 (citing cases from nearly every federal court of appeals). The result is a very bright line rule: If the named plaintiff's individual claims become moot *after* the trial court rules on certification, the suit will usually survive automatically, while if this happens *before*, the suit can survive only if another exception to mootness applies.

Here, the named plaintiffs' claims became moot before the trial court had time to decide whether to certify the class. Given the weight of federal authority, we decline to apply the automatic "class action exception" to mootness beyond the bounds of the Supreme Court's own caselaw. Therefore, if this class action is to survive the mooting of the named plaintiffs' individual claims, it must do so under another exception.

plaintiffs become moot before the trial court decides whether to certify the class, the class action may still survive so long as it fits the rubric of one of the courts' limited exceptions.[136]

One such exception applies to "inherently transitory" claims. This exception is premised on the idea that some claims, by their nature, are so short-lived that it may be impossible for the trial court to decide on certification before the named plaintiff's individual claims become moot.[137] At the same time, regardless of the mooting of the named plaintiff's claims, there continues to exist a population of individuals who suffer from the same alleged harms and therefore have the same inherently transitory claims against the same defendant.[138] Such a claim, therefore, would apply to many people, yet simultaneously would never be subject to judicial review because it would continuously become moot before a judge could certify the putative class.

Thus the U.S. Supreme Court has applied an exception to mootness to prevent such claims—and the underlying behavior of the defendants—from completely evading review by the courts. The exception is available where a population as a whole retains a live claim against the defendant, but the individual membership of that population is always changing due to the short-lived nature of the claim.[139]

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[136] *See, e.g.*, *Geraghty*, 445 U.S. at 398–400; *Clark v. State Farm Mut. Auto. Ins. Co.*, 590 F.3d 1134, 1139 (10th Cir. 2009) (noting several such exceptions).

[137] *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991).

[138] *See Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975).

[139] 1 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 2:13, at 122 (5th ed. 2011). An example of an inherently transitory claim is a challenge to the length of time an arrestee must wait in jail before receiving a judicial determination of probable cause as required by the Fourth Amendment. *See McLaughlin*, 500 U.S. at 51–52. If the only relief sought is injunctive and declaratory, the named plaintiff's individual claims may very well become moot as soon as he receives his probable cause hearing. But notwithstanding the mooting of the named plaintiff's individual claims,

The mechanism that animates this exception is the relation-back doctrine: The court's decision on certification is deemed to "relate back" to the moment when the named plaintiff first filed the suit—a time when there still existed a live dispute between the named plaintiff and the defendant.[140] Relating class certification back to the filing of the class complaint means the named plaintiff is deemed to have standing to litigate the certification question, even though his individual claims are moot.[141] By its terms, however, "relation back" is not available in a case where the named plaintiff lacked standing from the beginning—in such a case, there was no live controversy between the parties, completely depriving the court of jurisdiction.[142] The relation-back doctrine puts the case in the framework discussed above, whereby the subsequent mooting of the named plaintiff's individual claim, after a decision on certification, does not necessarily moot the entire class action.

We note that the exception for "inherently transitory" claims is different and distinct from the exception for claims that are "capable of repetition, yet evading review"[143]— an exception to mootness which we have previously recognized.[144] The two are similar in that the latter, like the

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there may continue to exist a body of people out there who still have the same claims and suffer the same injuries that the named plaintiff once did—arrestees stuck in jail for an unconstitutionally long time awaiting what should have been a prompt probable cause determination. Individual claimants move in and out of that class with the passage of time, but a body of such claimants continues to exist so long as the alleged harm persists.

[140] *See Geraghty*, 445 U.S. at 398–400.

[141] *Olson v. Brown*, 594 F.3d 577, 582–84 (7th Cir. 2010).

[142] 13C CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3533.9.1, at 521 (3d ed. 2008); *see M.D. Anderson Cancer Ctr.*, 52 S.W.3d at 711.

[143] *See, e.g.*, *Geraghty*, 445 U.S. at 398–99; *Clark*, 590 F.3d at 1139.

[144] *See Tex. A & M Univ. - Kingsville v. Yarbrough*, 347 S.W.3d 289, 290–91 (Tex. 2011).

former, requires a claim that is short-lived.[145] The two exceptions differ, however, in that the "capable of repetition" exception generally applies only if the plaintiff can show that the claim is capable of repetition *as to him*.[146]

Thus, to qualify for the exception for "inherently transitory" claims, the named plaintiff must show two things: First, that the claim is one of short duration,[147] and second, that there likely exists a continuing class of persons suffering the same alleged harm as the named plaintiff.[148]

2.

We adopt the federal exception to mootness for "inherently transitory" claims. As discussed above, Texas courts generally lack the authority to decide a case if it ceases to be "live" or if the parties no longer have a cognizable interest in the outcome of the case.[149] However, we conclude that the "inherently transitory" claims exception, as described above, ensures that there remains a live interest between the class of affected individuals—thereby satisfying constitutional justiciability concerns. And, like the exception for claims that are "capable of repetition yet evading review," this exception also enables our courts to review claims of governmental deprivation of constitutional rights that might otherwise be unreviewable.

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[145] *See id.*

[146] *See Geraghty*, 445 U.S. at 398–99; *Williams v. Lara*, 52 S.W.3d 171, 184 (Tex. 2001).

[147] *McLaughlin*, 500 U.S. at 52; *Swisher v. Brady*, 438 U.S. 204, 213 n.11 (1975).

[148] *Olson*, 594 F.3d at 582; *see Swisher*, 438 U.S. at 213 n.11; *Gerstein*, 420 U.S. at 110 n.11; *Sze v. I.N.S.*, 153 F.3d 1005, 1010 (9th Cir. 1998); *Zurak v. Regan*, 550 F.2d 86, 91–92 (2d Cir. 1977).

[149] *Williams*, 52 S.W.3d at 184.

C. Application

Here, we conclude that plaintiffs' claims are sufficiently short-lived to satisfy the first element of the exception to mootness for inherently transitory claims. However, in light of the intervening events noted by defendants, we are unable to determine whether the claims of the putative class are now moot. Thus we are unable to determine whether the claims here satisfy the second element of the exception, or whether there no longer exists a class having these same constitutional claims.

1.

The claims at issue—that defendants violated plaintiffs' constitutional rights to counsel, self-representation, and open courts—satisfy the first element of the exception. As the U.S. Supreme Court has noted, "criminal trials are typically of 'short duration.'"[150] Indeed, of the four underlying criminal cases that gave rise to this civil suit, three ended well before the trial court ruled on defendants' plea to the jurisdiction—much less even considered the petition for certification.[151] Elsewhere, we have noted that an inmate's time in jail "may be so short that it would be unlikely"

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[150] *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603 (1982) (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 563 (1980).

[151] The record includes data that illustrates just how short-lived a Texas misdemeanor case can be. In the trial court, plaintiffs cited studies from Hidalgo and Bexar Counties indicating that, for misdemeanor defendants who (like these plaintiffs) faced possible jail time, *even after they were appointed counsel* the average time from arrest to first appearance was about a month, and the average time from first appearance to final disposition was about another month. And, of course, magistration itself must generally occur within 24 hours of arrest. *See* TEX. CODE CRIM. PROC. art. 15.17(a). Plaintiffs further allege that the defendant county court at law judges have the practice of pressuring misdemeanor defendants to plead out at their first appearance. If true, this practice would further shorten the amount of time those cases remain "live"—meaning even less time to challenge the unconstitutional deprivation of their pretrial rights.

for him to be able to challenge his prison conditions without his challenge becoming moot.[152] The U.S. Supreme Court has come to the same conclusion when faced with challenges to pretrial detention,[153] and to parole release guidelines.[154] Thus we conclude that plaintiffs' right-to-counsel, self-representation, and open-courts claims "are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires."[155]

2.

However, we are unable to determine whether plaintiffs' claims satisfy the second element of the "inherently transitory" exception. On the one hand, plaintiffs' pleadings indicate that there was a widespread, systematic "custom or practice" in Williamson County of depriving indigent misdemeanor defendants of various pre-trial constitutional rights. By itself, this would appear to be enough to establish the alleged violations are likely to recur with regards to other members of an enduring class of individuals.[156]

On the other hand, defendants point to a number of recent changes in the law and in the County. All of these changes occurred after plaintiffs sued. Defendants assert these changes have mooted this suit by remedying all of the claims of the putative class.

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[152] *Williams*, 52 S.W.3d at 184.

[153] *McLaughlin*, 500 U.S. at 51–52; *Gerstein*, 420 U.S. at 110 n.11.

[154] *See Geraghty*, 445 U.S. at 399.

[155] *See McLaughlin*, 500 U.S. at 52 (quoting *Geraghty*, 445 U.S. at 399).

[156] *See, e.g.*, *Olson*, 594 F.3d at 583–84.

First, defendants apparently have adopted a new policy for appointing counsel to indigent criminal defendants in Williamson County.[157] Defendants assert this new plan provides additional protections for anyone needing a court-appointed attorney. Next, they point to a recently enacted statute that changed the requirements for appointing counsel to indigent defendants,[158] and to recent federal court opinions that have changed the law governing indigent defense.[159] Defendants assert that the new policy complies with these changes. This suit was initiated when another policy was in place—now that the County has a new policy, defendants argue that plaintiffs must initiate a new suit if they want to bring their constitutional claims. Finally, defendants assert that Williamson County has hired an additional "magistrate lawyer" as well as an "indigent defense coordinator to ensure that everyone who is entitled to a court-appointed attorney and requests [same] will get one." All of these intervening events, according to defendants, have mooted the class's claims and thus mooted this class action.

We disagree. Defendants are correct that a suit can become moot at any time, including on appeal, and we agree that the courts have an obligation to take into account intervening events that may render a lawsuit moot.[160] Further, defendants are right that where a plaintiff challenges a statute

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[157] The County's revised policy is not part of the record from the trial court, as defendants adopted it some time after filing their interlocutory appeal. They did, however attach a copy to one of their supplemental briefs to the court of appeals.

[158] *See* Act of June 16, 2007, 80th Leg., R.S., ch. 463, 2007 Tex. Gen. Laws 821.

[159] *See Rothgery v. Gillespie Cnty.*, 554 U.S. 191 (2008); *Davis v. Tarrant Cnty.*, 565 F.3d 214 (5th Cir. 2009).

[160] *See, e.g.*, *Williams*, 52 S.W.3d at 184; *City of Garland v. Louton*, 691 S.W.2d 603, 604 (Tex. 1985) (per curiam).

or written policy, that challenge may well become moot if the statute or policy is repealed or fundamentally altered.[161]

But here, defendants' bald assertion that they are now in compliance with the law is simply not enough to establish that the claims of the putative class are now moot. The focus of plaintiffs' complaint is on defendants' *actions* and *behavior*, not their written policies. Nowhere in their pleadings do they assert that the written policies in place are somehow unconstitutional. Plaintiffs allege, after all, that defendants' "custom and practice" is to systematically and deliberately deprive indigent misdemeanor defendants of their constitutional rights. This allegation no more hinges on the constitutionality of the current official policy than it did on the previous one.

Indeed, plaintiffs might argue that defendants violated their constitutional rights *in spite of* the then-existing policy. Thus, the existence of new written policies may have no practical effect on how defendants actually treat individuals who appear in Williamson County's courtrooms. Defendants may be depriving indigent criminal defendants of their constitutional pre-trial rights now just as plaintiffs allege they did in the past.

Similarly, bald statements that Williamson County has hired additional staff, allegedly for the purpose of helping provide legal advice to indigent criminal defendants, falls well short of establishing that all of the class's claims are now moot.

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[161] *See, e.g.*, *Trulock v. City of Duncanville*, 277 S.W.3d 920, 925–27 (Tex. App.—Dallas 2009, no pet.); *see generally* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 2.5.4, at 141–43 (5th ed. 2007).

We therefore remand this matter to the trial court to determine whether intervening events have truly mooted the claims of the putative class.[162] If the trial court concludes that there likely exists a constant class of persons suffering the same deprivations, then it should not find that this class action is moot. Indeed, the case is moot only if the new policies in fact remedy each and every one of the putative class's constitutional claims—if even one issue remains live between defendants and the putative class, the suit as a whole is not moot.[163] Because the facts pleaded here are sufficient to establish that a continuing class likely used to exist, and because defendants now argue that intervening events have mooted the class's claims, the burden is on defendants to establish this—cursory, blanket statements to this effect will not be enough.

Absent such a showing, the suit is not moot: A class of individuals, consisting of criminal defendants who share many or all of these claims with the named plaintiffs, would still likely exist and would still have a live, justiciable controversy with defendants.[164] The trial court should then proceed to the question of certification, which will "relate back" to the moment when the named plaintiffs first filed the suit—a time when there still existed a live dispute with defendants.[165] Thanks

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[162] *See* 13C CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3533.7, at 365–66 (3d ed. 2008); *see also United States v. Brandau*, 578 F.3d 1064, 1067–70 (9th Cir. 2009) (remanding case for further proceedings to determine whether subsequent events had truly mooted plaintiff's claims).

[163] *See Camarena v. Tex. Emp't Comm'n*, 754 S.W.2d 149, 151 (Tex. 1988).

[164] *See Williams*, 52 S.W.3d at 184.

[165] *See Geraghty*, 445 U.S. at 398–400.

to the relation-back doctrine, the named plaintiffs—that is, those with standing—will still have standing to litigate the certification question, even though their individual claims are moot.[166]

VI. Conclusion

The court of appeals erred in concluding that a named plaintiff must have standing on each of the class's claims in order to seek class certification. Thus, the court erred in vacating the trial court's denial of defendants' plea the jurisdiction and in dismissing this case for want of subject-matter jurisdiction. At least one named plaintiff had standing to bring at least one of the class's claims. Finally, the court of appeals erred in concluding that the claims of the putative class are now all moot.

On remand, the trial court should determine whether "intervening events" have resolved (and thereby mooted) the constitutional claims of the class, or if instead the class maintains a live dispute with defendants. If the trial court finds the latter to be the case, it should determine which of the other named plaintiffs (if any) had standing to bring which of the putative class's claims.

Given the procedural posture of this case, we cannot at this time adjudicate the merits of plaintiffs' complaint. We note, however, the gravity of their allegations: The U.S. Supreme Court has described the right to counsel as "indispensable to the fair administration of our adversary system of criminal justice."[167] In the words of one learned commentator, "[t]here is no more important

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[166] *Olson*, 594 F.3d at 582–84.

[167] *Brewer v. Williams*, 430 U.S. 387, 398 (1977); *see also Powell v. Alabama*, 287 U.S. 45, 57, 68–69 (1932) (describing the importance of the right).

protection provided by the Constitution to an accused than the right to counsel."[168] Like all participants in our judicial system, and indeed all members of our society, we take seriously an allegation that any person or entity is systematically depriving others of such a fundamental right.

That said, our decision today is limited to jurisdictional issues. Because the court of appeals erred in dismissing this suit for want of subject matter jurisdiction, we reverse its decision and remand to the trial court for further proceedings consistent with this opinion.

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Don R. Willett
Justice

OPINION DELIVERED: June 8, 2012

[168] 3B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 731, at 55 (3d ed. 2004).

IN THE SUPREME COURT OF TEXAS

NOS. 10-0683, 10-0714

AHF-ARBORS AT HUNTSVILLE I, LLC, PETITIONER,
AHF-ARBORS AT HUNTSVILLE II, LLC, PETITIONER,

v.

WALKER COUNTY APPRAISAL DISTRICT, RESPONDENT

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

Argued December 6, 2011

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

JUSTICE WILLETT filed a dissenting opinion.

A community housing development organization ("CHDO") that meets certain statutory requirements is exempt from *ad valorem* taxation on property it "owns".[1] The principal issue in these two consolidated cases is whether a CHDO must have legal title to property to qualify for the exemption. We hold that equitable title is sufficient and accordingly reverse the judgment of the court of appeals[2] and remand the cases to that court.

[1] TEX. TAX CODE § 11.182(b).

[2] ___ S.W.3d ___ (Tex. App.–Waco 2010) (mem. op.).

I

A

CHDOs are a creation of the Cranston-Gonzalez National Affordable Housing Act of 1990, as amended ("NAHA" or "the Act").[3] NAHA authorized the United States Department of Housing and Urban Development's HOME Investment Partnerships Program, which uses block grants to leverage local government and private funds to provide decent and affordable housing for low-income families.[4] A portion of the grants must be set aside for CHDOs.[5] As defined by Section 12704 of the Act, a CHDO is a nonprofit corporation[6] that

> (A) has among its purposes the provision of decent housing that is affordable to low-income and moderate-income persons;
>
> (B) maintains, through significant representation on the organization's governing board and otherwise, accountability to low-income community residents

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[3] 42 U.S.C. §§ 12701-12899i (2012).

[4] *Id.* § 12722 ("The purposes of this subchapter are — (1) to expand the supply of decent, safe, sanitary, and affordable housing, with primary attention to rental housing, for very low-income and low-income Americans; . . . (3) . . . (C) to promote the development of partnerships among the Federal Government, States and units of general local government, private industry, and nonprofit organizations able to utilize effectively all available resources to provide more of such housing; . . . (6) to expand the capacity of nonprofit community housing development organizations to develop and manage decent, safe, sanitary, and affordable housing . . . ."); 24 C.F.R. § 92.1 ("In general, under the HOME Investment Partnerships Program, HUD allocates funds by formula among eligible State and local governments to strengthen public-private partnerships and to expand the supply of decent, safe, sanitary, and affordable housing, with primary attention to rental housing, for very low-income and low-income families."). The program is explained on HUD's webpage at http://www.hud.gov/offices/cpd/affordablehousing/programs/home/.

[5] 42 U.S.C. § 12771(a) (2012).

[6] The Act defines a "nonprofit corporation" as "any private, nonprofit organization (including a State or locally chartered, nonprofit organization) that — (A) is organized under State or local laws, (B) has no part of its net earnings inuring to the benefit of any member, founder, contributor, or individual, (C) complies with standards of financial accountability acceptable to the Secretary, and (D) has among its purposes significant activities related to the provision of decent housing that is affordable to low-income and moderate-income persons." *Id.* § 12704(5).

and, to the extent practicable, low-income beneficiaries with regard to decisions on the design, siting, development, and management of affordable housing;

(C) has a demonstrated capacity for carrying out activities assisted under this Act; and

(D) has a history of serving the local community or communities within which housing to be assisted under this Act is to be located.[7]

Section 11.182 of the Texas Tax Code exempts a CHDO's property from *ad valorem* taxation. The basic exemption is set out in Subsection (b), which states:

An organization is entitled to an exemption from taxation of improved or unimproved real property it owns if the organization:

(1) is organized as a community housing development organization;

(2) meets the requirements of a charitable organization provided by Sections 11.18(e) and (f);

(3) owns the property for the purpose of building or repairing housing on the property to sell without profit to a low-income or moderate-income individual or family satisfying the organization's eligibility requirements or to rent without profit to such an individual or family; and

(4) engages exclusively in the building, repair, and sale or rental of housing as described by Subdivision (3) and related activities.[8]

Section 11.182 imposes additional requirements and restrictions on the exemption. Subsection (c) requires that a CHDO's property must be rented or offered for rent without profit to low- or

[7] *Id.* § 12704(6). The operation of CHDOs is described more fully in U.S. DEP'T OF HOUS. & URBAN DEV., COMMUNITY PLANNING AND DEVELOPMENT, NOTICE CPD-97-11 (Oct. 8, 1997), available at http://www.hud.gov/offices/cpd/affordablehousing/programs/home/topical/chdo.cfm.

[8] TEX. TAX CODE § 11.182(b).

moderate-income individuals within three years of its acquisition,[9] and Subsection (d) requires some CHDOs to spend forty percent of the taxes they would pay if not exempt for eligible persons in the county.[10] Subsection (g) imposes an annual audit requirement.[11] Subsection (j) restricts an exemption to property that was exempt for part of 2003.[12]

B

AHF-Arbors at Huntsville I, LLC, and AHF-Arbors at Huntsville II, LLC (collectively, "the Arbors"), each owns as its sole asset an apartment complex in Huntsville. The sole member of each limited liability company is Atlantic Housing Foundation, Inc., a South Carolina nonprofit corporation exempt from federal income taxation under Section 501(c)(3) of the United States Internal Revenue Code and certified as a CHDO by the Texas Department of Housing and Community Affairs ("TDHCA"). For federal income tax purposes, Atlantic and the Arbors are

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[9] *Id.* § 11.182(c) ("Property owned by the organization may not be exempted under Subsection (b) after the third anniversary of the date the organization acquires the property unless the organization is offering to rent or is renting the property without profit to a low-income or moderate-income individual or family satisfying the organization's eligibility requirements.").

[10] *Id.* § 11.182(d) ("A multifamily rental property consisting of 36 or more dwelling units owned by the organization that is exempted under Subsection (b) may not be exempted in a subsequent tax year unless in the preceding tax year the organization spent, for eligible persons in the county in which the property is located, an amount equal to at least 40 percent of the total amount of taxes that would have been imposed on the property in that year without the exemption on social, educational, or economic development services, capital improvement projects, or rent reduction. This subsection does not apply to property acquired by the organization using tax-exempt bond financing after January 1, 1997, and before December 31, 2001.").

[11] *Id.* § 11.182(g) ("To receive an exemption under Subsection (b) or (f), an organization must annually have an audit prepared by an independent auditor. The audit must include a detailed report on the organization's sources and uses of funds. A copy of the audit must be delivered to the Texas Department of Housing and Community Affairs and to the chief appraiser of the appraisal district in which the property subject to the exemption is located.").

[12] The Legislature imposed this restriction in 2003 and created a new exemption for organizations constructing or rehabilitating low-income housing. Act of June 1, 2003, 78th Leg., R.S., ch. 1156, §§ 1-3, 2003 Tex Gen. Laws 3256, adopting TEX. TAX CODE §§ 11.182(j), 11.1825, and 11.1826.

treated as a single entity.[13] The Arbors applied to the Walker County Appraisal District for a tax exemption for their property for 2003 and subsequent years. The District denied their applications, and they sued.[14]

The Arbors moved for summary judgment based on the affidavits of Atlantic's secretary and controller, Carol McBride, and a member of the apartments' management boards, Patricia Wuensche. Attached to McBride's affidavit were copies of: a letter from the Internal Revenue Service notifying Atlantic that it had been determined to be exempt from federal income taxation as a 501(c)(3) organization; certifications of Atlantic as a CHDO by the Texas Department of Housing and Urban Development and as exempt from franchise taxes by the Texas Comptroller of Public Accounts; articles creating Atlantic and documents showing its authority to do business in Texas; and articles creating the Arbors and regulations governing their affairs. Although the Arbors are not TDHCA-certified CHDOs as Atlantic is, they argued that they are indistinct from Atlantic, which operates the apartments through them in compliance with all requirements of Section 11.182.

The District objected to both affidavits as conclusory, and to McBride's affidavit as hearsay and beyond McBride's personal knowledge. The District responded to the Arbors' motion and moved for summary judgment itself. The District contended that the Arbors had failed to adduce any evidence that they were organized and operated as charitable organizations, that they were organized as CHDOs under NAHA Section 12704, or that they met the requirements of Section

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[13] With exceptions not relevant here, "a domestic eligible entity is . . . [d]isregarded as an entity separate from its owner if it has a single owner." 26 C.F.R. § 301.7701-3(b) (2012).

[14] Though each of the Arbors filed its own lawsuit, the two actions were prosecuted identically, and therefore we refer to the proceedings as if they were one. The court of appeals issued one opinion for both cases.

11.182(b), (c), (d), (g), and (j). The trial court denied the Arbors' motion, struck their evidence, and granted the District's motion.

The court of appeals affirmed, holding only that the Arbors had produced no evidence showing that they had complied with one portion of Section 11.182(g).[15] This, the court concluded, was sufficient to entitle the District to summary judgment without considering whether there was evidence that the Arbors met the other requirements for an exemption for the apartments.

We granted both of the Arbors' petitions for review.[16] We consider first whether the court of appeals' holding was correct. Concluding that it was not, we then turn to the principal issue disputed by the parties though not addressed by the court of appeals: whether Atlantic's ownership of the Arbors qualifies their property for a tax exemption under Section 11.182(b). We remand the case to the court of appeals for consideration of the remaining issues.

II

Section 11.182(g) states:

> To receive an exemption under Subsection (b) or (f), an organization must annually have an audit prepared by an independent auditor. The audit must include a detailed report on the organization's sources and uses of funds. A copy of the audit must be delivered to the Texas Department of Housing and Community Affairs and to the chief appraiser of the appraisal district in which the property subject to the exemption is located.

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[15] ___ S.W.3d ___ (Tex. App.–Waco 2010).

[16] 54 Tex. Sup. Ct. J. 1554 (Aug. 22, 2011). The Arbors each filed a separate petition for review, but because the petitions and the District's responses are essentially identical in both cases, we have consolidated the cases for decision.

The court of appeals held that because the Arbors offered no evidence that they delivered a copy of their annual audit to TDHCA, they failed to show that they qualified for an exemption. But Section 11.182(g) plainly conditions an exemption only on the preparation of an audit — something that must be done "[t]o receive an exemption". The statute does not state that a failure to meet its other requirements — that the audit be detailed, that it reflect both the sources and uses of funds, and that it be delivered both to TDHCA and the chief appraiser — likewise results in the denial of an exemption.

We confronted a similar situation in *Flores v. Millenium Interests, Ltd.*[17] Section 5.077(a) of the Texas Property Code requires that a person who sells a residence by executory contract (sometimes called a contract for deed) must provide the purchaser with a statement every January.[18] Subsections (c) and (d) impose liquidated damages on sellers who "fail[] to comply with Subsection (a)".[19] Subsection (b) provides that an annual statement "must include" specific information regarding amounts paid and remaining due under the contract.[20] The purchasers in *Flores* received annual statements but claimed liquidated damages because some of the information required by Subsection (b) was omitted.[21] The omissions were minor, and the purchasers did not claim to have been prejudiced in any way. We held that the statute tied the right to liquidated damages "to timely

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[17] 185 S.W.3d 427 (Tex. 2005).

[18] TEX. PROP. CODE § 5.077(a).

[19] *Id.* § 5.077(c)-(d).

[20] *Id.* § 5.077(b).

[21] *Flores*, 185 S.W.3d at 430-431.

delivery of the annual statement, but not its contents."[22] Only a statement so deficient as to be no statement at all would fail to comply with Section 5.077(a).[23]

Under Section 11.182(g), the failure to conduct an audit is understandably fatal to a claim for exemption, but deficiencies in the contents or delivery are matters that presumably may be corrected. Which is not to say that the requirements are unimportant. According to the District, delivery of an applicant's audit to TDHCA is critical because that agency administers NAHA funds and has the ability to analyze whether an organization is complying with federal requirements as well as the requirements for a state tax exemption. We do not disagree. Indeed, Section 11.182(g) makes delivery of the audit to TDHCA mandatory. But where, as here, the statute "does not specify the consequences for noncompliance[,] . . . we have looked to its purpose for guidance."[24]

The District argues, and we agree, that the statute requires applicants' audits to be delivered to TDHCA so that chief appraisers will have the benefit of that agency's review. If an appraisal district did not believe that review necessary in a particular case, it could grant an exemption based on its own review. If it needed the review, the district could delay action on the application until the requirement has been met. But the statute does not authorize a district to deny an exemption for non-delivery of an audity to TDHCA. The purpose of the statute is to provide a chief appraiser

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[22] *Id.* at 433.

[23] *Id.*

[24] *Hines v. Hash*, 843 S.W.2d 464, 468 (Tex. 1992); *accord In re Francis*, 186 S.W.3d 534, 540 (Tex. 2006); *Hubenak v. San Jacinto Gas Transmission Co.*, 141 S.W.3d 172, 184 (Tex. 2004); *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 494 (Tex. 2001).

substantive information to use in processing an application for exemption. Withholding a ruling pending delivery of an audit to TDHCA serves the statute's purpose; denying an exemption does not.

In the District's view, noncompliance with any requirement of Section 11.182(g) results in the denial of an exemption. Thus, an appraisal district could deny an exemption on the basis that an audit report was insufficiently detailed, if only in minor, even irrelevant, respects. This was essentially the same argument that we rejected in *Flores* because it served to impede rather than further the statute's purpose. We apply the same reasoning here.

Accordingly, we conclude that the District is not entitled to summary judgment denying the Arbors' requested tax exemption for lack of evidence of compliance with the audit delivery requirement of Section 11.182(g).

III

The Arbors' central argument was not addressed by the court of appeals. Section 11.182(b), as noted above, allows "[a]n organization" a tax exemption on "property it owns" if, as relevant here, it is "organized as a [CHDO]" and "owns the property for the purpose of" providing low- or moderate-income housing without profit.[25] The Arbors contend that their apartments are exempt property because ownership, within the meaning of the statute, includes equitable title, which Atlantic, a TDHCA-certified CHDO, holds by virtue of its complete control of the Arbors. The District argues that ownership means legal title, and because there is no evidence that the Arbors are CHDOs themselves, they are not entitled to an exemption.

[25] TEX. TAX CODE § 11.182(b).

The text of Subsection (b) does not suggest a resolution of the parties' dispute. But Subsection (e) provides that in certain instances, property "owned by a limited partnership" may be tax-exempt if 100 percent of its general partner is controlled by a CHDO meeting the requirements of Subsection (b). The meaning of "owned" is no clearer in (e) than in (b), but even assuming "owned" requires legal title, Subsection (e) would still allow a CHDO an exemption for property to which it does not hold legal title, and may not completely control, to the extent limited partners may participate.[26] We are unconvinced that limited partnerships are the one exception to Subsection (b)'s requirement of legal ownership by a CHDO and see no reason to distinguish between a general partner's control of a limited partnership and other types of corporate control over related entities, such as Atlantic's complete ownership of its subsidiaries in this case. The stronger argument is that Subsection (e) demonstrates that property may be tax-exempt even if a CHDO is only a participant in tiered ownership. The purpose of Subsection (e) is not to carve out an exception for non-CHDO limited partnerships but to limit exemptions for limited partnerships to those in which the general partner is wholly CHDO-owned.

Subsection (e) informs our construction of Subsection (b), three sentences earlier. Both provide a tax exemption for the CHDO-controlled use of property for low- and moderate-income housing without profit. Equitable ownership — the present right to compel legal title[27] — assures greater CHDO control under Subsection (b) than required by Subsection (e).

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[26] *See* TEX. BUS. ORGS. CODE § 153.102(a) ("A limited partner is not liable for the obligations of a limited partnership unless . . . the limited partner participates in the control of the business.").

[27] *Carmichael v. Delta Drilling Co.*, 243 S.W.2d 458, 460 (Tex. Civ. App.–Texarkana 1951, writ ref'd) ("An equitable title is the present right to the legal title.").

Moreover, this construction, as the Arbors argue, acknowledges the realities of the commercial housing industry. We have observed that in many instances, lenders require that property be purchased by a single-asset entity "so that in the event of default, the collateral can be recovered more easily than from a debtor with multiple assets and multiple creditors."[28] Often, the timing of property acquisition does not allow the acquiring entity to obtain a federal tax exemption or otherwise qualify as a CHDO. When the entity is wholly owned by a CHDO, use of the property for low-income housing is assured. Also, tiered ownership allows greater flexibility for investors, encouraging the involvement of private funds in developing low-income housing, which was part of NAHA's purpose in creating the concept of CHDOs.[29] And, of course, the *ad valorem* tax exemption allows charitable organizations to operate with less revenue.

The District argues that this construction of Section 11.182(b) violates the rule that statutes conferring tax exemptions must be strictly construed.[30] But strictly construing Subsection (b) does not require us to ignore Subsection (e) or the purpose of the exemption. The District points to legislative history surrounding the enactment of Subsection (j), suggesting that the Legislature made the exemption unavailable after 2003 because property was being removed from tax rolls with no

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[28] *Basic Capital Mgmt., Inc. v. Dynex Commercial, Inc.*, 348 S.W.3d 894, 897 (Tex. 2011).

[29] 42 U.S.C. § 12722(c) (2012).

[30] *Bullock v. Nat'l Bancshares Corp.*, 584 S.W.2d 268, 271-272 (Tex. 1979) ("Statutory exemptions from taxation are subject to strict construction since they are the antithesis of equality and uniformity and because they place a greater burden on other taxpaying businesses and individuals. An exemption cannot be raised by implication, but must affirmatively appear, and all doubts are resolved in favor of taxing authority and against the claimant. Simply stated, the burden of proof is on the claimant to clearly show that it comes within the statutory exemption." (citations omitted)).

real benefit to the community. But any reservations the Legislature may eventually have had about the wisdom of Section 11.182's exemption do not alter the meaning of the statutory text.

The District argues that since taxation ordinarily falls only on legal ownership,[31] exemptions should benefit only legal owners. While the argument has the virtue of symmetry, the Legislature is not so constrained in authorizing tax exemptions. The District also argues that entities that are separate for purposes of imposing liability should not be treated as one for purposes of qualifying for tax exemptions. But federal tax law disregards the separate identity of some entities,[32] as it does with Atlantic and the Arbors, and there is no reason why Section 11.182 should not do the same.

In five cases, the courts of appeals have differed in their construction of Section 11.182. In the first, *Orange County Appraisal District v. Agape Neighborhood Improvement, Inc.*, the court allowed an exemption for property, title to which was held by a CHDO's wholly-owned subsidiary, not unlike the situation presented here.[33] The court's analysis appears to have been consistent with ours today. But in the next case, *American Housing Foundation v. Brazos County Appraisal District*, the court denied an exemption for property held by a limited partnership with a CHDO-owned general partner.[34] Then in *TRQ Captain's Landing v. Galveston Central Appraisal District*, the court upheld an exemption for a limited partnership that was wholly owned by a limited liability

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[31] *Childress Cnty. v. State*, 92 S.W.2d 1011, 1015 (Tex. 1936) ("The person having legal title to property is generally considered to be the owner thereof for purposes of taxation.").

[32] *See supra* note 13.

[33] 57 S.W.3d 597, 601-602 (Tex. App.–Beaumont 2001, pet. denied).

[34] 166 S.W.3d 885, 889 (Tex. App.–Waco 2005, pet. denied). The court concluded that Section 11.182(e) did not apply because the apartments at issue were constructed before that provision's effective date. *Id.*

corporation with a CHDO as its only member.[35] The court held that the CHDO had equitable title to the property of its subsidiary's subsidiary, that such ownership satisfied Section 11.182(b), and that the CHDO's exemption was imputed to the legal owner, the taxpayer.[36] The court's analysis was essentially the same as ours here.

But the next year, the court in *Jim Wells County Appraisal District v. Cameron Village, Ltd.* disagreed.[37] There, a CHDO owned only the limited partnership's general partner, not the limited partner, too, as in *TRQ Captain's Landing*, but the court did not base its decision on that distinction. Rather, it concluded that a "CHDO must be the record owner of the property to qualify for the exemption under section 11.182(b)."[38] On similar facts, in *Harris County Appraisal District v. Primrose Houston 7 Housing L.P.*, a different panel of the same court that decided *TRQ Captain's Landing* denied an exemption to a limited partnership because its CHDO-general partner owned only a tiny fraction of the limited partnership interest.[39] Unlike the court in *Cameron Village*, the *Primrose* court agreed with *TRQ Captain's Landing* that "CHDO status, as a necessary condition to receiving an exemption under section 11.182(b), can be imputed to non-CHDO subsidiaries that are wholly owned and controlled by a CHDO",[40] but distinguished that case because there, the

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[35] 212 S.W.3d 726 (Tex. App.–Houston [1st Dist.] 2006, pet. granted). Our consideration of the petition in *TRQ Captain's Landing* has been abated due to respondent's bankruptcy.

[36] *Id.* at 732.

[37] 238 S.W.3d 769 (Tex. App.–San Antonio 2007, pet. denied).

[38] *Id.* at 778.

[39] 238 S.W.3d 782 (Tex. App.–Houston [1st Dist.] 2007, pet. denied).

[40] *Id.* at 787.

CHDO also owned the limited partner. Without such control, the court concluded, the CHDO-general partner did not have equitable title to the limited partnership's property.[41]

We agree with the reasoning in *TRQ Captain's Landing*, which, as we have explained, is compelled by the text of Section 11.182 and consistent with its purpose. The dissent in that case argued that the majority would allow mere investors in an entity to benefit from a tax exemption on property the entity can control.[42] But this is true only when the investors are CHDOs. As long as a CHDO has equitable title to property, we see no reason to treat investors *with* a CHDO differently from investors *in* the CHDO. Indeed, as we have observed already, CHDOs were created to draw private investments into public housing.

Accordingly, we hold that a CHDO's equitable ownership of property qualifies for an exemption under Section 11.182(b).

IV

We apply this rule to the situation before us. Each of the Arbors is a limited liability company with a single asset — the apartments — and a single member — Atlantic, a CHDO. Each of the Arbors has managers, who, under Texas law, are the governing authority of the company.[43]

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[41] *Id*. The court did not explain why the general partner lacked control of the limited partnership, nor why Section 11.182(e) was not considered.

[42] *TRQ Captain's Landing*, 212 S.W.3d at 740-741 (Bland, J., dissenting).

[43] TEX. BUS. ORGS. CODE § 101.251 ("The governing authority of a limited liability company consists of . . . the managers of the company, if the company's certificate of formation states that the company will have one or more managers . . . .").

But managers serve at the pleasure of the members.[44] Thus, Atlantic has complete control over the Arbors and equitable title to their property — the power to compel transfer of legal title. This ownership satisfies the requirement of Section 11.182(b) that exempt property be owned by a CHDO. For purposes of a federal income tax exemption, Atlantic and the Arbors are treated as one. For the same reason, the *ad valorem* exemption is imputed to the Arbors.

The parties raise many other issues. The District contends that the Arbors are not charitable organizations, that their apartments are not used for low- and moderate-income housing, and that other requirements of Section 11.182 as well as federal law have not been met. The Arbors argue that the trial court erred in striking their evidence and in concluding that no evidence supported their applications for exemptions. We express no view on any of these issues. 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: June 8, 2012

[44] *Id.* § 101.304 ("[A] manager of a limited liability company may be removed, with or without cause, at a meeting of the company's members called for that purpose.").

IN THE SUPREME COURT OF TEXAS

NOS. 10-0683, 10-0714

AHF-ARBORS AT HUNTSVILLE I, LLC, PETITIONER,
AHF-ARBORS AT HUNTSVILLE II, LLC, PETITIONER,

v.

WALKER COUNTY APPRAISAL DISTRICT, RESPONDENT

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

JUSTICE WILLETT, dissenting.

I respectfully disagree with the Court's resolution of both issues.

I

The Court concludes that the Arbors were not required to deliver a copy of their annual audits to TDHCA in order to claim their exemptions. Section 11.182(g) imposes three requirements:

- The first sentence explicitly states that "[t]o receive an exemption," the property owner "must" have an audit prepared.[1]
- The second sentence specifies that the audit "must" contain certain information.
- The third sentence states that a copy of the audit "must" be delivered to TDHCA and the chief appraiser of the appraisal district.

[1] TEX. TAX CODE § 11.182(g).

The requirements are in the same statutory subsection, all contain the word "must," and all pertain to the audit. I cannot agree that the Legislature only intended the first requirement as a mandatory prerequisite to receiving the exemption, and considered the other two as merely advisory, recommended, or subject to later compliance, when the word "must" is found in all three sentences. The Court's reading ignores longstanding principles of statutory construction, namely, that provisions should be read in context,[2] and that meaning should be given to all provisions if possible.[3] Read in context, the provision sets out the three things a property owner must do to receive the exemption.

I agree with the court of appeals' common-sense reading of Section 11.182(g) and would affirm that court's judgment without reaching other issues. I would hold that substantial compliance with Subsection (g) sufficient to warrant the exemption requires compliance with each of the straightforward requirements set out in the three sentences of the subsection. A complete failure to deliver the audit to TDHCA should preclude the applicant from receiving the exemption.

II

Putting aside the issue of nondelivery, I disagree with the Court's conclusion that a property owner is entitled to a Section 11.182 exemption when the property is owned by a limited liability company whose sole member is a CHDO. The issue is debatable, and the Court accurately describes

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[2] *E.g.*, TEX. GOV'T CODE § 311.011(a); *State ex rel. State Dep't of Highways & Pub. Transp. v. Gonzalez*, 82 S.W.3d 322, 327 (Tex. 2002).

[3] *E.g.*, *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.").

the split of authority in our courts of appeals. Ultimately, however, I think the District has the better argument.

Section 11.182(b) provides a tax exemption to an organization for "property it owns" if the organization "is organized as a community housing development organization" and "owns the property."[4] The Arbors own the properties but are not CHDOs; Atlantic is a CHDO but does not own the properties. Yes, Atlantic is the sole member of the Arbors, but a member of a limited liability company "does not have an interest in any specific property of the company."[5] In sum, none of these entities is entitled to a property tax exemption under Section 11.182.

These companies are asking the Court to pierce the corporate veil that they themselves created. The Court postulates that the corporate structure was needed to secure financing and for other business reasons. Regardless of the reasons Atlantic or its principals created the Arbors, I would not allow private parties to create separate corporate entities when it suits them, and then expect the courts and taxing authorities to ignore those corporate formalities when they stand in the way of preferential tax treatment.

I find the Court's discussion of equitable ownership unpersuasive. The Court embraces the concept that a corporate parent is the equitable owner of property otherwise held by a subsidiary because the parent has a "present right to compel legal title." The reasoning proves too much. Does this mean a parent corporation or other controlling shareholder is also liable for the taxes or other debts of the subsidiary, because the parent controls the subsidiary and has a "present right" to compel

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[4] TEX. TAX CODE § 11.182(b).

[5] TEX. BUS. ORGS. CODE § 101.106(b).

the transfer of the subsidiary's property? I prefer that courts generally respect corporate formalities and whatever benefits and burdens flow from the separateness of the corporate entities.

Texas law respects corporate formalities, and piercing the corporate veil is usually limited to circumstances of fraud or other malfeasance. The Legislature has provided that a holder of shares or "an owner of any beneficial interest in shares," including "any affiliate of such a holder [or] owner" is not liable for the contractual obligations of a corporation on the theory that the holder or beneficial owner "was the alter ego of the corporation or on the basis of actual or constructive fraud . . . or other similar theory."[6] The only exception is when the "holder, beneficial owner, subscriber, or affiliate caused the corporation to be used for the purpose of perpetrating and did perpetrate an actual fraud on the obligee primarily for the direct personal benefit of the holder, beneficial owner, subscriber, or affiliate."[7] The Legislature has further provided that a holder of corporate shares is not liable for any corporate obligation on grounds that the corporation failed "to observe any corporate formality."[8] These rules apply to limited liability companies,[9] and indeed, limited liability companies would serve little purpose if rules limiting liability did not apply.

This Court, in a franchise tax case, refused to disregard the corporate separateness of a utility and its affiliates, rejecting the taxing authority's attempt the treat the corporations as a single business entity for tax purposes. We concluded that "no basis for disregarding the separate corporate

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[6] *Id.* §§ 21.223(a), (a)(2).

[7] *Id.* § 21.223(b).

[8] *Id.* § 21.223(a)(3).

[9] *Id.* § 101.002(a).

identities" existed.[10] In another tax case, a court of appeals ruled that a taxing authority's notice to a parent corporation did not amount to adequate notice to a subsidiary, reasoning that "subsidiary corporations and parent corporations are separate and distinct 'persons' as a matter of law; the separate [identity] of corporations will be observed by the courts even in instances where one may dominate or control, or may even [be treated] as a mere department, instrumentality, or agency of the other."[11]

If taxing authorities, upon nonpayment of property taxes by a subsidiary, could routinely look to the parent to pay the taxes on the theory that the parent, after all, could compel a transfer of title and is the "equitable owner" of the property, the legal and business communities would be astounded. I, too, would likely object to a taxing authority's practice of ignoring corporate formalities and treating parent and subsidiary as one big happy equitable family of companies. The reverse practice here—giving a subsidiary a tax exemption because the parent, if it owned the property, could have claimed the exemption—strikes me as equally untenable. We have recognized, in a variety of tax cases, that taxing authorities should ordinarily impose taxes on and grant exemptions to the entity holding legal title to the property,[12] and in this case the Arbors are distinct

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[10] *S. Union Co. v. City of Edinburg*, 129 S.W.3d 74, 89 (Tex. 2003).

[11] *Valero S. Tex. Processing Co. v. Starr Cnty. Appraisal Dist.*, 954 S.W.2d 863, 866 (Tex. App.—San Antonio 1997, pet. denied).

[12] *See Bailey v. Cherokee Cnty. Appraisal Dist.*, 862 S.W.2d 581, 584 (Tex. 1993) ("While it is true that the heirs hold equitable title to estate property, this interest does not give rise to tax liability. The responsibility for taxes lies with the administrator as holder of legal title."); *Tex. Turnpike Co. v. Dallas Cnty.*, 271 S.W.2d 400, 401–02 (Tex. 1954) (rejecting argument that "the equitable title is the taxable title," and holding that private corporations constructing toll roads were not entitled to property tax exemptions on ground that they had conveyed "equitable, beneficial, and superior" title to State under statute providing for such conveyances, when they continued to own "the legal title to the property acquired and to be acquired"); *Childress Cnty. v. State*, 92 S.W.2d 1011, 1015 (Tex. 1936) ("The person having

legal entities holding legal and record title to the properties in issue. Since they are not CHDOs, they are not entitled to an exemption under Section 11.182.

The Court discusses Section 11.182(e),[13] which seems to allow a limited partnership in some circumstances to qualify for the property-tax exemption if the general partner is a CHDO. But the Arbors are not limited partnerships created under provisions now found in Title 4 of the Business Organizations Code.[14] Instead, they are limited liability companies created under Title 3,[15] a separate statutory regime. The Arbors concede in their brief that "[b]ecause both Arbors and Atlantic are corporations and not partnerships, subsection (e) does not apply." They have never sought an exemption under Subsection (e). If the Court is saying that what's good for limited partnerships is fine for limited liability companies too, I would leave that decision to the Legislature, particularly here, where our practice is to construe tax exemptions narrowly,[16] as the Court concedes.

The fact that the Legislature made provision for a limited partnership to qualify for a property tax exemption when its general partner is a CHDO, while not making similar provision for a limited liability company to qualify for the exemption when its sole member is a CHDO, is sufficient for me to disagree with the Court on this issue. The Legislature could have made similar provision for both types of entities, and did so in Section 11.1825, another tax-exemption provision inapplicable to

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legal title to property is generally considered to be the owner thereof for purposes of taxation.").

[13] TEX. TAX CODE § 11.182(e).

[14] *See* TEX. BUS. ORGS. CODE §§ 153.001–.555.

[15] *See id.* §§ 101.001–.621.

[16] *N. Alamo Water Supply Corp. v. Willacy Cnty. Appraisal Dist.*, 804 S.W.2d 894, 899 (Tex. 1991); *Bullock v. Nat'l Bancshares Corp.*, 584 S.W.2d 268, 271–72 (Tex. 1979).

today's case.[17] We need not consider why the Legislature would treat the two entities differently under Section 11.182. I would note, however, that plausible reasons might exist for drawing a statutory distinction. A limited partnership, by law and business convention, ordinarily consists of passive limited partners and a single, corporate general partner who manages the business of the partnership.[18] Therefore, "there is no particular reason for a limited partnership to have any managerial employees—or indeed any employees at all."[19] Requiring a limited partnership to behave like a CHDO is not as a practical matter much different from requiring the limited partnership's general partner to operate as a CHDO. I am not aware that the same can be said of limited liability companies, which do not have general partners, may have multiple members who control the company, may or may not have a parent corporation, and may have managers who manage the company even if the sole member is a parent corporation.[20] On the last point, the Court acknowledges that the Arbors have managers who are the governing authority of the companies.

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[17] *See* TEX. TAX CODE § 11.1825(c).

[18] *See Reid Road Mun. Util. Dist. No. 2 v. Speedy Stop Food Stores, Ltd.*, 337 S.W.3d 846, 859 (Tex. 2011) (Willett, J., concurring) (citing TEX. BUS. ORGS. CODE §§ 153.102, .152; 19 ROBERT W. HAMILTON ET AL., BUSINESS ORGANIZATIONS §§ 1.8, 13.1, 13.2, 14.7 (Tex. Practice 2004)).

[19] *Id.* (Willett, J., concurring).

[20] Except during certain formation and termination periods, a limited liability company must have one or more "members." TEX. BUS. ORGS. CODE § 101.101. It is operated by its managers if its certificate of formation provides for managers, or alternatively by its members. *Id*. § 101.251. A member may be a corporation or natural person. *See id.* §§ 1.002(69-b), 101.102. Title 3 neither prohibits nor expressly authorizes the member of a limited liability company to be a corporate parent of the company. But if the company has only a single member and that member is a corporation, the company would in effect be something akin to a subsidiary of the sole corporate member, since a member of a limited liability company is something akin to a shareholder of a corporation, with limited liability and a right to share in distributions, but no right to any specific property of the company. *See id.* §§ 101.002(a), .106(b), .114, .203.

The Legislature worded Section 11.182 in a manner that treats LLCs and LPs differently, presumably on purpose. I would respect that policy choice and apply the statute as enacted rather than amend it as desired. Lawmakers, whatever their reasons, enacted a statute that simply makes the exemption unavailable here.

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Don R. Willett
Justice

OPINION DELIVERED: June 8, 2012

IN THE SUPREME COURT OF TEXAS

No. 10-0734

AMERICO LIFE, INC., AMERICO FINANCIAL LIFE AND ANNUITY INSURANCE COMPANY, GREAT SOUTHERN LIFE INSURANCE COMPANY, THE OHIO STATE LIFE INSURANCE COMPANY, AND NATIONAL FARMERS' UNION LIFE INSURANCE COMPANY, PETITIONERS,

v.

ROBERT L. MYER AND STRIDER MARKETING GROUP, INC., RESPONDENTS

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

PER CURIAM

This case concerns an arbitration provision that allows each party to appoint one arbitrator to a panel, subject to certain requirements. At issue is whether Americo Life, Inc. waived its objection to the removal of the arbitrator it selected. The underlying dispute concerned the financing mechanism for Americo's purchase of several insurance companies from Robert Myer.[1] Pursuant to the financing agreement, Americo and Myer submitted their dispute to arbitration under American Arbitration Association (AAA) rules. The arbitrators found in favor of Myer, and Americo filed a

[1] Petitioners Americo Life, Inc., Americo Financial Life and Annuity Insurance Company, Great Southern Life Insurance Company, the Ohio State Life Insurance Company, and National Farmers' Union Life Insurance Company are referred to as Americo. Respondents Robert L. Myer and Strider Marketing Group, Inc. are referred to as Myer.

motion to vacate the award. The trial court granted the motion. It held that Americo was entitled to any arbitrator that met the requirements set forth in the financing agreement and that the arbitrator removed by the AAA met those requirements. The court of appeals reversed, holding that Americo had waived these arguments by not presenting them to the AAA. Because the record demonstrates otherwise, we reverse the court of appeals' judgment and remand the case to the court of appeals for further proceedings.

The parties entered into a financing agreement for Americo's purchase of several insurance companies from Myer. This agreement provides that any disputes "shall be referred to three arbitrators." It further provides that "Americo shall appoint one arbitrator and Myer shall appoint one arbitrator and such two arbitrators to select the third." The financing agreement provides that each arbitrator "shall be a knowledgeable, independent businessperson or professional."

However, the contract also provides that, subject to exceptions not at issue here, the proceedings "shall be conducted in accordance with the commercial arbitration rules of the American Arbitration Association." At the time the parties entered into the financing agreement, the AAA rules provided that its "rules and any amendment of them shall apply in the form in effect at the time the administrative filing requirements are met for a demand for arbitration or submission agreement received by the AAA." At the time of the demand for arbitration between the parties, the AAA rules provided that "[a]ny arbitrator shall be impartial and independent . . . and shall be subject to disqualification for (i) partiality or lack of independence . . . ."

Here, Myer argued to the AAA that Americo's selected arbitrator, Ernest Figari, Jr., was not impartial and therefore should be removed. Americo responded that Figari was, in fact, impartial.

The parties dispute whether Americo additionally responded that its selected arbitrator need only meet the "independent" and "knowledgeable" requirements from the financing agreement.

The AAA agreed with Myer and removed Figari from the arbitration panel. Americo asserted a standing objection to the continuation of the arbitration without Figari. Americo also stated that it would proceed to arbitrate without waiving its objection and without waiver of the right to appeal any decision based on the removal of Figari. Americo subsequently selected another arbitrator.

The arbitration panel rendered a unanimous decision awarding Myer declaratory relief, breach of contract damages of $9.29 million, $15.8 million in damages for wrongfully withheld payments under the financing agreement, and $1.29 million in attorney's fees and costs. Myer filed a petition to confirm the award in the district court and Americo filed a motion to vacate or modify the award. Americo argued that, *inter alia*, the award was not made by arbitrators selected under the financing agreement's requirements and was therefore void.[2] The court granted Americo's motion to vacate and found that the AAA failed to follow the arbitration selection method contained in the financing agreement, that the AAA had no authority to strike Figari, and that the award was void because it was issued by an improperly appointed panel.

The court of appeals reversed. It held that:

> After arbitration, appellees argued to the trial court the award should be vacated under section five of the Federal Arbitration Act because the award was not made by arbitrators who were appointed under the method provided in the

[2] Americo's motion to vacate or modify the award was pursuant to section five of the Federal Arbitration Act (FAA), which provides: "If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed . . . ." 9 U.S.C. § 5.

> [financing] agreement. In their brief in support of their motion to vacate the arbitration award, appellees further explained their argument to mean the [financing] agreement did not require the party-appointed arbitrators to be "independent and *impartial*. Nor does the Agreement allow the AAA to disqualify a party's appointed arbitrator for partiality, bias, or any other basis." They continued to argue that because their right to select an arbitrator was governed by the standards in the [financing] agreement, the impartiality standard set out in the AAA rules was inapplicable. Essentially, appellees argued to the trial court they had a right to a non-neutral arbitrator. This, however, is not the argument they raised to the AAA in response to appellants' objection to Figari.

315 S.W.3d 72, 75 (Tex. App.—Dallas 2009, pet. filed) (emphasis in original) (footnote omitted).

We have held that "appellate courts should reach the merits of an appeal whenever reasonably possible." *Perry v. Cohen*, 272 S.W.3d 585, 587 (Tex. 2008) (citing *Verburgt v. Dorner*, 959 S.W.2d 615, 616 (Tex. 1997)). Here, the record demonstrates that Americo argued to both the AAA and the district court that it was entitled to any arbitrator who met the requirements set forth in the financing agreement, regardless of the AAA's requirements.

In response to Myer's objection to Figari, Americo argued to the AAA that Figari was neutral. However, Americo also asserted:

> Finally, an argument can be made that the AAA rules do not govern the selection of and qualifications for arbitrators in this proceeding. . . . The Agreement states that "[e]ach arbitrator shall be a knowledgeable, independent businessperson or professional." . . .
>
> As long as Mr. Figari is "a knowledgeable, independent businessperson or professional," he is an acceptable designee for the arbitration panel hearing this matter, irrespective of the AAA rules. . . . Here, the parties' arbitration agreement plainly provides the method for selecting arbitrators for the three-person panel and establishes the qualifications for serving on the panel. . . . Mr. Figari possesses the requisite qualifications and the fact that he has served previously and is now serving as a member of a panel considering a dispute between some of these same parties does not change that fact. There has been—and can be—no allegation that Mr. Figari has been anything but knowledgeable and independent in his performance on the panels in Myer I and Myer II.

Furthermore, Americo wrote the AAA again after the AAA removed Figari but before the arbitration, stating:

> [T]he AAA Commercial Arbitration Rules do not govern the selection of and qualifications for arbitrators to hear disputes between Americo and Myer. . . . The Agreement states that "[e]ach arbitrator shall be a knowledgeable, independent businessperson or professional." . . .
>
> Mr. Figari is "a knowledgeable, independent businessperson or professional". Therefore, he is a proper designee for the Panel to hear this matter.

In addition, Americo's letter to the AAA cited *Brook v. Peak International, Ltd.*, which discusses the vacation of arbitration awards by arbitrators not appointed under the method provided by a contract and the preservation of such a complaint by presenting it during arbitration. 294 F.3d 668, 673 (5th Cir. 2002). Americo reiterated this argument in the district court, stating that "the Award must be vacated under FAA § 5 and applicable law, because the Award was not made by arbitrators who were appointed under the method provided in the Agreement."

The court of appeals is correct that Americo did not expressly state that arbitrators were not required to be neutral. 315 S.W.3d at 75–76. However, Americo argued that the AAA requirements did not apply, that the only applicable requirements were that they be knowledgeable and independent businesspersons or professionals, and that Figari met these qualifications. Americo properly preserved this argument. Therefore, without hearing oral argument, TEX. R. APP. P. 59.1, we reverse the court of appeals' judgment and remand the case to the court of appeals for further proceedings consistent with this opinion.

OPINION DELIVERED: December 16, 2011

IN THE SUPREME COURT OF TEXAS

NO. 10-0750

ROBERT SUTHERLAND, JESUS DE LA GARZA AND SOUTHERN CUSTOMS PAINT AND BODY, PETITIONERS,

V.

ROBERT KEITH SPENCER, RESPONDENT

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

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

CHIEF JUSTICE JEFFERSON filed a dissenting opinion, in which JUSTICE WILLETT joined.

In this case, we consider whether the excuse offered by defendants for failing to answer a lawsuit timely is sufficient to satisfy the first element of the *Craddock* test for setting aside a no-answer default judgment; *i.e.*, that the failure to appear was not intentional or the result of conscious indifference but was the result of a mistake or an accident.[1] *See Craddock v. Sunshine Bus Lines, Inc.*, 133 S.W.2d 124, 126 (Tex. 1939). Because the affidavits attached to the defendants' motion

[1] The style of this case initially reflected the parties as they were originally named in the trial court, including "Jesse Garza." Because De La Garza's briefing in this Court refers to him as "Jesus De La Garza," which is consistent with his affidavit filed in the trial court, we have corrected the case style to reflect what we believe is his legal name. There is no dispute that these names, as well as "Jesse De La Garza" and "Jesse de la Garza," refer to the same person.

established the first *Craddock* element, the defendants' motion for new trial could not be denied on the ground that the excuse was insufficient. Accordingly, we reverse the court of appeals' judgment and remand the case to that court.

I

Robert Spencer contracted with Southern Customs Paint and Body to paint and perform a frame-off restoration on his 1965 Chevrolet Corvette for $7,500. Spencer alleged that when he went to pick up his car five months later, he found that the work was incomplete and that irreplaceable parts and pieces of the vehicle were missing. In accordance with the notice provision of the Deceptive Trade Practices Act (DTPA), Spencer sent Southern Customs and its co-operators, Jesus "Jesse" De La Garza and Robert Sutherland, (collectively, Southern Customs) a demand letter alerting them to the possibility of a suit. *See* TEX. BUS. & COM. CODE § 17.505 (requiring a consumer to give written notice to the defendant at least sixty days before filing suit). Upon receipt, Southern Customs responded to that letter.

A year later, Spencer brought a DTPA suit against Southern Customs for violating the terms of the automobile repair service contract. Spencer complained of an incomplete and inadequate paint job on his Corvette, lost car parts, and false representations regarding the time and cost for completing the work. Through a process server, Spencer served all three named defendants with citations. One citation named "Jesse Garza" as the defendant for service, but the return stated that the citation was served on "Jesse De La Garza." Another citation named "Southern Customs Paint and Body" as a defendant, while the return stated the citation was served on "Southern Custom's by delivering to Robert Sutherland." De La Garza pointed out the citation's error in his name to the

process server, who then offered to take the citation back to correct the mistake. De La Garza declined that offer and told the process server that regardless of the error, he knew he was the person being sued and to leave the documents with him.

Southern Customs failed to file a timely answer. Spencer obtained a default judgment that awarded him nearly $150,000, which included the trebling of Spencer's economic and mental anguish damages due to alleged intentional conduct under the DTPA, as well as attorney's fees.

Southern Customs filed a timely motion for new trial, arguing that service on De La Garza was improper, and that Southern Customs established the necessary *Craddock* elements to set aside the default judgment. Under *Craddock*, a trial court is required to set aside a default judgment if (1) "the failure of the defendant to answer before judgment was not intentional, or the result of conscious indifference on his part, but was due to a mistake or an accident"; (2) "the motion for a new trial sets up a meritorious defense"; and (3) granting the motion "will occasion no delay or otherwise work an injury to the plaintiff." *Craddock*, 133 S.W.2d at 126. The trial court denied the motion for new trial. The court of appeals affirmed the trial court's judgment, holding that the default judgment was not void for defective service, and that Southern Customs was not entitled to a new trial because it failed to satisfy the first *Craddock* element. ___ S.W.3d ___, ___ (Tex. App.—Corpus Christi–Edinburg 2010). Because Southern Customs asserted facts that, if true, negate intentional or consciously indifferent conduct, we reverse the court of appeals' judgment and remand the case for consideration of the second and third elements of the *Craddock* test.

II

Southern Customs asserts that service of process was invalid because one of the citations misstated the name of Jesse De La Garza and the return on the other citation did not show proper service on Southern Customs Paint and Body. Southern Customs states that "[t]here are no presumptions in favor of valid issuance, service, and return of citation," citing *Fidelity & Guaranty Insurance Co. v. Drewery Construction Co.*, 186 S.W.3d 571, 573–74 (Tex. 2006). That is true when attacking a default judgment by restricted appeal, but our analysis is different when, as here, a default judgment is attacked by a motion for new trial. *See id.* (discussing the difference between a restricted appeal, which is brought directly in the appellate court where the record is limited, and a motion for new trial or bill of review, which is filed in the trial court where the record can be developed). In this circumstance, we focus on "the critical question in any default judgment: 'Why did the defendant not appear?'" *Id.* at 574. If the defendant did not appear because he or she never received the suit papers, then the court should generally set aside the default judgment. *Id.* But if the defendant received the suit papers and has some other reason for not appearing, then the default judgment must be set aside if the defendant proves the three elements of the *Craddock* test. *Id.* (citing *Craddock*, 133 S.W.2d at 126). Here, De La Garza and Sutherland acknowledged in their affidavits that they received the suit papers. Thus, to determine whether the trial court erred by refusing to set aside the default judgment and order a new trial, we must determine whether Southern Customs satisfied the *Craddock* test. *Id.* Because the court of appeals addressed only *Craddock*'s first element, we limit our review to that determination. *See Old Republ. Ins. Co. v. Scott*, 873 S.W.2d 381, 382 (Tex. 1994) (per curiam).

A defendant satisfies its burden as to the first *Craddock* element when its factual assertions, if true, negate intentional or consciously indifferent conduct by the defendant and the factual assertions are not controverted by the plaintiff. *In re R.R.*, 209 S.W.3d 112, 115 (Tex. 2006) (per curiam). Consciously indifferent conduct occurs when "the defendant knew it was sued but did not care." *Fidelity*, 186 S.W.3d at 576. Generally, "some excuse, although not necessarily a good one, will suffice to show that a defendant's failure to file an answer was not because the defendant did not care." *In re R.R.*, 209 S.W.3d at 115. Here, Southern Customs offered an excuse that was not controverted and, if true, negated intentional or consciously indifferent conduct on its part. Specifically, Southern Customs alleged, among other reasons, that the citation was left in a stack of papers on a desk and forgotten about because of limited time spent at the office due to weather conditions over a nearly three-week period during the Christmas holiday season. *See Craddock*, 133 S.W.2d at 126 (holding that the effect of weather on business "certainly constituted some excuse for the oversight"). Spencer made no attempt to controvert Southern Customs's claims regarding the weather conditions during this time period or the weather's adverse effect on Southern Customs's business. We conclude that this excuse is sufficient to show that the failure to answer was not the result of intentional or consciously indifferent conduct.

Contrary to the dissent's assertion, this decision does not alter our default judgment jurisprudence. We do not hold that forgetfulness alone is sufficient to satisfy the first *Craddock* element; rather, we simply conclude that the excuse presented here is so similar to that which we accepted as sufficient in *Craddock* that the same result is required. Southern Customs provided some excuse for its oversight, which satisfies the first element of *Craddock*. In *Craddock*, weather

conditions altered a company's ordinary course of business, which ultimately led to the misplacement of a citation among less urgent mail and the failure to answer the lawsuit before judgment. *Id.* at 125. Similarly, weather conditions were alleged in this case to have altered the ordinary course of business for Southern Customs, ultimately leading Sutherland and De La Garza to misplace the citations in a pile of ordinary papers and to fail to answer the lawsuit before judgment.[2] This *Craddock*-like situation, coupled with time spent out of the office for the holidays and the defendants' forgetfulness, combine to create "some excuse, although not necessarily a good one" and demonstrate that the failure to answer was not intentional or the result of conscious indifference. *See In re R.R.*, 209 S.W.3d at 115. As we stated in *Craddock*, "the absence of an intentional failure to answer rather than a real excuse for not answering was the controlling fact." *Craddock*, 133 S.W.2d at 125. Because of the similarity of the excuse asserted in *Craddock* and the uncontroverted excuse in this case, our holding does not extend *Craddock*; it merely follows it. Moreover, our holding not only conforms to existing law, it also comports with the policy that "an adjudication on the merits is preferred in Texas." *Holt Atherton Indus., Inc. v. Heine*, 835 S.W.2d 80, 86 (Tex. 1992).

III

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[2] Sutherland's and De La Garza's uncontroverted affidavits each state:

> When we received the papers, it was less than a week before the Christmas holidays. The weather conditions during this period made it difficult for me to perform much labor for any customers because weather conditions adversely affect paint work on automobiles. I did return to the shop on Monday and worked part of the day. . . . I also worked briefly on Tuesday, December 23, 2008, again, just returning automobiles and scheduling work. By this time, and due, in part, to the holidays, I was not thinking about the papers that had been delivered to me at my shop.

Southern Customs provided a sufficient excuse for failing to answer the suit timely, thus satisfying the first element of the *Craddock* standard. The trial court's denial of Southern Customs's motion for new trial, therefore, cannot be affirmed on the ground that its excuse for not answering was insufficient. The court of appeals erred when it held otherwise. Accordingly, we grant the petition for review and, without hearing oral argument, we reverse the court of appeals' judgment and remand the case to that court for consideration of the second and third *Craddock* elements. TEX. R. APP. P. 59.1.

_____
Paul W. Green
Justice

OPINION DELIVERED: June 29, 2012

IN THE SUPREME COURT OF TEXAS

NO. 10-0750

ROBERT SUTHERLAND, JESUS DE LA GARZA
AND SOUTHERN CUSTOMS PAINT AND BODY, PETITIONERS,

V.

ROBERT KEITH SPENCER, RESPONDENT

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

CHIEF JUSTICE JEFFERSON, joined by JUSTICE WILLETT, dissenting.

"I forgot."

We reject this excuse when tax returns are late, or when homework is missing, but a defendant can now use it to disregard an official directive by the State of Texas that he either answer a lawsuit or risk a judgment against him. The defendants here received and reviewed the citation and petition, placed the papers on their office desk, stopped thinking about the lawsuit because of the holidays and "weather conditions," and ultimately forgot about it. If those facts constitute a sufficient excuse for neglecting to answer a lawsuit, the rules and precedent governing default judgments have been displaced by a simple command: no default judgment will stand if the defendant asserts that the mundane distractions of everyday life destroyed his cognition.

Because we prefer a merits determination to a procedural forfeit, we have been reluctant to uphold a default judgment if it is clear that the defendant intended to answer the lawsuit. *See Holt Atherton Indus. v. Heine*, 835 S.W.2d 80, 86 (Tex. 1992) ("[A]n adjudication on the merits is preferred in Texas."); *see also Titan Indem. Co. v. Old S. Ins. Grp., Inc.*, 221 S.W.3d 703, 708 (Tex. App.—San Antonio 2006, no pet.) ("It is a basic tenet of jurisprudence that the law abhors a default because equity is rarely served by a default."). This policy should always inform our analysis, but that does not mean we can simply ignore procedural commands. A rule of procedure is a rule of law. We should tread carefully before we tolerate its disregard based on the tenuous rationale presented here.

Our precedent and rules have warned about the risk of default for more than a century. It functions primarily to spur quick action when a defendant is served with a lawsuit. Our legal system is built around deadlines. Deadlines ensure the orderly process of litigation. Statutes of limitations force the plaintiff to act, and the risk of default induces the defendant to answer. *See, e.g.*, 10A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2681, at 9 (3d ed. 1998) ("[T]he possibility of being held in default acts as a deterrent to those parties resorting to delay as an element of their litigation strategy."). If that tool is to have any effect, and the rule of law any meaning, it must be enforced. *Cf. Edwards Aquifer Auth. v. Chem. Lime, Ltd.*, 291 S.W.3d 392, 403 (Tex. 2009) ("Filing deadlines . . . necessarily operate harshly and arbitrarily with respect to individuals who fall just on the other side of them, but if the concept of a filing deadline is to have any content, the deadline must be enforced. Any less rigid

standard would risk encouraging a lax attitude toward filing dates." (quoting *United States v. Locke*, 471 U.S. 84, 101 (1985))).

Long ago, having taken all of these considerations into account, we announced that a default judgment should be set aside if the defendant can establish certain benchmarks:

> A default judgment should be set aside and a new trial ordered in any case in which the failure of the defendant to answer before judgment was not intentional, or the result of conscious indifference on his part, but was due to a mistake or an accident; provided the motion for a new trial sets up a meritorious defense and is filed at a time when the granting thereof will occasion no delay or otherwise work an injury to the plaintiff.

Craddock v. Sunshine Bus Lines, Inc., 133 S.W.2d 124, 126 (Tex. 1939). Our mission was to "prevent an injustice to the defendant without working an injustice on the plaintiff." *Id.* Because the *Craddock* standard is equitable, its application will vary on a case-by-case basis. Over the years, we have focused the inquiry on the degree to which the defendant knew about the lawsuit but took no affirmative steps to answer it, even after knowing about the consequence of inaction.

We have had many occasions to describe how a defendant can show that the failure to answer was neither intentional nor the result of conscious indifference. Conscious indifference means "that the defendant knew it was sued but did not care." *Fidelity & Guar. Ins. Co. v. Drewery Constr. Co.*, 186 S.W.3d 571, 576 (Tex. 2006) (per curiam). We have also clarified the types of mistakes that negate conscious indifference. *Compare Bank One, Tex., N.A. v. Moody*, 830 S.W.2d 81, 84–85 (Tex. 1992) (accepting the bank's excuse that based on its past practices it thought it need only freeze a debtor's account and submit the balance of the account to the clerk of the court rather than file an answer in response to a writ of garnishment), *with In re R.R.*, 209 S.W.3d 112, 115 (Tex.

2006) (per curiam) ("Not understanding a citation and then doing nothing following service does not constitute a mistake of law that is sufficient to meet the *Craddock* requirements."). We have even offered guidance on how to proceed through the analysis, instructing lower courts to look to the "knowledge and acts" of the defendants, *Strackbein v. Prewitt*, 671 S.W.2d 37, 39 (Tex. 1984), and informing courts that "[a]n excuse need not be a good one to suffice," *Fidelity*, 186 S.W.3d at 576. But in the end, the facts always drive the analysis, and it is the facts that clarify the standard. *See, e.g.*, *Bank One*, 830 S.W.2d at 83 ("The court's application of its rule in *Craddock* to the facts of *Craddock* further clarifies the rule.").

We recently held "that *some* excuse, although not necessarily a good one, will suffice to show that a defendant's failure to file an answer was not because the defendant did not care." *In re R.R.*, 209 S.W.3d at 115 (emphasis added) (citing *Fidelity*, 186 S.W.3d at 576). Respondents have argued that *any* excuse is sufficient. But that cannot be so because we subsequently upheld a default judgment because the offered excuse was wholly insufficient. *See Levine v. Shackelford, Melton & McKinley, L.L.P.*, 248 S.W.3d 166, 168–69 (Tex. 2008) (upholding a default judgment based on the defense attorney's "pattern of ignoring deadlines and warnings from the opposing party" despite the defendants' claim "that their attorney placed the answer, along with a filing letter, in his 'outgoing mail bin' four days before the trial court signed the original default judgment"). If any excuse negated conscious indifference then *Craddock*'s command would lose all meaning. Thus, there will always be a question of whether the facts reveal a sufficient excuse. *See, e.g.*, *Smith v. Babcock & Wilcox Constr. Co.*, 913 S.W.2d 467, 468 (Tex. 1995) (per curiam) ("A failure to appear is not intentional or due to conscious indifference within the meaning of the rule merely because it is

deliberate; it must also be without *adequate* justification." (emphasis added)). And our prior cases show what types of excuses qualify:

- Not receiving the citation is always a sufficient excuse for not answering. *See, e.g.*, *Estate of Pollack v. McMurrey*, 858 S.W.2d 388, 391 (Tex. 1993) (noting that no evidence established that the defense attorney knew that his clients had been served and that the failure to answer under these circumstances "could not have been intentional or the result of conscious indifference"); *cf. Mathis v. Lockwood*, 166 S.W.3d 743, 745 (Tex. 2005) (per curiam) (accepting a defendant's excuse that she failed to appear at trial because she never received notice of the setting).
- Losing the service papers can be a sufficient excuse if it is "supported by some explanation from the person most likely to have seen them, or of the efforts made to find them." *Fidelity*, 186 S.W.3d at 575–76 (setting a default judgment aside based on the defendant's excuse of losing the citation because the defendant's affidavits showed no intent or indifference but instead detailed its "efforts to establish a system that would avoid precisely what happened").
- Misplacing the citation is sufficient when it is the result of a turnover in staff or a breakdown in communication. *See, e.g.*, *Dir., State Emp. Workers' Comp. Div. v. Evans*, 889 S.W.2d 266, 269 (Tex. 1994) (setting aside a post-answer default judgment when the attorney failed to appear because her predecessor, whom she replaced after trial had been set, misdated the trial date on his calendar and conveyed the wrong information to her); *Old Republic Ins. Co. v. Scott*, 873 S.W.2d 381, 382 (Tex. 1994) (per curiam) (accepting a workers' compensation carrier's excuse that the citation was misplaced because it was inadvertently included with

files that were being transferred from one adjustment company to another); *Strackbein*, 671 S.W.2d at 39 (finding no conscious indifference when the failure to answer was the result of a "breakdown of communication" between two individuals, each of whom thought the other was going to forward the relevant materials to the attorney).

- Some mistakes of law suffice if the mistake is the result of a defendant's prior interactions with the law. *See, e.g.*, *In re R.R.*, 209 S.W.3d at 115 (holding that a mother's mistake of law that was "based on her prior experiences with the court system and her contacts with CPS," along with her action of "staying in regular contact with the caseworker about the progress of the case" was sufficient to "negate the element of conscious indifference to proceedings designed to terminate the parent-child relationship between [her] and her children"); *Bank One, Tex.*, 830 S.W.2d at 84–85.

This list is not exhaustive, but it is a useful point of reference when analyzing a default judgment. None of these cases, however, address the type of excuse presented in this case. Both De La Garza and Sutherland explain their failure to answer as follows:

> I remember someone coming to my shop on or about December 19, 2008, and leaving some papers with me and my partner. This was a Friday. The person who gave the papers to me did not explain what they were for or that I had any obligation to do anything in response. I had never been sued before like this and have no experience with the legal system. I briefly reviewed the papers and the[n] placed them on a desk in my office. My desk is covered in papers, concerning various matters. We do not employ a secretary or have any administrative help. My partner and I do everything. When we received the papers, it was less than a week before the Christmas holidays. The weather conditions during this period made it difficult for me to perform much labor for any customers because weather conditions adversely affect paint work on automobiles. I did return to the shop on Monday and worked part of the day. However, the work was limited to mostly returning automobiles to customers. I spent little time in my office. I also worked briefly on Tuesday,

December 23, 2008, again, just returning automobiles and scheduling work. By this time, and due, in part, to the holidays, I was not thinking about the papers that had been delivered to me at my shop. The papers had been placed on my desk but were not on my mind and were camouflaged with other papers;

I did not return to the shop again after December 23, 2008, until January 5, 2009. During this period, the shop was closed for the holidays and, in part, because of the weather conditions. I also spent a lot of time during this period in San Antonio, Texas, to visit friends for the holidays. Also during this period, my thoughts were on the holidays and things I had to do to plan and prepare for the holidays. Therefore, my thoughts were not on the papers that had been delivered to me;

Between January 5, 2009, and January 16, 2009, I resumed a regular schedule at the shop. During this period, I was working and not thinking about the papers that had been delivered to me. In fact, by this time, I had forgotten that [sic] about them. I also did not understand or realize that I had any obligation to do anything, including filing an answer to the papers within any time period. This was clearly a mistake on my part;

I now understand that a default judgment was entered because an answer to the suit was not filed within the time allowed. My failure to review the documents and understand what they must have been was an accident or mistake by me because I did not understand the significance of the documents and even failed to remember that I had gotten them. Further, the papers were given to me during the Christmas and New Year's holiday period, when my mind was focused elsewhere and not on the papers. I have never been sued before. Nor did I consciously disregard answering the suit because I did not even realize that the papers that had been delivered required any attention by me. Had I realized what the documents must have been, I would have immediately retained the services of an attorney to represent me, as I did as soon as I received notice of the default judgment. The notice received by me in the mail was the first indication that I had that a lawsuit had been filed against me that required affirmative action by me.[1]

This excuse cannot suffice. The defendants did not lose the citation. They knew where it was. De La Garza placed it on his desk upon receipt. *Cf. Fidelity*, 186 S.W.3d at 575 ("People often

[1] The only difference between the excuse provided in De La Garza's affidavit and Sutherland's affidavit is that Sutherland's does not contain the sentence: "I also spent a lot of time during this period in San Antonio, Texas, to visit friends for the holidays."

do not know where or how they lost something—that is precisely why it remains 'lost.'"). Nor is this a case where a mistake of law justifies the failure to answer. The only mistake the defendants offer is that they did not know that they had to respond to the citation. Yet they read the citation when the process server delivered it. The citation said: "You have been sued. You may employ an attorney. If you or your attorney do not file a written answer with the clerk who issued this citation by 10:00 a.m. on the Monday next following the expiration of twenty days after you were served this citation and petition, a default judgment may be taken against you." *See* TEX. R. CIV. P. 99(c). Even putting aside the citation's clear warning, we have held that "[n]ot understanding a citation and then doing nothing following service does not constitute a mistake of law that is sufficient to meet the *Craddock* requirements." *In re R.R.*, 209 S.W.3d at 115.

This case is distinct from *Craddock*, where inclement weather caused the defendant to misplace the citation. There, an insurance company fell behind in its work because of an influx of claims due to a recent hail and wind storm. *Craddock*, 133 S.W.2d at 125. To catch up, the company began separating important mail "from that which was not so important." *Id.* In the process, the citation was inadvertently placed with the unimportant mail, despite being marked "urgent," and was not discovered until the day the default judgment was rendered. *Id.*

In this case, the affidavits obliquely speak of "weather conditions." There is no assertion that the weather impeded access to the courthouse, precluded the retention of a lawyer, or (as in *Craddock*) overburdened the defendants' business with an influx of work. Indeed, according to the affidavits, the defendants had more time on their hands as business subsided due to the weather.

That leaves "the holidays." We are lenient when deadlines fall on legal holidays. *See* TEX. R. CIV. P. 4. But the rules nevertheless require that litigants answer lawsuits, request a jury, move for new trial, perfect an appeal—all within prescribed time limits and even when holidays intervene. In any event, the defendants offer no particular reason why the holidays prevented them from answering the lawsuit. Rather, they assert that their minds were preoccupied by the holidays, to the exclusion of the lawsuit. Consequently, this case comes down to one proposition: that a defendant who says he forgot about being sued is not indifferent to the risk of default.

Even a liberal interpretation of our precedent cannot justify the Court's acceptance of this excuse. As we have consistently instructed, determining whether the failure to answer was a result of conscious indifference requires looking to the "knowledge and acts" of the defendant. *Strackbein*, 671 S.W.2d at 39. Here, the defendants reviewed the documents, set them on the desk, and then did nothing. Absent a justifiable mistake of law, we have never set aside a default judgment when the defendant did nothing after receiving the citation. Instead, the defendants have always made some effort, or demonstrated an intent, to respond. One of our more lenient cases illustrates this point. In *Strackbein*, Strackbein sued Prewitt. *Id.* at 38. When Prewitt failed to answer, Strackbein obtained a default judgment, and Prewitt later sought a new trial. *Id.* Prewitt's affidavits in support of his motion for new trial established the following:

> (1) on June 18, three days after being served, Prewitt called Mr. Bentley and asked if Bentley would represent him in the suit. He was advised by Bentley that he would do so if the papers in the case were forwarded to him; (2) Prewitt then instructed Julie Miracle to gather all of the documents pertaining to the Strackbein matter; (3) on June 23, after the documents had been assembled, Prewitt again called Bentley's office and talked with a secretary who advised him that Bentley was out of town but that he should mail the documents to her so that the matter could be timely handled;

> (4) Prewitt then instructed Julie Miracle to mail the documents to Bentley's office; (5) however, due to a breakdown of communication, Julie Miracle thought Prewitt was going to mail the documents and Prewitt thought Julie Miracle would mail them; (6) instead, the papers were misplaced in the office and were not discovered until Prewitt received notice of default; and (7) until that time, Prewitt believed that the papers were in the attorney's office and that the suit was being handled by the attorney.

Id. at 39. Based on the affidavit, we concluded that "there [was] no reasonable interpretation . . . which would constitute evidence that Prewitt's failure to answer the citation was a result of an intentional act or conscious indifference." *Id.* Prewitt twice contacted an attorney and took steps to answer the lawsuit. De La Garza and Sutherland, by contrast, reviewed the citation, put it on a desk, and focused their attention elsewhere—the holidays, work, visiting friends. These actions do not negate conscious indifference—they establish it. *See Fidelity*, 186 S.W.3d at 575–76 ("[T]he *Craddock* standard is one of intentional or conscious indifference—that the defendant knew it was sued but did not care."). Holding otherwise renders the citation's command impotent.

We will one day see a case in which a defendant served with citation is so overwhelmed with events that a trial judge exercises sound discretion to order a new trial. In this case, however, the period from the defendants' receipt of the citation to notice of the default is marked with contempt for their obligation to the rule of law. The trial court was not required to accept the defendants' excuse on these facts. Because the Court holds otherwise, I respectfully dissent.

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Wallace B. Jefferson
Chief Justice

OPINION DELIVERED: June 29, 2012

IN THE SUPREME COURT OF TEXAS

NO. 10-0781

U-HAUL INTERNATIONAL, INC. D/B/A U-HAUL,
U-HAUL CO. OF TEXAS, INC. D/B/A U-HAUL OF DALLAS, AND
EAST FORK ENTERPRISES, INC. D/B/A JOT 'EM DOWN, INC.,
PETITIONERS,

v.

TALMADGE WALDRIP, BERNICE WALDRIP, DINAH SIMINGTON,
AND ANNE WALDRIP-BOYD,
RESPONDENTS

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

Argued February 8, 2012

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

JUSTICE LEHRMANN filed a dissenting opinion.

After being seriously injured in an accident by a U-Haul truck, Talmadge Waldrip[1] sued several U-Haul corporate entities and an independent dealer on theories of negligence and gross negligence, alleging that the accident was the result of a systematic pattern of poor inspection and repair practices, and incompetence.

[1] Bernice Waldrip, Dinah Simington, and Anne Waldrip-Boyd, also referred to in the record as Annabeth or Anne Boyd, are also Respondents in this case. We will refer to them collectively as "Waldrip."

Following a three-week trial, a jury found U-Haul International, Incorporated d/b/a U-Haul (UHI) and U-Haul Company of Texas, Incorporated d/b/a U-Haul Company of Dallas (UHT) both negligent and grossly negligent and East Fork Enterprises, Incorporated d/b/a Jot 'Em Down (JED) negligent (collectively, U-Haul). The trial court awarded approximately $45 million in damages, including more than $23 million in punitive damages against UHI and UHT.[2] 322 S.W.3d 829, 839. The court of appeals reversed the trial court's exemplary damages award against UHI and affirmed the trial court's judgment in all other respects. At issue in this case is whether Waldrip presented legally sufficient evidence at trial to support the actual and punitive damages awards, and whether the court of appeals erred in overturning the gross-negligence award against UHI. We reverse the court of appeals' judgment in part and affirm in part and remand the case for a new trial on the negligence claims against the defendants.

I. Background and Procedural Posture

Talmadge Waldrip was severely injured while exiting a U-Haul truck that rolled backwards onto him, allegedly due to problems with the truck's parking brake and transmission. U-Haul argues that its maintenance and safety procedures were adequate and the problems with the truck were not the result of faulty inspection or maintenance. Waldrip contends that U-Haul's failure to discover the problems with the truck's parking brake and transmission systems was due to negligence and gross negligence in its inspection and maintenance program.

The truck at issue in this case, identified as JH6097T, was a standard transmission jumbo hauler. The vehicle could roll backwards when idle unless the transmission was in gear or the

[2] The jury originally awarded more than $84 million in compensatory and exemplary damages, but the trial court reduced the award pursuant to Chapter 41 of the Texas Civil Practice and Remedies Code.

parking brake was applied, or both. Waldrip testified that the truck rolled, despite his putting it in first gear and applying the parking brake. The jury found for Waldrip on all grounds and awarded actual damages of $21,425,000, of which it apportioned 50 percent to UHI, 49 percent to UHT, and 1 percent to JED. The jury also found UHI and UHT grossly negligent and awarded punitive damages of $42 million against UHI and $21 million against UHT. The plaintiffs did not submit a question on the gross negligence of JED in their proposed jury charge. After applying the statutory cap on punitive damages, the trial court entered judgment against UHI and UHT, ordering each to pay $11,760,000 in punitive damages as well as its share of the actual damages award. The court of appeals overturned the exemplary damages award against UHI, but otherwise affirmed the trial court's judgment, including actual damages. U-Haul filed a petition for review in this Court.[3]

II. Facts

A. U-Haul Organization and Maintenance and Inspection Program

UHI is an equipment rental company based in Phoenix, Arizona with 49 subsidiaries operating in the United States and Canada. These subsidiaries, including UHT, operate U-Haul-owned rental centers, as well as oversee the operations of independent dealers, including JED, that rent U-Haul equipment. Of the more than 15,000 U-Haul rental locations across the United States and Canada, 14,000 of those locations are independent dealers. At the time of trial, U-Haul's fleet comprised more than 100,000 trucks.

As U-Haul's vehicle-inspection and maintenance policies for the fleet's parking brakes and transmissions are at issue, we will briefly review them. UHI is responsible for developing and maintaining the company's policies for inspecting, repairing, and maintaining the vehicles. UHT

[3] An amicus brief was filed by Texas Civil Justice League.

is responsible for enforcing and implementing UHI's policies in Texas. UHI has promulgated maintenance and repair policies relevant to this case. First, the preventive maintenance (PM-5) inspection is scheduled for every 5,000 miles and includes a functional and visual parking brake inspection, an inspection of the transmission-fluid level, a check for signs of leakage, and a test drive of the truck by another person to include a check of the parking brake. A PM-5 inspection is performed by a trained mechanic.[4]

Also relevant to this case is the vehicle-safety certification required by UHI in addition to the PM-5. UHI requires that all trucks undergo a safety certification at specified chronological intervals. The required frequency of these certifications is in dispute.[5] Safety certifications include a functional and visual parking brake test.[6] Area Field Managers (AFMs) were employed by UHT and other UHI subsidiaries and charged with performing safety inspections on the trucks at independent dealers. The record indicates that AFMs are not mechanics and perform operational functions distinct from U-Haul's mechanics.

A third relevant UHI policy is the receipt and dispatch tag program (R&D tag). With every rental, U-Haul records customer feedback on the truck's performance using the R&D tag to collect information. When a customer returns a truck to either an independent dealer or company-owned

[4] It is unclear whether the person responsible for the test drive in order to check the parking brake must also be a mechanic.

[5] Some U-Haul documents require all trucks to be safety-certified every thirty days, while other company documents suggest that the thirty-day requirement applied only to trucks housed at company-owned centers and that trucks assigned to independent dealers were to be safety-certified on a sixty-to-ninety day schedule.

[6] The parties disputed at trial whether safety certifications required checking transmission-fluid levels in standard transmission trucks and checking the truck for signs of leakage. The answer to this question is not dispositive of any issues in this case.

location, U-Haul agents[7] are required to ask the customer about any problems with the truck, including brake, engine, or electrical problems, and the agent records this information on the R&D tag, which is a UHI form. The agent must sign the tag to certify that the truck is ready for rental.[8]

UHI also requires an annual inspection per the United States Department of Transportation (DOT) guidelines. The parties dispute, however, whether federal law requires U-Haul to conduct this inspection.[9] If any safety issues are discovered during an inspection or the R&D-tag process that cannot be repaired on-site, U-Haul policy requires that the truck be grounded and the information entered into the company computer system in the Downed Equipment Tracker (DET) database until the repairs are completed. UHI maintained this computer database for all of the trucks in U-Haul's fleet.

B. History of the Truck Waldrip Rented (JH6097T Jumbo Hauler)

Talmadge Waldrip was injured in September 2006 when the parking brake or the transmission on the truck his daughter rented malfunctioned and the truck rolled over him as he attempted to exit it. At the time of the accident, JH6097T was an eighteen-year-old U-Haul jumbo hauler with a manual transmission and an odometer reading of more than 233,000 miles. At the time of the accident, JH6097T had an inoperable parking brake and a damaged transmission. The parties disagree on the extent and cause of these conditions, and whether they caused the accident.

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[7] Here, the term "agent" refers to customer-service personnel working at the rental desk at U-Haul owned stores or independent dealers.

[8] Prior to every rental, the agent on duty is tasked with 1) checking the lights, 2) checking for leaks, 3) checking fluid levels, 4) checking tire pressure and tread, and 5) cleaning the windshield and cab. The R&D tag also requires the agent to note whether a PM-5 inspection or safety certification is due.

[9] U-Haul argues that the PM-5 inspections, which are more detailed than the DOT inspection, constitute a DOT inspection, while Waldrip argues that a separate DOT inspection is required by federal law. It is not necessary to resolve this question in this appeal.

In the years before Waldrip's accident, JH6097T had been driven throughout North America. When the accident happened, the truck was on its third transmission. The rear transmission seal had been replaced three times since 2001. The entire parking brake system had been replaced as well, but evidence presented by Waldrip at trial indicated that parking brake problems persisted.

In September 2005, a year before Waldrip's accident, the truck was grounded and placed in the DET database after a customer reported that the parking brake light stayed on and the truck had "no parking brake," according to language entered in the database. The parties dispute exactly what "no parking brake" means. U-Haul contends that the notation "no parking brake" meant only that the indicator light was not working, a conclusion it argues is buttressed by the truck passing subsequent parking-brake inspections. Waldrip asserts that "no parking brake" meant that the parking brake itself was not functioning. U-Haul did not perform repairs on the parking brake at that time. James Anderson, the U-Haul employee who repaired the parking-brake light, testified that he inspected the parking brake and found it to be functioning.

While in Dallas prior to the accident, the truck passed safety certifications three times—in November 2005, January 2006, and March 2006. The November 2005 safety certification was performed by Reginald Benjamin, a UHT employee. The latter two certifications were performed by Jason Crews, an AFM hired by Lynn Buck, UHT's Marketing Company President in Dallas. Crews had no prior experience in maintaining, inspecting, or repairing trucks when he was hired. Buck, aware of Crews' lack of experience, testified that she believed mechanical experience was not necessary for the role because AFMs are not responsible for repairs and are merely responsible for identifying truck problems during safety certifications. Buck also testified that U-Haul provided the necessary on-the-job training for AFMs. Crews underwent two to three weeks of training, including

one day in a "shop" in which he went through a typical day of work. However, Waldrip presented some evidence that, according to U-Haul's policies, Crews should have spent more than one day in a "shop."

The JH6097T was transferred by UHT to JED in June 2006 and Crews remained responsible for safety certifying the truck. Crews certified the truck as safe again in July 2006. At trial, Crews did not specifically remember working on JH6097T, but stated he would not have placed the safety certification sticker on it if the parking brake had not passed inspection. Crews did not check the fluid levels of JH6097T during safety certifications because he believed that he was not required to do so on standard-transmission trucks.[10] At trial, Crews indicated that he did not know that it was possible to check the transmission-fluid levels on standard-transmission vehicles, and even testified that a standard transmission did not contain transmission fluid. He later acknowledged that the fluid could be checked in a standard transmission.

1. Customers who had parking brake and transmission problems with the JH6097T truck and reported those problems to U-Haul

Several people who rented and drove JH6097T in the year before Waldrip's accident testified at trial that they did or did not have certain problems while driving the truck. Because U-Haul's knowledge of these problems is at issue, we separate those customers who had problems and testified they reported them to U-Haul from those customers who either did not have problems with the truck or did not report problems.

[10] The parties disputed at trial whether U-Haul's policies in 2006 required an AFM to check the transmission-fluid levels on standard-transmission trucks. U-Haul argues that its policy did not require such a check, while Waldrip says that U-Haul policy had been updated to require AFMs to check transmission-fluid levels on standard trucks, as well as checking for leaks.

We discuss first those customers who reported issues with the truck's parking brake or transmission. In October 2005, JH6097T passed a PM-5 inspection in Florida.[11] After this PM-5 inspection, Ignacio Reveles rented and drove JH6097T from Florida to Texas. Reveles testified that the transmission was "not in good condition," that he had trouble starting the truck and shifting gears, and that the truck rolled backwards with the parking brake set while it was in gear. In order to keep the truck from rolling again, he placed wooden blocks behind the back tires of the truck for the duration of his trip. Reveles testified that he reported these problems to the U-Haul agent in Florida and was told to call U-Haul's 1-800 number. When he returned the truck to a Dallas U-Haul center, he said he told the agent that the parking brake did not work, he had problems shifting gears, and the truck leaked. The R&D-tag does not record any of the problems reported by Reveles and records of the toll-free call indicate only that Reveles reported a dead battery.

Steve Marco rented the truck on September 1, 2006. Unlike other renters of JH6097T, he had driven large standard transmission trucks. Marco testified to many problems with the truck, including difficulty shifting gears and lack of tension in the parking-brake lever. Because of this, he took precautions to make sure the truck did not roll, including turning the wheels and parking against a curb. Marco says he reported these problems, but the R&D tag for that rental does not reflect any reported issues.[12]

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[11] At trial, there was a discrepancy in mileage on JH6097T's odometer and the number written on the PM-5 inspection form, raising a dispute about whether the documentation of the PM-5 inspection related to JH6097T or another truck.

[12] U-Haul contends that Marco did not report any problems with the parking brake, only that the parking-brake lever had no tension in it.

Jonathan Simington, Waldrip's grandson, rented the truck on September 9, 2006.[13] Simington also had experience driving manual trucks. After Simington set the parking brake and put it into first gear, the truck rolled down a building ramp. He also reported that the transmission jumped out of gear while he was driving. Larry Boyd, Simington's uncle, was working at JED at the time Simington returned the truck and was 10 to 15 feet from Simington with his back turned. Simington reported these problems to Boyd, although he acknowledges that Boyd may not have heard him. Simington did not report any of these problems to Waldrip or any other U-Haul entity.

2. Customers who did not report parking brake and transmission problems with the truck to U-Haul

In September 2005, after the U-Haul jumbo hauler was placed in the DET database and the parking-brake light was fixed, Pablo Cassanova rented the truck in Florida and reported that the truck was in good working condition. He parked the truck overnight on an incline and did not put the transmission in gear, but he did set the parking brake and the truck did not move.

Derrick Bradley was the first customer to rent JH6097T after the July 2006 safety certification. He testified that he had difficulty getting the truck from second to third gear. JED was closed when he returned the truck, so he parked the truck near the entrance gate and set the parking brake. Bradley observed it roll backwards about a foot until it hit the gate.[14] Bradley says he called

[13] Waldrip founded JED in 1969 and transferred his interest in the company to his daughter, Anne Waldrip-Boyd, and her then-husband, Larry Boyd, in 1996. At the time of the accident, the Boyds had mediated a divorce settlement, and neither Waldrip nor Anne owned any interest in JED at the time of trial. Larry Boyd maintained ownership of JED.

[14] It was disputed at trial whether Bradley put the truck in neutral or in first gear prior to setting the parking brake. U-Haul argued that he said he put it in neutral in previous statements, but Bradley testified at trial that he put the truck in gear.

JED the next day to ask about the gate, but did not notify anyone of the problems he had with the truck.

Bree Adams rented the truck from JED in July 2006 after Bradley returned the truck. She did not have any transmission problems and the truck did not move when the parking brake was engaged, although Adams acknowledged that she parked on a generally flat surface.

Jeff Everett rented the truck from JED in August 2006. He parked on both flat and inclined surfaces, put the truck in gear, and set the parking brake. The truck did not move. Everett did not know whether the transmission gears or the parking brake held the truck in place. He also acknowledged that he had "no idea" if the parking brake was working because he did not test it.

Clay Vestal rented the truck on August 17, 2006, and had problems getting the truck into gear. The truck rolled down his driveway, among other unrelated problems. He did not report any of these problems to any U-Haul employees.

3. Waldrip's Accident

Waldrip's daughter, Anne Waldrip-Boyd, rented JH6097T from JED on September 20, 2006. Anne asked Waldrip to drive the truck because she could not operate a standard transmission**.** Waldrip drove the truck about seven miles to a warehouse in Forney, Texas. Waldrip testified that when he arrived at the warehouse, which was located on a slight slope, he turned off the ignition, put the truck in first gear, and set the parking brake. For the truck to have rolled backwards with the transmission in first gear, both the parking brake and the transmission must have malfunctioned. As he stepped out of the truck, it began rolling backwards, with the truck door hitting him in the back and knocking him to the ground. The truck then rolled over Waldrip and dragged him down the slope approximately sixty feet.

C. Expert Testimony on JH6097T's Condition

1. Waldrip's Experts

Waldrip sued U-Haul, alleging negligence and gross negligence. Extensive evidence on the state of JH6097T's parking-brake system and transmission was presented at trial. Waldrip presented Randy Reed, a mechanic with over twenty-three years of experience working with large trucks and specifically with U-Haul's jumbo hauler design. Reed inspected the truck's parking-brake system and transmission two days after the accident and again months later. He testified that he found damage to both. Reed testified that the parking-brake drum, brake shoes, and drive shaft were coated in oil, which led to a lack of friction and made the braking system ineffective. Reed had inspected hundreds of parking-brake systems on similar trucks and had seen "a lot of damaged components," but had never seen "one of this factor, not with that kind of grease on it."[15] Reed also stated that half of the transmission's six-quart capacity had leaked though the rear-transmission seal. The seal featured numerous indentations around its circumference, leading Reed to conclude that it had been installed with an improper tool, causing it to leak.

Reed opined that the transmission fluid leaked onto the parking-brake assembly, accelerating the brake shoes' wear and causing them to separate from the metal backing plates. A correctly maintained and adjusted parking brake locks the drive shaft so the truck will hold when the brake is engaged. However, if oil or any petroleum product gets on the brake shoes, the shoes must be replaced and cannot simply be cleaned. According to Reed, parking-brake failure was a direct result of the condition of the brake shoes and drum. After considering the witnesses' testimony regarding

[15] Reed used the term "grease" interchangeably with "oil" to mean "any type of petroleum product" which would cause the brake components to lubricate and interfere with the friction of these components.

the parking-brake failures, Reed concluded the parking brake was not functioning by some point in 2005 and, more particularly, was not functional in October 2005 after the last PM-5 inspection, or after the last safety certification in July 2006.

Reed also believed that low transmission-fluid levels damaged the first and reverse gears. Reed said the damage created a "false gear" capable of deceiving drivers into believing the truck was in first gear when in fact it was not in any gear. If a driver was able to actually get the truck into gear, the transmission alone would hold the truck in place, regardless of whether the parking brake worked. If the truck was actually in the "fake out gear," however, the gear would not hold the truck. Reed believed the rear transmission seal had been leaking "for a while," given the amount of fluid in the transmission.

Reed rejected U-Haul's theory that the transmission seal leak was caused by someone driving with the parking brake engaged, stating that the physical evidence did not fit that theory because the necessary components did not overheat. Significantly, Reed claimed that with proper maintenance and inspection, the faulty condition of both the parking brake and the transmission would have been detected. Reed did not believe that the reported inspections on the truck were performed correctly and said maintenance of the truck was "for lack of better terms not–not there."

Waldrip also presented Dr. Kurt Marshek, a Ph.D. in mechanical engineering, to critique U-Haul's policies and practices regarding its vehicles' safety. Marshek noted that "it probably doesn't even make sense to have the truck on the road anymore with 225,000 miles on it or 228,000 miles, especially if it's having all sorts of mechanical problems, which this particular truck was having." Marshek also testified that DOT inspections were required annually, but observed that the last DOT inspection on JH6097T occurred in May 2005, more than one year prior to the accident.

Marshek rejected U-Haul's argument that conducting PM-5 inspections relieved U-Haul of its duty to perform the federal inspection, noting that the latter is a time-based inspection.

Based on the various witnesses' testimony that the parking brake failed after the last PM-5 inspection, including Reveles and Bradley, Marshek told the jury that if a proper DOT inspection had been performed before September 2006, the parking-brake failure would have been detected. He observed further that U-Haul's failure to perform that inspection was a proximate cause of the accident. Based on his review of U-Haul documents and the testimony of James Guinn, a former U-Haul center general manager, Marshek concluded that safety certifications were required on trucks such as JH6097T every thirty days, but that JH6097T's safety certifications did not adhere to such a schedule. Marshek reasoned that, had safety certifications been correctly administered every thirty days in at least the three months before the accident, the parking-brake failure would have been detected. Marshek also believed that the last safety certification—in July 2006—was not properly performed, based on Bradley's testimony that the truck rolled when the parking brake was applied.

2. U-Haul's Experts

U-Haul's experts examined the truck and agreed with Waldrip's experts that the parking brake was inoperable and the transmission was damaged when the accident occurred. However, they disagreed on the cause and the extent of this damage, as well as when it occurred. U-Haul presented Thomas Green, who holds a bachelor's degree in mechanical engineering and is a consultant in accident reconstruction, cause, and analysis, as well as vehicle-systems analysis. After examining the truck's transmission after the plaintiffs had inspected and dismantled it, Green observed damage to the reverse gear teeth, but noted that all other gears "looked to be in good shape" and had no abnormal signs of wear. Green concluded that the damage was caused by one or more drivers trying

to shift into reverse while the vehicle was moving forward. While the damage could cause problems shifting into reverse, it would not cause problems shifting into first gear. Green also argued that there was no "absence of lubrication" that would "cause any problem."

Green agreed with Reed that the oily substance coating the parking brake came from a leak in the rear transmission seal. He said the leak could have been caused by dirt or debris getting into the seal, improper installation of the seal, or heat generated by driving with the parking brake engaged. He did not believe the seal was improperly installed (although he agreed an improper tool may have been used), leaving heat or debris as the likely causes of the leak. Because the fluid drained from the transmission contained metal, he believed the seal began leaking after July 2005, when the truck's transmission fluid was drained and changed. Green acknowledged that the leak could have been discovered either by checking for leaks or checking the transmission-fluid levels. But, he believed that the transmission had been properly maintained, explaining that the gears were not abnormally worn and were adequately lubricated and that U-Haul records showed the transmission fluid was changed and checked when required.

Ken Sorenson, a Ph.D. in mechanical engineering, inspected the truck's parking-brake system for U-Haul after the plaintiffs had already done so. The system was contaminated with oil and debris and the brake shoes were worn down to the metal plate. He concluded the truck had been driven with the parking brake applied, wearing down the brake shoes.[16] He also inspected the transmission

[16] Sorenson conducted independent testing using a similar truck with both moderately and completely worn brake shoes. Sorenson adjusted the parking brake so the truck would not move when in second gear. He then drove the truck in first gear with the parking brake engaged and, after driving between one and six miles, he observed the parking-brake handle fall into the disengaged position. He said that finding was significant because a person could be driving with the parking brake engaged and not know it.

and, like Green, saw that the spline teeth on the reverse gear were deformed. Other than that damage, he said the rest of the gear teeth looked "okay."

D. Canadian Evidence

Over objection to his testimony, Waldrip presented evidence about investigations of U-Haul's safety practices in Canada. Brian Patterson testified as a lay witness. Patterson was president of the Ontario Safety League (OSL),[17] a private entity that inspected U-Haul trucks coming into Canada from the United States in 2005 and 2006 and reached conclusions about U-Haul's routine safety. Patterson testified that he personally observed the inspections of approximately thirty U-Haul vehicles by licensed mechanics, and the evidence he reviewed "indicated a systemic disregard for public safety in the maintenance of vehicles in the Province of Ontario." Patterson personally recalled only three vehicles with inoperable parking brakes. He also testified to other problems including carbon-monoxide poisoning, leaking brake lines, leaking transmission fluid, broken power steering hoses, bald tires, faulty suspensions, broken brake drums, faulty shocks, and rotted truck floors. As a result of the initial investigation, Canadian governmental entities initiated investigations of U-Haul and, as part of those investigations, approximately 1,400 vehicles were inspected. Brake issues were studied separately in British Columbia, where fifty percent of the trucks tested had faulty brakes. Patterson stated that the trucks with faulty brakes "would not have been allowed on the road." Patterson offered no documentation in support of his testimony.

[17] According to Patterson, OSL is an organization that regularly worked with the Royal Canadian Mounted Police, the Ministry of Transportation, and the Ontario Provincial Police.

Patterson explained that the inspection reports were retained by the garage, which was defunct at the time of trial.[18]

Patterson also testified that he dealt directly with top U-Haul officials in Canada, one of whom was Claude Bouchet. According to Patterson, Bouchet told him that, "particularly in 2005 he had absolute difficulty getting any action from . . . U-Haul International, and in fact, he had no real say over being able to correct the problems that [had] been identified in Canada." Patterson also disagreed with statements made by UHI's board chairman, Joe Shoen, that U-Haul's safety policies and procedures were a "10 of 10."

E. U-Haul's Safety Procedures

Shoen testified that of the 100,000 trucks in U-Haul's fleet, more than 4,500 were standard-transmission jumbo haulers with mileage exceeding 200,000. He was not concerned about the number of higher-mileage trucks still on the roads because the trucks were built for a 300,000-mile service life. Defending U-Haul's safety procedures, Shoen testified that UHI created an inspection-maintenance system allowing every participant in the system to stop a truck rental if a problem were revealed. The system operates on the presumption that the truck "doesn't rent" until someone in the system makes a "positive move."

Schoen described U-Haul's safety-inspection process as a tiered, multi-step progression. The process begins with the R&D-tag, used on each rental and requiring the agent to go through eight steps before allowing the truck to be rented. The next level is the periodic safety certification. Shoen explained that U-Haul-owned stores rent three times more frequently than independent

[18] Additionally, photographs taken at the time of the inspections were in the possession of the *Toronto Star* newspaper, which, along with a Canadian television station, published "exposes" on U-Haul.

dealers; consequently, equipment at the dealers is inspected three times less frequently, although Shoen said it "ends up being about the same interval based on numbers of customers through the vehicle." The third level of UHI's program is the mileage-based preventive maintenance inspections, such as the PM-5 inspection. Additionally, Shoen testified that although the company is not subject to the federal regulations relating to the DOT inspection, it voluntarily performs annual DOT inspections on its trucks.

Shoen stated that UHI's system is "as good or better" than its "truck rental peers." His opinion was that "U-Haul is rated a 10 in safety." He agreed that a truck with an inoperable parking brake would not be "a 10" and such a condition would, in fact, be a "material shortcoming" of the truck. Shoen testified that an inoperative brake would be the fault of "[e]verybody probably involved in the U-Haul system . . . from myself down through and including the people at the actual rental location." He disputed any suggestion that it was somehow to U-Haul's advantage to delay and avoid maintenance, explaining that a lack of maintenance could pose "worse financial consequences than the cost of the maintenance . . . ."[19]

Schoen believed Crews properly performed all safety certifications on the truck in the months before the accident because Crews signed off on the inspections, saying "if [Crews] certified that it worked, then it worked." If the parking brake did not work the next day when the truck was rented to the first customer, he believed something must have happened in the intervening time to have caused the problem.

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[19] This particular statement was in response to a question concerning U-Haul's alleged "one-hoss shay" policy on repairs that was addressed by the court of appeals. 322 S.W.3d 835. The policy centered around "good repair, no [sic] perfect repair," and its goal was to fix certain parts of trucks so that the whole truck would fail at one time. However, we agree with the court of appeals that Waldrip presented no evidence that Shoen or anyone from U-Haul knew of, enforced, or followed this policy.

Lynn Buck testified that she knew that Crews had no mechanical experience when she hired him, but that mechanical experience was not a qualification she was looking for when hiring an AFM because they received training, would only perform "minor maintenance checks," and more qualified people were brought in if a repair were needed.

F. Procedural Disposition

The jury found UHI, UHT, and JED negligent and the proximate cause of Waldrip's injuries, apportioning liability among them.[20] It also found both UHI and UHT grossly negligent and awarded Waldrip exemplary damages against both of them. The plaintiffs did not submit a question on the gross negligence of JED in their proposed jury charge. The trial court entered judgment on the verdict, with some modifications, and U-Haul appealed.

UHI and UHT challenged the legal and factual sufficiency of the jury's gross-negligence findings against them. The court of appeals overturned the gross-negligence finding against UHI, holding that a reasonable juror could not form a firm conviction that UHI acted grossly negligent, mainly because Waldrip presented no evidence of Thomas Coffee's capacity with UHI and because no evidence showed that UHI had any knowledge of problems with JH6097T. Coffee, UHI's Director of Repair Analysis and Support, was employed to maintain UHI's computer records, including the DET. U-Haul also alleged that the trial court abused its discretion by allowing Patterson's testimony, arguing that the evidence was irrelevant, prejudicial hearsay tainting the entire

[20] The jury also found that: 1) JED was negligent while acting in furtherance of a mission for the benefit of UHT and subject to UHT's control as to the details of the mission; 2) UHT was negligent while acting in furtherance of a mission for the benefit of UHI and subject to the control of UHI as to the details of the mission; and 3) UHI authorized UHT to delegate to JED all or part of UHT's responsibility to further the mission of UHI or ratified the delegation of responsibilities.

trial. The court of appeals held that the trial court did not abuse its discretion in allowing this evidence. 322 S.W.3d at 852.

The court of appeals affirmed the gross-negligence award against UHT, based on Buck's hiring of Crews. *Id.* at 848. The court held that the jury could have formed a firm conviction that Crews was unfit and Buck was reckless in hiring him, which together caused Waldrip's injuries. *Id.* The court also affirmed the negligence findings against UHI, UHT, and JED. *Id.* at 842–43. In this Court, U-Haul argues that the court of appeals erred in affirming the gross-negligence award against UHT and affirming the negligence awards against all of the U-Haul entities. U-Haul also argues that the court of appeals erred in concluding that the trial court did not abuse its discretion by admitting Patterson's testimony.

III. Discussion

A. Canadian Evidence

The trial court allowed Patterson's testimony on the investigations by OSL, a safety advocacy group in Canada, and other Canadian entities about the safety of U-Haul's vehicles. The Waldrips argued that the evidence showed 1) that the "incidence and type of safety problems with the trucks inspected in Canada" were indicative of the "condition of the entire fleet, including the truck that injured Waldrip," and 2) UHI's conscious indifference to the "system-wide failures of its maintenance and inspection program . . . ." The court of appeals affirmed the trial court's admission of the Canadian evidence, holding that our opinion in *Nissan Motor Co. Ltd. v. Armstrong*, 145 S.W.3d 131 (Tex. 2004), did not mandate exclusion of this evidence and, even if the trial court's ruling was in error, the error probably did not result in an improper judgment. 322 S.W.3d at 848-49. The court of appeals allowed Patterson to testify but interpreted the trial court as having granted

U-Haul a running objection. The court was unpersuaded by U-Haul's argument that admission of the evidence violated its due process rights.

U-Haul argues that its objections were not waived because it timely and properly raised objections to the testimony. Although it appears U-Haul "clearly identified the source and specific subject matter of the expected objectionable evidence prior to its disclosure to the jury," objecting to Patterson's testimony on the Canadian evidence, the trial court declined to grant a running objection. *See Volkswagen of Am., Inc. v. Ramirez*, 159 S.W.3d 897, 907 (Tex. 2004) (specifying the requirements for a running objection). Instead, after a hearing on the matter, the judge ruled:

> The Court's going to overrule the objections and allow Mr. Patterson to testify . . . [a]nd let the record show that I'm allowing [U-Haul counsel] to insert these objections when actually Mr. Patterson is being called as opposed to excusing the jury and having to go through all of these objections again.

As required by the trial court, U-Haul objected on the grounds of relevance, hearsay, and lack of similarity a total of 12 times throughout Waldrip's direct examination of Patterson. U-Haul timely objected to the Canadian evidence, and we will consider U-Haul's challenges to Patterson's testimony. Some of the more pertinent objections are noted in the discussion.

Evidentiary rulings are committed to the trial court's sound discretion. *Bay Area Healthcare Grp., Ltd. v. McShane*, 239 S.W.3d 231, 234 (Tex. 2007) (per curiam). A trial court abuses this discretion when it acts without regard for guiding rules or principles. *Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 43 (Tex. 1998). Even if the trial court abused its discretion in admitting certain evidence, reversal is only appropriate if the error was harmful, *i.e.*, it probably resulted in an improper judgment. *See Nissan*, 145 S.W.3d at 144; TEX. R. APP. P. 44.1, 61.1.

Waldrip argues that if we consider objections to this evidence, we should only do so in

relation to UHI, as UHT and JED waived objections to this evidence by their failure to request a limiting instruction under Texas Rule of Evidence 105. As U-Haul correctly argues, however, Rule 105 does not apply when the evidence in question is not admissible against any party for any purpose. *See* TEX. R. EVID. 105(a) (advising that the court, upon request, should restrict evidence to its proper scope if evidence is admissible as to one party or for one purpose). Additionally, this evidence was presented to the jury without specifying against whom it was offered. Notwithstanding Waldrip's assertion that the evidence was only offered against UHI, U-Haul argues that it was used against and prejudiced all defendants. We agree that the questioning and Patterson's answers were not limited to UHI. Waldrip's counsel alluded to "U-Haul" safety problems throughout the questioning, and the jury was never advised by counsel or the court that it was only to consider the evidence against UHI.

1. Abuse of Discretion

U-Haul's principal argument is that Patterson's testimony did not meet our requirement that trial courts "carefully consider the bounds of similarity, prejudice, confusion, and sequence" in deciding whether to allow Waldrip to present Patterson's testimony to the jury. *See Nissan,* 145 S.W.3d at 139. In *Nissan*, Armstrong sued Nissan for injuries arising from a car accident caused by unintended acceleration. 145 S.W.3d at 134–35. At trial, Armstrong presented evidence of a Nissan-maintained database of 757 complaints of unintended acceleration from customers driving the same model vehicle as Armstrong's. *Id.* at 136, 140–41. The jury returned a verdict in Armstrong's favor and the court of appeals affirmed. *Id.* at 136.

We reversed the court of appeals and ordered a new trial because the database evidence was not relevant and constituted hearsay, explaining that none of the reports attributed the unintended

acceleration to the throttle cable, which was the plaintiff's theory of her case. *Id*. at 141, 149. We concluded that the complaints were not sufficiently similar to the defect Armstrong alleged to be admissible. *Id.* at 141; *see also Mo. Pac. R.R. Co. v. Cooper*, 563 S.W.2d 233, 236 (Tex. 1978) ("The plaintiffs were required to show that the earlier accidents occurred under reasonably similar but not necessarily identical circumstances.") (citations omitted). Moreover, all of the reports were hearsay. *Nissan*, 145 S.W.3d at 140.

In *Serv. Corp. Int'l v. Guerra*, we applied *Nissan*'s reasoning to plaintiffs' case against a corporation that operated a cemetery (SCI Texas) and its parent corporation (SCI International) for alleged mental anguish caused by moving the decedent's body from one burial plot to another without the family's permission. 348 S.W.3d at 226. The trial court admitted evidence of other lawsuits, verdicts, and judgments against SCI International. *Id.* at 233. The SCI entities appealed, arguing that the evidence was irrelevant. *Id*. at 227, 233–34. We explained that evidence of other wrongful acts is not admissible to show "action in conformity therewith." *Id*. at 235 (citing TEX. R. EVID. 404). It is admissible to show a party's material intent if the prior acts were "so connected with the transaction at issue that they may all be parts of a system, scheme or plan." *Id.* at 235 (quoting *Oakwood Mobile Homes, Inc. v. Cabler*, 73 S.W.3d 363, 375 (Tex. App.—El Paso 2002, pet. denied)). The plaintiffs offered this evidence on a theory similar to that of the Waldrips in this case, arguing that the evidence was "relevant to show a pattern of indifference amounting to a common scheme" and that SCI "took no action to avoid recurrences of misconduct." *Id.* at 236. We rejected the argument in *Guerra* because the plaintiffs failed to show a sufficient connection between the evidence offered and the events at issue, outside of the broad characterization of the incidents showing a "pattern of indifference." *Id*.

Although the issue in *Guerra* was the relocation of a body without permission, only some of the evidence offered by the plaintiffs detailed similar behavior. *Id.* Waldrip's evidence suffers from the same pitfall, as very little of the Canadian evidence presented dealt with faulty parking brakes and none of it specifically addressed transmission issues. Rejecting in *Guerra* admission of other allegedly similar evidence of relocating a body, we explained that:

> 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.

Id. Even under the guise of a similar "pattern of indifference" argument, Patterson's testimony suffers from similar pitfalls.

Patterson testified at length about a wide range of problems allegedly discovered in Canada when the OSL conducted an investigation into the "routine practices of U-Haul International and U-Haul Arizona." He also testified that he personally saw the condition of about thirty of the fourteen hundred U-Haul trucks that were inspected in Ontario by licensed mechanics. The thirty trucks he observed being inspected in Canada were owned by U-Haul Arizona. Notwithstanding relevance and hearsay objections, which were overruled, Patterson concluded that U-Haul had a "systematic disregard for public safety in the maintenance of vehicles in the Province of Ontario." After the trial court overruled an objection to relevance, he further testified that, of the fourteen hundred trucks tested, "brake issues" accounted for fifty percent of the problems. He specified that three of the vehicles had "emergency brake" (parking brake) issues. He also testified, notwithstanding objections that this testimony was irrelevant and prejudicial, that there were carbon monoxide poisoning issues in some U-Haul truck cabs because carbon monoxide could seep in through leaky floors. Without

producing the government reports, he further testified that there were Canadian government studies of fourteen hundred trucks and that fifty percent of the vehicles tested had faulty brakes and would not have been allowed on the road in British Columbia. The hearsay objection to that testimony was overruled.

Like the evidence presented in *Nissan* and *Guerra*, Patterson's testimony is not sufficiently similar to JH6097T and distracted the jury from the relevant legal issues, for several reasons. *See Guerra*, 348 S.W.3d at 236; *Nissan*, 145 S.W.3d at 138. First, there is no evidence that the trucks tested in Ontario were of the same type or size, or even if their parking brake and transmission systems were the same or similar. There is no assertion or evidence that the vehicles inspected in Canada were jumbo haulers like the vehicle that injured Waldrip in Texas. U-Haul also takes issue with Patterson's inability to explain how the trucks in Canada were selected for inspection and whether the trucks were similar to JH6097T, were subject to the same or similar inspection and maintenance requirements as JH6097T, or if the deficiencies found in these trucks were attributable to problems in UHI's inspection and maintenance policies. No evidence showed whether the trucks had similar mileage to JH6097T.

The majority of the issues in Patterson's testimony are unrelated to problems with parking brakes or transmissions, the frequency with which the trucks were inspected, or how they were inspected. In fact, evidence presented in *Nissan* was arguably closer in similarity to the accident at issue in that case than Patterson's testimony is to the accident at issue in this case. All of the evidence in *Nissan* related to the same model automobile as the one driven by the plaintiff and involved the same alleged condition of unintended acceleration. *See* 145 S.W.3d at 140–41. The proposition that the jumbo hauler was negligently maintained must be proven and cannot simply be

inferred from even a large number of complaints unless the requisite similarity is established to make the prior incidents relevant, *i.e.*, probative of the liability of U-Haul in this case. *See id.* at 142.[21]

Waldrip also argues that Patterson's testimony was relevant to show that UHI, and specifically Shoen, had knowledge of a widespread disregard for its fleet maintenance and safety policies and that this resulted in deficiencies in fleet safety, including inadequate or inoperable parking brake or transmission systems. There was no attempt to identify the safety standards for the same or similar trucks in Canada or in the United States, and no opinion, if admissible, was offered on whether the trucks tested would have been allowed on the road in Texas or the United States. Our concerns about prejudice, confusion, relevance and delay are not alleviated simply because the evidence here was supposedly offered for a different reason than the evidence about product defects in *Nissan*. *See id.* at 138.

We do not pass judgment on the substance of Patterson's testimony, only on the predicate for its admissibility. All of the questions and shortcomings discussed above in the admissibility of his testimony do not necessarily have to be answered to properly admit it. However, Patterson's testimony falls well short of supporting a reasonable conclusion that safety problems in a foreign country indicated a disregard of inspection and maintenance programs causing an objectively extreme risk of serious injury in the United States; nor does it provide any reasonable basis to

[21] The answers to many questions that were not answered here may (or may not) show sufficient similarity to make the prior incidents admissible. These include: 1) Did the same manufacturer make the U-Haul trucks tested in Canada and JH6097T? 2) Were the transmission and parking-brake parts the same or similar? 3) We know that the JH6097T truck at issue in this case was a jumbo hauler. Do the different sizes or types of U-Haul trucks utilize different parking brakes or parking-brake systems? 4) Is there a difference between the way the braking system and the parking-brake systems operate? 5) Are the standards against which the Canadian tests were performed the same as those in the United States and Texas? 6) How do problems with truck parts not shown to be the same or similar to the JH6097T parts at issue in this case indicate that the parking brake and transmission systems in the JH6097T were inoperable?

conclude that the accident in this case was attributable to a defective U-Haul safety program.

Shoen's testimony confirmed that Canadian regulations and standards were used in the investigations performed in Canada that Patterson identified. Without evidence on what those Canadian regulations and standards were and how they relate to those of the United States or Texas, this evidence is not probative of U-Haul's adherence to or failure to adhere to appropriate standards in the United States. Patterson did not testify, even if proper, that the policies or procedures in Texas or the United States were unsafe, he only offered his lay opinion that the trucks were not suitable for operation under unspecified standards in Canada. Waldrip did not carry his burden of showing the relevance of this evidence.

U-Haul contends it was an abuse of discretion to admit testimony of the contents of public records concerning the inspection results of fourteen hundred trucks in Canada and the braking and other problems allegedly found, when the actual reports were not themselves produced. If shown to be relevant, with a proper foundation, Patterson could conceivably surmount hearsay hurdles for the truck inspections he personally observed. That included thirty vehicles. He was not present for the inspection of the many other U-Haul trucks inspected. He had no personal knowledge of those inspections, but based his testimony on the government reports or studies that presumably contained the information. *See* Tex. R. Evid. 602 ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."). Patterson did not produce any of the public reports from which the findings he testified to originated. We have not addressed whether failing to produce or admit the public records renders inapplicable the hearsay exception of Rule 803(8) for public reports setting forth factual findings from an

investigation made pursuant to lawful authority.[22] *See* Tex. R. Evid. 803(8); *cf. Benefield v. State*, 266 S.W.3d 25, 34 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (excluding public records for failure to properly authenticate them). The briefing does not directly address this issue of first impression and we reserve it for another day.

Waldrip also argues that this evidence was merely offered as "rebuttal" testimony in response to Shoen's comments about U-Haul's safety program being "as good or better" than its "truck rental peers" and that "U-Haul is rated a 10 in safety." But Waldrip, not U-Haul, first offered Shoen's testimony in excerpts from Shoen's videotaped deposition. Waldrip chose to present Shoen's testimony to the jury, and U-Haul attempted to rebut its substance. The trial court abused its discretion by allowing Waldrip to present Shoen's testimony only to bootstrap Patterson's "rebuttal" testimony, when the evidence did not meet *Nissan*'s requirements.

2. Improper Judgment

Reversal of erroneously admitted evidence is warranted only if the error probably resulted in the rendition of an improper judgment. *See Nissan*, 145 S.W.3d at 144; TEX. R. APP. P. 44.1, 61.1. Although we have recognized the "impossibility of prescribing a specific test" for harmless-error review, *McCraw v. Maris*, 828 S.W.2d 756, 757 (Tex. 1992), we must evaluate the entire case from voir dire to closing argument, considering the evidence as a whole, the strength or weakness of the case, and the verdict. *Reliance Steel & Aluminum Co. v. Sevcik*, 267 S.W.3d 867, 871 (Tex. 2008) (citations omitted); *Spohn Hosp. v. Mayer*, 104 S.W.3d 878, 883–84 (Tex. 2003). In determining whether the erroneous admission of evidence probably led to an improper judgment, courts look to the role the evidence played in the context of the trial and the efforts made by counsel

[22] This assumes, without deciding, that public offices or agencies of foreign countries are included in this rule.

to emphasize the erroneous evidence, as well as whether contrary evidence existed that the improperly admitted evidence was calculated to overcome. *See Guerra*, 348 S.W.3d at 236; *Sevcik,* 267 S.W.3d at 873–74; *Nissan*, 145 S.W.3d at 144. We believe that the erroneous admission of Patterson's testimony probably led to an improper judgment.

In affirming the trial court's decision to admit this evidence, the court of appeals focused on the page length of Patterson's testimony in relation to the voluminous trial record. *See* 322 S.W.3d at 850. We have held, however, that even if improper evidence is only mentioned briefly, the nature of the evidence can have a profound impact on a trial. *See Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1, 25–26 (Tex. 2008). Waldrip's counsel emphasized Patterson's testimony throughout the trial. Patterson was allowed to testify during direct examination that U-Haul's trucks had rotten floors, allowing carbon monoxide to seep into the passenger compartment and potentially causing carbon monoxide poisoning to the drivers and passengers, notwithstanding objections on the grounds of prejudice and irrelevance to the brake issue that was alleged to have caused the injuries. Waldrip's counsel argued in closing that U-Haul had "a rotten fleet."

Waldrip's advocacy for inclusion of this testimony, over objection, suggests it was a significant element of this case. *See Guerra,* 348 S.W.3d at 237; *Sevcik*, 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. 1992)). Further, the court of appeals' opinion bolsters our conclusion, as that court overturned the gross-negligence holding against UHI because the jury found UHI grossly negligent without properly admitted evidence supporting that finding. *See, e.g., Guerra*, 348 S.W.3d at 237 ("Because there was no evidence to support a finding of compensable mental anguish, the jury's [award of mental anguish

damages] 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.") (citing *Sevcik*, 267 S.W.3d at 872). We agree with the court of appeals that Waldrip did not carry his evidentiary burden in the gross-negligence holding against UHI, and that Patterson's testimony was likely important in the jury's finding against UHI on this issue.

It also appears there was legally sufficient evidence of U-Haul's negligence. The jury could have reasonably believed that the truck's parking brake was inoperable in September 2006 when the jumbo hauler was placed in the DET. UHI designed and maintained the system for repairs and maintenance and the computer database records for the entire fleet. The jury reasonably could have viewed JH6097T's multiple brake and transmission problems as sufficient to place UHI on notice through its DET system of the danger that the truck presented to renters. The jury also arguably had a reasonable basis for believing that 1) UHT had notice of the parking brake and transmission problems with JH6097T and 2) the safety certifications were negligently performed. Furthermore, a reasonable juror could have believed that Crews negligently performed his safety certifications. We conclude there was legally sufficient evidence for a reasonable juror to believe that JH6097T's parking brake and transmission problems had persisted for some time and that JED violated its duty by not discovering these problems or by continuing to rent JH6097T knowing the risk it posed to its customers. On the record of the prior trial, there appears to be some evidence to support the negligence findings and justify the remand for a new trial.

B. Gross Negligence

In reviewing an award for exemplary damages, we conduct a legal sufficiency review under

the "clear and convincing" evidence standard. *Garza*, 164 S.W.3d at 609 (citations omitted). "'Clear and convincing' means the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." TEX. CIV. PRAC. & REM. CODE § 41.001(2); *In re J.F.C.*, 96 S.W.3d 256, 264 (Tex. 2002). Even if the inclusion of the Canadian evidence was not an abuse of discretion, this Court does not believe that Waldrip presented clear and convincing evidence that UHI or UHT was grossly negligent.

Gross negligence consists of both objective and subjective elements. *See Lee Lewis Constr., Inc. v. Harrison*, 70 S.W.3d 778, 785 (Tex. 2001). Plaintiffs must prove by clear and convincing evidence that 1) when viewed objectively from the defendant's standpoint at the time of the event, the act or omission involved an extreme degree of risk, considering the probability and magnitude of the potential harm to others and 2) the defendant had actual, subjective awareness of the risk involved, but nevertheless proceeded with conscious indifference to the rights, safety, or welfare of others. *See id.*; TEX. CIV. PRAC. & REM. CODE § 41.001(11); *State v. Shumake,* 199 S.W.3d 279, 287 (Tex. 2006) (citing *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 21 (Tex. 1994)). In essence, Waldrip must establish that UHI and UHT were aware that JH6097T posed an extreme degree of risk and that each of them had actual, subjective awareness that the truck's parking-brake system was not functional, but nevertheless proceeded to allow the truck to be rented.

Under the objective component, "extreme risk" is not a remote possibility or even a high probability of minor harm, but rather the likelihood of the plaintiff's serious injury. *Mobil Oil Corp. v. Ellender*, 968 S.W.2d 917, 921 (Tex. 1998); *Harrison*, 70 S.W.3d at 785. The subjective prong, in turn, requires that the defendant knew about the risk, but that the defendant's acts or omissions demonstrated indifference to the consequences of its acts. *La.-Pac. Corp. v. Andrade*, 19 S.W.3d

245, 246–47 (Tex. 1999); *Wal-Mart Stores, Inc. v. Alexander*, 868 S.W.2d 322, 326 (Tex. 1993).

The trial court instructed the jury that for UHI or UHT to be grossly negligent, 1) the person or persons responsible for the act or omission must be employed by UHI/UHT in a managerial capacity acting in the scope of that managerial capacity; or 2) UHI/UHT authorized the doing and the manner of the act; or 3) an employee of UHI/UHT was unfit and UHI/UHT was reckless in employing him; or 4) UHI/UHT or an employee in a managerial capacity of UHI/UHT ratified or approved the act. *See Hammerly Oaks, Inc. v. Edwards,* 958 S.W.2d 387, 391 (Tex. 1997). U-Haul does not argue any objections to these instructions.

1. UHI

Waldrip's gross-negligence claim against UHI is based on three pieces of evidence: 1) a two-page affidavit of Thomas Coffee, 2) Patterson's testimony, and 3) federal motor-carrier regulations, with which U-Haul says it is in voluntary compliance. While this Court must view this evidence in the light most favorable to the trial court's gross-negligence finding, Waldrip must establish U-Haul's gross negligence by clear and convincing evidence. *Garza*, 164 S.W.3d at 609. Even if the Canadian evidence was rightfully admitted, we agree with the court of appeals that Waldrip has not set forth clear and convincing evidence of gross negligence against UHI. We take each of Waldrip's arguments in turn.

First, Waldrip notes that Thomas Coffee, UHI's Director of Repair Analysis & Support, was in charge of maintaining UHI's computer database, including the DET. Waldrip contends that the database gave UHI knowledge of when a truck was in the DET. He further argues that this knowledge establishes that UHI acted with conscious indifference by allowing the truck to be rented after it became aware that the parking brake was inoperable and was not repaired. However, we

agree with the court of appeals that Waldrip presented no evidence that Coffee was employed by UHI in a managerial capacity. 322 S.W.3d at 845 (citing *Hammerly Oaks*, 958 S.W.2d at 391). An employee's title alone is not dispositive of whether he is a vice principal. *Hammerly Oaks*, 958 S.W.2d at 391. Waldrip urges us to hold that Coffee is a vice principal, yet offers no evidence or case law to support his claim.

Waldrip also offers no evidence establishing that Coffee or UHI had "actual awareness" of potential parking-brake problems with JH6097T. *See Andrade*, 19 S.W.3d at 246 (party asserting gross negligence must establish that the defendant had "subjective awareness" of a risk and showed "conscious indifference" toward the risk involved). Even assuming that the parking brake itself, and not merely the parking-brake light, was malfunctioning, absent positive proof of knowledge by management, actual knowledge cannot be imputed to UHI based on one entry in a massive database.

Waldrip also argues that the court of appeals erroneously required direct proof that UHI was aware of the specific threat posed to Waldrip by JH6097T. *See, e.g.*, *Harrison*, 70 S.W.3d at 785 (holding that a foreseeable risk does not require proof that the defendant anticipated "the precise manner in which the injury will occur"); *Mellon Mortg. Co. v. Holder*, 5 S.W.3d 654, 655 (Tex. 1999) (holding that it is enough that the "general danger" was foreseeable); *see also* TEX. CIV. PRAC. & REM. CODE § 41.001(11) (requiring "an extreme degree of risk . . . to others," not specific to the plaintiff). Waldrip argues that, given the Canadian studies, Shoen was aware of the general risk that safety inspections were not being properly performed on UHI's aging fleet and that brakes could fail at any time and will always eventually fail if inspections never reveal the need for repair.

We agree with Waldrip that awareness of an extreme risk does not require proof that the defendant anticipated the precise manner in which the injury would occur or be able to identify to

whom the injury would befall. *See, e.g., Harrison*, 70 S.W.3d at 785; *Holder*, 5 S.W.3d at 655. However, Waldrip is not relieved of his burden of showing, by clear and convincing evidence, that UHI had knowledge of the risk of the truck rolling posed by JH6097T's brake and transmission problems. *See* TEX. CIV. PRAC. & REM. CODE § 41.001(2); *see also Shumake,* 199 S.W.3d at 287 (citing *Moriel*, 879 S.W.2d at 21). Waldrip's evidence did not demonstrate that anyone at UHI had knowledge of an extreme risk and showed conscious indifference to this knowledge. *See Andrade*, 19 S.W.3d at 246.

Waldrip next attempts to impute gross negligence to UHI based on its alleged violation of DOT requirements governing the inspection of its trucks. The parties argue at length whether U-Haul is subject to such laws, but we do not need to answer this question. The mere existence of federal regulations does not establish the standard of care or establish gross negligence per se. *See Omega Contracting, Inc. v. Torres*, 191 S.W.3d 828, 842–43 (Tex. App.—Fort Worth 2006, no pet.) (citing *Supreme Beef Packers, Inc. v. Maddox*, 67 S.W.3d 453, 457 (Tex. App.— Texarkana 2002, pet. denied)). The fact that a motorist does not have a current DOT inspection does not mean she has been grossly negligent in the inspection and repair of her vehicle. After considering all of the evidence against UHI, we agree with the court of appeals that Waldrip did not offer legally sufficient evidence of UHI's gross negligence.

2. UHT

UHT is the entity responsible for implementing the policies in Texas for inspecting, repairing, and maintaining U-Haul vehicles. Although Waldrip asserts several theories to support the gross-negligence finding against UHT, the court of appeals based its affirmation of this part of the award on Lynn Buck's hiring of Crews. The court of appeals reasoned that the jury could have

formed a firm conviction that Crews was unfit and that Buck was reckless in hiring him. 322 S.W.3d at 848. U-Haul alleges that Waldrip did not offer clear and convincing evidence that Crews was unfit or that Buck was reckless in hiring him. We address each of these points in turn.

Viewed in the light most favorable to the jury's finding, it is likely that Waldrip presented ample evidence from which a jury could form a firm conviction that Crews was unfit to be an AFM. While U-Haul is correct that Waldrip did not prove that Crews was unfit merely because of his lack of experience, Crews' testimony at trial could, and most likely did, lead a jury to believe that he was unfit to be an AFM. While Waldrip did not present any evidence on whether U-Haul's training program was inadequate, the jury could have reasonably formed a firm conviction that Crews was grossly negligent in performing his duties as an AFM. He testified at trial that the transmission fluid could not be checked in a standard-transmission truck and that such a transmission did not have transmission fluid, though he later admitted that he was wrong.

However, Waldrip did not carry his burden of proof in establishing that Buck was subjectively aware of the risk of hiring Crews and consciously chose to disregard it. The court of appeals upheld the gross-negligence finding against UHT based solely on the reckless-hiring-of-an-unfit-employee theory. *Id.* This theory derives from the Second Restatement of Torts, which Texas has adopted on this issue. *See* RESTATEMENT (SECOND) OF TORTS § 909 (1977)*; Hammerly Oaks*, 958 S.W.2d at 391 (confirming adoption of Restatement's "exceptional liability" test for imputing gross negligence to a corporation). But, in light of our 1994 decision in *Moriel* and revisions to Chapter 41 promulgated by the Legislature in 2003, the standard for gross negligence based on this theory has changed. *See Moriel*, 879 S.W.2d at 23; TEX. CIV. PRAC. & REM. Code § 41.001(11) (*amended by* Act of June 2, 2003, 78th Leg. R.S., ch. 204, § 13.02, 2003 Tex. Gen Laws 887).

Moriel emphasized the "exceptional" nature of punitive damages and limited them to situations in which the defendant knew of an extreme risk of serious injury but consciously disregarded it. 879 S.W.2d at 18–19, 22. In that case, an employer covered by workers' compensation with a punitive damages award entered against it sought clarification of the gross-negligence standard and the imposition of punitive damages. *Id*. at 12, 14. In holding that the plaintiff had not presented legally sufficient evidence to establish the employer's gross negligence, we reasoned that a plaintiff must "'establish' the defendant's *actual* conscious indifference, rather than raise the mere belief that conscious indifference might be attributable to a hypothetical reasonable defendant." *Id*. at 20. After *Moriel*, the Legislature raised the standard of proof for punitive damages from a gross-negligence award to "clear and convincing." TEX. CIV. PRAC. & REM. CODE § 41.003(b) (*amended by* Act of April 6, 1995, 74th Leg., R.S., ch. 19, § 1, 1995 Tex. Gen. Laws 110).

While the court of appeals addressed Crews' unfitness as an AFM, it did not elaborate on Buck's mental state. Viewing the evidence in the light most favorable to the gross-negligence finding, Waldrip did not prove by clear and convincing evidence that Buck was aware, yet consciously indifferent to, the extreme danger caused by hiring Crews or hiring an AFM with no mechanical experience. Buck testified that she knew Crews had no mechanical experience, yet did not feel that hiring him was an extreme risk because 1) the U-Haul training program would provide basic competence and 2) AFMs were not charged with performing work that required a mechanic's skill or knowledge. Without evidence that a mechanical background was required for the AFM role or evidence that U-Haul's training program was inadequate and that Buck knew that, Waldrip fell short of establishing by clear and convincing evidence that Buck knew, and was consciously

indifferent to, the risk associated with hiring Crews. In fact, the court of appeals' opinion noted that Buck believed that an AFM needed no mechanical experience, indicating that she was not consciously indifferent to the risks posed by a non-mechanic. 322 S.W.3d at 846–48 ("Buck hired a person with no mechanical experience, *and who she believed needed no mechanical experience*, to be directly responsible for checking the transmission fluid level and check [sic] for transmission fluid leaks on a heavy-duty truck.") (emphasis added).

Further, we are concerned about the impact the court of appeals' reasoning may have on future gross-negligence cases involving alleged reckless hiring. Under the court of appeals' reasoning, any time an employer hires a previously inexperienced employee requiring training in specific safety tasks, the employer conceivably may be found grossly negligent and subject to punitive damages if the employee acts negligently in performing her tasks. However, a party cannot be liable for gross negligence when it actually and subjectively believes that circumstances pose no risk to the injured party, even if they are wrong. *See Andrade*, 19 S.W.3d at 248.

We agree with the court of appeals' rejection of Waldrip's other gross-negligence theories. We do not believe Waldrip offered clear and convincing evidence establishing Guinn's subjective awareness of or conscious disregard of any problems with JH6097T's parking brake or transmission, or any evidence that any U-Haul employee was grossly negligent and UHT ratified that gross negligence.

IV. Conclusion

We reverse the court of appeals' judgment in part and affirm in part. Because the trial court's admission of the Canadian evidence was an abuse of discretion that probably led to the rendition of an improper verdict, we reverse the judgment of the court of appeals and remand the negligence

claims for a new trial against all defendants. We also reverse the court of appeals and render a take nothing judgment on the gross-negligence claims against UHT. We affirm the court of appeals' judgment rendering a take nothing judgment on the gross-negligence claims against UHI. In sum, we render a take nothing judgment on the gross-negligence claims against UHI and UHT and remand the negligence claims against all defendants for a new trial.[23]

Dale Wainwright
Justice

OPINION DELIVERED: August 31, 2012

[23] This Court and our courts of appeal have rendered a take nothing judgment on claims in cases for which the evidence is legally insufficient to support the verdict and remanded, where appropriate, for new trial those claims that appear to be supported by legally sufficient evidence. *See Service Corp. Int'l v. Guerra*, 348 S.W.3d 221 (Tex. 2011) (rendering a take nothing judgment on actual and gross-negligence claims and remanding for a new trial on other claims for actual damages based on erroneous admission of prejudicial evidence); *Matbon, Inc. v. Gries*, 288 S.W.3d, 471, 490 (Tex. App.—Eastland 2009, no pet.); *Phillips v. Bramlett*, 258 S.W.3d 158, 164, 182–83 (Tex. App.—Amarillo 2007), *rev'd on other grounds*, 288 S.W.3d 876 (Tex. 2009); *Durham Transp., Inc. v. Valero*, 897 S.W.2d 404, 407, 417 (Tex. App.—Corpus Christi 1995, writ denied); *Wal-Mart Stores, Inc. v. Cordova*, 856 S.W.2d 768, 769 (Tex. App.—El Paso 1993, writ denied); *cf. Nissan Motor Co. v. Armstrong*, 145 S.W.3d 131 (Tex. 2004) (reversing for new trial based on erroneous admission of prejudicial evidence but declining to render on the gross-negligence claims because the record apparently included some evidence of gross negligence).

IN THE SUPREME COURT OF TEXAS

NO. 10-0781

U-HAUL INTERNATIONAL, INC. D/B/A U-HAUL,
U-HAUL CO. OF TEXAS, INC. D/B/A U-HAUL OF DALLAS, AND
EAST FORK ENTERPRISES, INC. D/B/A JOT 'EM DOWN, INC.,
PETITIONERS,

v.

TALMADGE WALDRIP, BERNICE WALDRIP, DINAH SIMINGTON,
AND ANNE WALDRIP-BOYD,
RESPONDENTS

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

JUSTICE LEHRMANN, dissenting.

I agree with the Court that the evidence supporting the jury's punitive damages award is legally insufficient. I also agree that there is some evidence of negligence. But I believe that the Court's conclusion that the trial court abused its discretion in admitting evidence of widespread problems with U-Haul's trucks in Canada is questionable, at best. Even if that conclusion were correct, though, I agree with the court of appeals that the court's error was harmless. Accordingly, I dissent from the Court's judgment to the extent it reverses and remands the plaintiffs' negligence claim for a new trial.

I.

At trial, the plaintiffs, Talmadge and Bernice Waldrip and their daughters Dinah Simington and Annabeth Boyd, introduced the testimony of Brian Patterson. Patterson, president of the Ontario Safety League, testified that inspections of U-Haul trucks entering Canada revealed a "systemic disregard for public safety in the maintenance of vehicles in the Province of Ontario." According to Patterson, an investigation by various Canadian governmental entities detected problems with the brakes in more than fifty percent of U-Haul's trucks. Based upon our decision in *Nissan Motor Co. v. Armstrong,* 145 S.W.3d 131 (Tex. 2004), the Court concludes that the trial court abused its discretion in admitting Patterson's testimony, and that its admission probably resulted in a wrongful judgment. ___ S.W.3d at ___. I respectfully disagree.

A. Doubtful that the trial court abused its discretion

First, it is questionable whether the trial court abused its discretion in admitting Patterson's testimony. Unlike the evidence that was improperly admitted in *Nissan*, the Canadian evidence was at least arguably probative of the plaintiffs' theory that Waldrip's injury resulted from U-Haul's inherently deficient and haphazardly followed maintenance procedures. *See Nissan*, 145 S.W.3d at 140–42. Rule 406 of our rules of evidence expressly recognizes that "[e]vidence of . . . the routine practice of an organization . . . is relevant to prove that the conduct of the . . . organization on a particular occasion was in conformity with the . . . routine practice." TEX. R. EVID. 406.

In *Nissan*, the plaintiffs asserted products liability claims against a car's manufacturer after the vehicle unexpectedly accelerated. *Nissan*, 145 S.W.3d at 136. In particular, they claimed that the acceleration was caused by a defective throttle cable or boot, but the allegedly faulty parts had been removed and destroyed after the accident. *Id.* At 134, 136. We held that the trial court abused

its discretion by admitting a database of more than 700 incidents of unintended acceleration, the testimony of four witnesses who had experienced the phenomenon, and several narrative reports regarding other incidents of unintended acceleration without proof of similarity. *Id.* at 144. In doing so, we emphasized that a claimant's testimony that a vehicle unintentionally accelerated, without more, cannot prove that a defect caused the acceleration. *Id.* at 137. The plaintiff, we said, "had to present evidence that her . . . car was defective, not just that other owners experienced unintended acceleration." *Id.* at 138. We determined that the disputed evidence was improperly admitted because there was no evidence that most of the incidents were sufficiently similar, and the sheer volume of reported incidents likely caused confusion and prejudice. *Id.* at 141, 147. Clearly, evidence of dissimilar incidents of unintended acceleration is irrelevant to whether a particular vehicle accelerated as the result of a defect. But evidence that more than fifty percent of U-Haul's trucks entering Canada had improperly functioning brakes is indicative of routinely shoddy maintenance practices.[1]

B. The error was harmless.

Even if the trial court did abuse its discretion in admitting Patterson's testimony, the error was harmless. As the Court observes, there is no specific test for determining whether the erroneous admission of evidence probably resulted in the rendition of an improper judgment. ____ S.W.3d at ____ (citing *McCraw v. Maris*, 828 S.W.2d 756, 757 (Tex. 1992)). Instead, a reviewing court must examine the entire record "from voir dire to closing argument, considering the 'state of the evidence,

[1] In *Services Corp. International v. Guerra*, also cited by the Court, we held that the trial court abused its discretion in admitting evidence of other lawsuits against a cemetery company because there was no evidence that double-selling lots and clandestinely moving bodies were part of a system, scheme, or plan. 348 S.W.3d 221, 236 (Tex. 2011). Here, in contrast, U-Haul's inspection and maintenance procedures were formal and intended to be applied system-wide. The fact that they were not followed for such a large percentage of vehicles entering Canada supports the plaintiffs' evidence that they were not followed with respect to the truck in this case.

strength and weakness of the case, and the verdict.'" *Reliance Steel & Aluminum Co. v. Sevcik,* 267 S.W.3d 867, 871 (Tex. 2008) (quoting *Standard Fire Ins. Co. v. Reese*, 584, S.W.2d 835, 841 (Tex. 1979)). "[W]hether erroneous admission is harmful is more a matter of judgment than precise measurement." *Nissan*, 145 S.W.3d at 144. In exercising that judgment, courts should bear in mind that "a jury's decision is not to be tampered with lightly." *In re Columbia Med. Ctr. of Las Colinas*, 290 S.W.3d 204, 210–11 (Tex. 2009) (parenthetically describing *Wal–Mart Stores, Inc. v. Seale,* 904 S.W.2d 718, 722 (Tex. App.—San Antonio 1995, no writ)). My review of the record leads me to conclude that any error the trial court may have committed in admitting Patterson's testimony does not warrant a new trial. The jury's verdict did not turn on that evidence; to the contrary, there was abundant evidence of U-Haul's negligence.

First, erroneous admission of evidence "is likely harmless if the evidence was cumulative, or if the rest of the evidence was so one-sided that the error likely made no difference." *Reliance Steel*, 267 S.W.3d at 873 (footnote omitted). "[T]he complaining party [must] demonstrate that the judgment turns on the particular evidence admitted." *Nissan*, 145 S.W.3d at 144. U-Haul has not met that burden.

Patterson's testimony was both cumulative and far overshadowed by other evidence of U-Haul's negligence. There was evidence that U-Haul had more than 4,000 trucks with more than 200,000 miles on them. Moreover, the evidence in this case shows that, after the truck had been rented by one customer, U-Haul had been made aware that the parking brake on the truck Waldrip later rented had not been working properly and the brake light was staying on. The brake light was repaired, yet the problem with the parking brake itself was not. In his opening statement, U-Haul's attorney expressly admitted that the problem should have been fixed, but was not, due to a

"miscommunication." Joseph Shoen, U-Haul International's chairman of the board, acknowledged that an inoperative parking brake would be a "material shortcoming" and would be U-Haul's fault. He also acknowledged that U-Haul might permit vehicles with expired safety certifications, significant components of U-Haul's safety program, to be rented "[a]t the discretion of the person doing the renting."

The Court's determination that the trial court's admission of Patterson's testimony was harmful is based almost entirely on the emphasis supposedly placed upon it by Waldrip's counsel. ___ S.W.3d at ___. But Waldrip's counsel's efforts to gain the admission of Patterson's testimony were far from extraordinary; Waldrip's counsel dispassionately explained his view of its relevance to the trial court. Waldrip's counsel did not mention the Canadian evidence in conducting voir dire or in his opening statement. And any reference to it in his closing argument was elliptical, at best. He did not mention Patterson's name or expressly refer to the Canadian evidence. Instead, he merely alluded to U-Haul's "rotten fleet." That reference could as easily refer to the evidence of the age and mileage of U-Haul's fleet and its slipshod maintenance procedures. In light of the record as a whole, that vague reference does not justify casting aside a three-week jury trial.

The emphasis placed upon the Canadian evidence by Waldrip's counsel in questioning Lyn Buck is equally insignificant. Buck's testimony occupies 155 pages of the record. She was questioned at length about U-Haul's maintenance practices and safety procedures. The plaintiffs' examination of her focused on whether U-Haul's procedures were faulty for not requiring leasing agencies to test vital safety systems on returned trucks before they were rented again, and the fact that several renters before Waldrip had experienced and reported problems with the truck's parking brake. Her testimony regarding the Canadian evidence spans less than three and a half pages.

During that brief interval, she testified that Patterson's statement that more than fifty percent of the trucks entering Canada had defective brakes was shocking, but questionable, and that Schoen had knowledge of the reported problems. Patterson's testimony was no more emphasized in the plaintiffs' questioning of Buck than it was in closing argument.

In other cases where we have required a new trial, the conclusion that the case turned on erroneously admitted evidence rested on much firmer ground than the Court finds here. In *Nissan*, for example, we were persuaded that the erroneous admission of evidence of other incidents of unintended acceleration was harmful in large part because of the court of appeals' reliance on the large volume of incidents. *Nissan*, 145 S.W.3d at 146–47. "As the experienced justices of the court of appeals made this mistake, it is probable that the jurors did as well." *Id.* at 147. We also noted that the plaintiffs' counsel had mentioned the evidence "[a]t every opportunity." *Id.* at 144. In *Reliance Steel*, the fact that the jury awarded more damages than the evidence supported or that the plaintiff's counsel asked for strongly suggested that improperly admitted evidence of the defendant's $1.9 billion in gross sales probably led to the rendition of a wrongful judgment. *Reliance Steel*, 267 S.W.3d at 871–73; see also *Coastal Oil & Gas Corp. v. Garza Energy Trusts*, 268 S.W.3d 1, 25 (Tex. 2008) (noting that the jury's award of more than three times the damages plaintiff requested showed that erroneous introduction of an internal memo was harmful). And in *In re M.P.A.*, 364 S.W.3d 277, 289 (Tex. 2012), rather than a single vague allusion to improperly admitted evidence, counsel referred to it throughout closing argument. *See also Coastal Oil & Gas*, 268 S.W.3d at 24–25 (noting that erroneously admitted internal memo was mentioned by both sides throughout their closing arguments). If the admission of Patterson's testimony was error, its impact does not compare with these cases.

II.

Regardless of whether the trucks described in Patterson's testimony were similar to the ones that injured Waldrip or what Canada's safety standards require, the fact that more than half of them had brake problems is probative of U-Haul's routine, systemic disregard for its own maintenance policies. For that reason, I think that it is doubtful that the trial court abused its discretion in admitting the evidence. Even assuming it was error, however, the error was harmless in light of the entire record. I respectfully dissent.

_____

Debra H. Lehrmann
Justice

OPINION DELIVERED: August 31, 2012

IN THE SUPREME COURT OF TEXAS

NO. 10-0802

MISSION CONSOLIDATED INDEPENDENT SCHOOL DISTRICT, PETITIONER,

v.

GLORIA GARCIA, RESPONDENT

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

Argued January 10, 2012

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

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

This case raises a fundamental question of discrimination law: Can a plaintiff establish a prima facie case of age discrimination when undisputed evidence shows she was replaced by someone older? While the answer may seem obvious, courts in this state and the federal judiciary alike are anything but uniform in their response. The specific issue today is whether, under the Texas Commission on Human Rights Act (TCHRA), such a claimant is ever entitled to a

presumption of age discrimination under the *McDonnell Douglas* burden-shifting framework.[1] We answer no.

To establish a prima facie case of age discrimination under the TCHRA, we hold that a plaintiff in a true replacement case must show that he or she was (1) a member of the protected class, (2) qualified for his or her employment position, (3) terminated by the employer, and (4) replaced by someone younger. Because it is undisputed that the plaintiff here was replaced by an older worker, she has failed to allege a prima facie case, and the trial court should have granted the defendant's plea to the jurisdiction. We reverse the court of appeals' judgment in part and render judgment dismissing this suit.

I. Background

Gloria Garcia worked for the Mission Consolidated Independent School District for 27 years. The District fired her in 2003, and Garcia filed suit, alleging she was terminated in retaliation for her participation in certain protected activities and that she was also discriminated against based on her race, national origin, age, and gender. Garcia is a female of Mexican-American descent, and she was 48 years old when she was fired.

The District filed a plea to the jurisdiction,[2] arguing that Garcia's pleadings failed to establish a prima facie case of discrimination. The District attached evidence that Garcia was replaced by

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[1] *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (setting forth the procedure for assessing a disparate-treatment claim when direct evidence of discrimination is lacking).

[2] This is the District's second interlocutory appeal to this Court after denial of a plea to the jurisdiction. *See Mission Consol. Indep. Sch. Dist. v. Garcia* (*Garcia I*), 253 S.W.3d 653, 654–55 (Tex. 2008). The District's initial plea argued that the Tort Claims Act's election-of-remedies provision barred a number of Garcia's claims. *Id.* at 655. We held that the election scheme barred some of Garcia's original claims but did not bar recovery under the TCHRA. *Id.* at 660.

another Mexican-American woman who was three years older than Garcia. Garcia did not dispute this evidence and declined to request or submit any evidence of her own. The trial court denied the District's plea.

On interlocutory appeal, the court of appeals affirmed in part and reversed in part. On the race, national origin, and gender discrimination claims, the court held that the plea should have been granted because Garcia failed to show that she was replaced by a person outside those protected classes.[3] But on the age-discrimination claim, the court held that replacement by an older worker was not fatal to Garcia's claim. Applying the inferential "pretext" method of proof first articulated in *McDonnell Douglas*, the court held that an age-discrimination plaintiff can meet her prima facie burden by alleging she was replaced by someone younger or by "otherwise show[ing] that she was discharged because of age."[4] Because the District's evidence did not conclusively negate the "otherwise show" element, the court of appeals held that the plea was properly denied on Garcia's age-discrimination claim.

II. Discussion

In this Court, the District argues that a plaintiff relying on the prima facie case to prove age discrimination must demonstrate that her replacement was younger; otherwise, she is not entitled to a presumption of discrimination and must submit direct evidence of discriminatory intent to defeat a plea to the jurisdiction. Because there is no dispute that Garcia's replacement was older and

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[3] 314 S.W.3d 548, 557. Garcia did not file a petition for review challenging the court of appeals' disposition of these claims.

[4] *Id.* at 556 (citing *Bienkowski v. Am. Airlines, Inc.*, 851 F.2d 1503, 1505 (5th Cir. 1988)).

because she submitted no other evidence to create a fact issue on discriminatory intent, the District argues that the trial court should have dismissed her age-discrimination claim. We agree.

Under the TCHRA, "an employer commits an unlawful employment practice if because of race, color, disability, religion, sex, national origin, or age the employer . . . discharges an individual or discriminates in any other manner against an individual in connection with compensation or the terms, conditions, or privileges of employment."[5] Section 21.051 is effectively identical to Title VII, its federal equivalent, except that Title VII does not protect against age and disability discrimination.[6] (Those forms of discrimination are addressed in separate statutes.[7]) Because one of the purposes of the TCHRA is to "provide for the execution of the policies of Title VII of the Civil Rights Act of 1964,"[8] we have consistently held that those analogous federal statutes and the cases interpreting them guide our reading of the TCHRA.[9]

As a result, Texas courts follow the settled approach of the U.S. Supreme Court in recognizing two alternative methods of proof in discriminatory treatment cases.[10] The first method, rather straightforward, involves proving discriminatory intent via direct evidence of what the

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[5] TEX. LAB. CODE § 21.051.

[6] *Quantum Chem. Corp. v. Toennies*, 47 S.W.3d 473, 475 (Tex. 2001); *see* 42 U.S.C. § 2000e-2(a) (2006).

[7] *See, e.g.*, Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621–634 (2006).

[8] TEX. LAB. CODE § 21.001(1).

[9] *Quantum Chem.*, 47 S.W.3d at 476 (citing *NME Hosps., Inc. v. Rennels*, 994 S.W.2d 142, 144 (Tex. 1999)).

[10] *See id.* at 476.

defendant did and said.[11] However, the High Court recognized that motives are often more covert than overt, making direct evidence of forbidden animus hard to come by.[12] So to make matters easier for discrimination plaintiffs, the Court created the burden-shifting mechanism of *McDonnell Douglas*.[13] Under this framework, the plaintiff is entitled to a presumption of discrimination if she meets the "minimal" initial burden of establishing a prima facie case of discrimination.[14] Although the precise elements of this showing will vary depending on the circumstances, the plaintiff's burden at this stage of the case "is not onerous."[15] The *McDonnell Douglas* presumption is "merely an evidence-producing mechanism that can aid the plaintiff in his ultimate task of proving illegal discrimination by a preponderance of the evidence."[16] The prima facie case "raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors."[17] Ultimately, if the defendant fails to "articulate some legitimate, nondiscriminatory reason" for the employment decision, that presumption will be sufficient to support a finding of liability.[18]

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[11] *Id.*; *see also Wright v. Southland Corp.*, 187 F.3d 1287, 1289 (11th Cir. 1999).

[12] *See U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983).

[13] *McDonnell Douglas*, 411 U.S. at 802–05.

[14] *See Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981); *see also Wal-Mart Stores, Inc. v. Canchola*, 121 S.W.3d 735, 739 (Tex. 2003).

[15] *Burdine*, 450 U.S. at 253.

[16] *See Wright*, 187 F.3d at 1292–93.

[17] *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978).

[18] *See McDonnell Douglas*, 411 U.S. at 802–03.

The issue before us is whether the District's plea to the jurisdiction should have been granted here, where its evidence allegedly negated an element of Garcia's prima facie case and Garcia offered no evidence whatsoever to support her age-discrimination claim. To answer this question, we explore the elements of the prima facie case and whether these elements are "jurisdictional facts" properly addressed in a plea to the jurisdiction.

A. Prima Facie Case as a Jurisdictional Issue?

We first address a threshold issue not raised by the parties or the courts below: Did the District properly challenge Garcia's prima facie case by way of a plea to the jurisdiction? In other words, does a plaintiff's failure to allege a prima facie case of age discrimination rob the trial court of jurisdiction over that claim or merely implicate the merits thereof? If the latter, the trial court should deny the plea to the jurisdiction and consider this challenge at the summary judgment phase or at trial. The District obviously believes this issue implicates jurisdiction, both lower courts treated it as such, and Garcia makes no argument to the contrary. But because this question deals with jurisdiction, we can (and must) consider it ourselves.[19]

1. Plea to the Jurisdiction Practice in Texas

The answer will depend on whether an analysis of Garcia's prima facie case calls for "a significant inquiry into the substance of the claims"[20] or instead constitutes a challenge to the "existence of jurisdictional facts" permitted by our plea to the jurisdiction practice.[21] A plea to the

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[19] *See Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443–44 (Tex. 1993).

[20] *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000).

[21] *See Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 227 (Tex. 2004).

jurisdiction is a dilatory plea, the purpose of which is generally to defeat an action "without regard to whether the claims asserted have merit."[22] Typically, the plea challenges whether the plaintiff has alleged facts that affirmatively demonstrate the court's jurisdiction to hear the case.[23] However, a plea to the jurisdiction can also properly challenge the *existence* of those very jurisdictional facts. In those cases, the court can consider evidence as necessary to resolve any dispute over those facts, even if that evidence "implicates both the subject-matter jurisdiction of the court and the merits of the case."[24]

In those situations, a trial court's review of a plea to the jurisdiction mirrors that of a traditional summary judgment motion.[25] Initially, the defendant carries the burden to meet the summary judgment proof standard for its assertion that the trial court lacks jurisdiction.[26] If it does, the plaintiff is then required to show that a disputed material fact exists regarding the jurisdictional issue.[27] If a fact issue exists, the trial court should deny the plea.[28] But if the relevant evidence is undisputed or the plaintiff fails to raise a fact question on the jurisdictional issue, the trial court rules on the plea as a matter of law.[29]

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[22] *Bland*, 34 S.W.3d at 554.

[23] *See Tex. Ass'n of Bus.*, 852 S.W.2d at 446.

[24] *Miranda*, 133 S.W.3d at 226.

[25] *Id.* at 228; *see also* TEX. R. CIV. P. 166a(c).

[26] *See Miranda*, 133 S.W.3d at 228.

[27] *Id.* (citing *Huckabee v. Time Warner Entm't Co.*, 19 S.W.3d 413, 420 (Tex. 2000)).

[28] *Id.* at 227–28.

[29] *Id.* at 228.

In the District's plea to the jurisdiction here, it argued that the trial court had no jurisdiction over the age-discrimination claim because Garcia "[could not] prove her prima facie case of discrimination as a matter of law." This argument necessarily implies that the elements of the prima facie case are themselves jurisdictional facts, and that a trial court has no jurisdiction over a discrimination suit against a governmental employer when the plaintiff cannot even meet the prima facie burden.

2. The Elements of the Prima Facie Case as Jurisdictional Facts

In a suit against a governmental employer, the prima facie case implicates both the merits of the claim *and* the court's jurisdiction because of the doctrine of sovereign immunity.[30] Sovereign immunity deprives a trial court of jurisdiction over lawsuits in which the state or certain governmental units have been sued, unless the state consents to suit.[31] As a result, immunity is properly asserted in a plea to the jurisdiction.[32] We held in *Garcia I* that "the TCHRA clearly and unambiguously waives immunity" for suits brought against school districts under the TCHRA.[33]

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[30] *See id.* at 226.

[31] *State v. Lueck*, 290 S.W.3d 876, 880 (Tex. 2009).

[32] *Miranda*, 133 S.W.3d at 225–26 (citing *Hosner v. DeYoung*, 1 Tex. 764, 769 (1847)).

[33] *Garcia I*, 253 S.W.3d 653, 660 (Tex. 2008). The District incorrectly contends that our opinion in *Garcia I* did not actually address the issue of whether the TCHRA clearly and unambiguously waives immunity for school districts. After analyzing the effect of the Tort Claims Act's election-of-remedies provision, we considered whether the TCHRA independently waived the District's immunity from suit. *Id.* at 659. We examined the language of the TCHRA's waiver provision and stated—with respect to the specific suit against the school district—that "[w]hile this Court has not previously addressed the issue, all the courts of appeals that have considered it have concluded that the TCHRA clearly and unambiguously waives immunity, and we agree." *Id.* at 660 (citing cases). There is nothing further for us to decide on this issue here.

However, the Legislature has waived immunity only for those suits where the plaintiff actually alleges a violation of the TCHRA by pleading facts that state a claim thereunder.[34]

State v. Lueck is instructive. There, we were presented with a similar question of whether the elements of a statutory cause of action were properly challenged in a plea to the jurisdiction.[35] Lueck had sued the State and the Texas Department of Transportation (collectively TxDOT) for firing him in violation of the Whistleblower Act, which protects employees who "in good faith report[] a violation of law by the employing governmental entity or another public employee to an appropriate law enforcement authority."[36] TxDOT filed a plea to the jurisdiction, claiming that despite the Legislature's waiver of immunity for Whistleblower claims,[37] TxDOT retained immunity from Lueck's suit because his "report" of a violation did not fall under the terms of the statute.[38] Specifically, TxDOT argued that Lueck did not actually report a violation of law, and the person to whom he sent the email was not a "law enforcement authority."[39] Lueck argued that those elements implicated only the merits of his claim, not the court's jurisdiction to hear the case, and were therefore not the proper subject of a plea to the jurisdiction.[40] We disagreed and held that the

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[34] *See Lueck*, 290 S.W.3d at 881–82; *see also In re United Servs. Auto. Ass'n*, 307 S.W.3d 299, 307 (Tex. 2010) (citing *Lueck* for the proposition that "when elements of a statutory claim involve 'the jurisdictional inquiry of sovereign immunity from suit,' those elements can be relevant to both jurisdiction and liability").

[35] *Lueck*, 290 S.W.3d at 881.

[36] TEX. GOV'T CODE § 554.002(a).

[37] *Id.* § 554.0035.

[38] *Lueck*, 290 S.W.3d at 879.

[39] *Id.* at 879–80; *see also* TEX. GOV'T CODE § 554.002(a).

[40] *Lueck*, 290 S.W.3d at 881.

statutory elements in Section 554.002(a) are "jurisdictional when necessary to ascertain whether plaintiff has adequately alleged a violation of the [Whistleblower Act]."[41]

We looked to the language of the Whistleblower Act's immunity provision for support. Section 554.0035 provides that "[a] public employee *who alleges a violation of this chapter* may sue the employing state or local government entity for the relief provided by this chapter."[42] We stated:

> [I]t necessarily follows from this language that Lueck must actually allege a violation of the Act for there to be a waiver from suit. Therefore, the elements under section 554.002(a) must be considered in order to ascertain what constitutes a violation, and whether that violation has actually been alleged. We conclude that the elements of section 554.002(a) can be considered as jurisdictional facts, when it is necessary to resolve whether a plaintiff has alleged a violation under the Act.[43]

Otherwise, we reasoned, any superficial reference to the Act in a pleading would be sufficient to establish the State's consent to be sued—and additionally, the trial court's jurisdiction over the claim—a result the Legislature did not intend.[44]

Lueck's reasoning applies to the prima facie elements of a TCHRA claim as well. As in *Lueck*, Chapter 21 of the Labor Code waives immunity from suit only when the plaintiff actually states a claim for conduct that would violate the TCHRA. The section waiving immunity from suit, Section 21.254, provides that after satisfying certain administrative requirements, "the *complainant* may bring a civil action."[45] A "complainant" is defined in the TCHRA as "an individual who brings

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[41] *Id.* at 884.

[42] TEX. GOV'T CODE § 554.0035 (emphasis added).

[43] *Lueck*, 290 S.W.3d at 881.

[44] *See id.* at 882 (citing *Tex. Dep't of Criminal Justice v. Miller*, 51 S.W.3d 583, 587 (Tex. 2001)).

[45] TEX. LAB. CODE § 21.254 (emphasis added).

an action or proceeding *under this chapter*."[46] Thus, as in *Lueck*, it necessarily follows that a plaintiff must actually "bring[] an action or proceeding under this chapter" in order to have the right to sue otherwise immune governmental employers.[47] For a plaintiff who proceeds along the *McDonnell Douglas* burden-shifting framework, the prima facie case is the necessary first step to bringing a discrimination claim under the TCHRA. Failure to demonstrate those elements means the plaintiff never gets the presumption of discrimination and never proves his claim.[48] And under the language of Chapter 21 and our decision in *Lueck*, that failure also means the court has no jurisdiction and the claim should be dismissed.

This conclusion does not mean a plaintiff in Garcia's position will be required to marshal evidence and prove her claim to satisfy this jurisdictional hurdle.[49] While a plaintiff must plead the elements of her statutory cause of action—here the basic facts that make up the prima facie case—so that the court can determine whether she has sufficiently alleged a TCHRA violation, she will only be required to submit evidence if the defendant presents evidence negating one of those basic facts.[50] And even then, the plaintiff's burden of proof with respect to those jurisdictional facts must not "involve a significant inquiry into the substance of the claims."[51] Cases may exist where the trial

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[46] *Id.* § 21.002(4) (emphasis added).

[47] *Id.*; *see also Lueck*, 290 S.W.3d at 881.

[48] *See Quantum Chem. Corp. v. Toennies*, 47 S.W.3d 473, 477 (Tex. 2001).

[49] *See Lueck*, 290 S.W.3d at 884.

[50] *See Miranda*, 133 S.W.3d at 228.

[51] *Lueck*, 290 S.W.3d at 884 (citing *Bland*, 34 S.W.3d at 554).

court decides, in the exercise of its broad discretion over these matters, that the inquiry is reaching too far into the substance of the claims and should therefore await a fuller development of the merits.[52] Nevertheless, *some* inquiry is necessary because if TCHRA plaintiffs were allowed to stand on talismanic allegations alone, the constraining power of pleas to the jurisdiction would practically be eliminated.[53]

B. The Elements of the Prima Facie Case

Having decided that a plea to the jurisdiction is the proper vehicle for this challenge, we must now identify the elements of a prima facie case of age discrimination under the TCHRA. The first three elements are undisputed: the plaintiff must demonstrate that he or she was (1) a member of the protected class, (2) qualified for his or her employment position, and (3) terminated by the employer.[54] The controversy in this case arises from the fourth element. The District claims that, to establish the last prong of the prima facie case, Garcia must demonstrate that she was replaced by someone outside the protected class or by someone younger. The court of appeals, however, held that a plaintiff could also meet the fourth prong by demonstrating that she was "otherwise . . . discharged because of age," regardless of whether she was replaced by someone younger.[55] The question in this case is whether the test is actually that broad. We hold it is not.

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[52] *See Bland*, 34 S.W.3d at 554.

[53] *Lueck*, 290 S.W.3d at 884.

[54] *Autozone, Inc. v. Reyes*, 272 S.W.3d 588, 592 (Tex. 2008) (per curiam). Under both state and federal law, the protected class for age discrimination claims consists of those 40 years of age and older. *See* TEX. LAB. CODE § 21.101; 29 U.S.C. § 631(a) (2006).

[55] 314 S.W.3d at 556.

There is no prima facie case requirement in the text of the TCHRA; the statute simply proscribes discrimination "because of race, color, disability, religion, sex, national origin, or age."[56] The mechanics of the prima facie case—and its significance in discrimination cases—are products of caselaw, specifically of the burden-shifting framework created by the U.S. Supreme Court in *McDonnell Douglas*[57] and consistently applied to TCHRA cases by this Court.[58] As noted above, this framework allows a plaintiff who lacks direct evidence to raise an inference of discrimination by way of the prima facie case.[59] However, the Supreme Court in *McDonnell Douglas* did not establish an immutable list of elements, noting instead that "[t]he facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required . . . is not necessarily applicable in every respect to differing factual situations."[60] Accordingly, lower courts have been left to grapple with the specifics of how the test should be applied to particular types of claims. In the age-discrimination context, the parties have noted something of a split in the federal circuits over the elements of the prima facie case, and more specifically, over the breadth of the fourth prong. Because the Texas Legislature has indicated we should look to federal law for guidance on

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[56] TEX. LAB. CODE § 21.051.

[57] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–05 (1973).

[58] *See, e.g., Ysleta Indep. Sch. Dist. v. Monarrez*, 177 S.W.3d 915, 917 (Tex. 2005); *Wal-Mart Stores, Inc. v. Canchola*, 121 S.W.3d 735, 739 (Tex. 2003); *Quantum Chem.*, 47 S.W.3d at 476.

[59] *McDonnell Douglas*, 411 U.S. at 802.

[60] *Id.* at 802 n.13.

interpreting the TCHRA,[61] we consider this conflict before determining the proper elements in Texas.

1. The Approach in the Federal Circuits

For the most part, the federal circuits are in accord that a prima facie case of age discrimination requires a showing that the plaintiff was (1) a member of the protected group, (2) qualified for the job, and (3) discharged from his or her position.[62] However, that harmony turns to discord when we approach the fourth and final element. For example, under the Fifth Circuit's original prima face case, an age-discrimination plaintiff was simply required to show that "he was replaced with a person outside the protected group."[63] However, it soon became apparent that the *Price* test could not reasonably be applied in cases where the plaintiff was not replaced—so called reduction-in-force cases—so in 1983, the Fifth Circuit modified the final element so that a plaintiff could establish a prima facie case by showing he was (a) replaced by someone outside the protected class, (b) replaced by someone younger, or (c) otherwise discharged because of age.[64] This is the test the court of appeals applied in this case and the source of the parties' disagreement.

The District argues that the Fifth Circuit never intended the "otherwise discharged because of age" element to apply in true replacement cases like this one, but rather, simply carved out a niche for reduction-in-force cases. But in the years since *Elliott*, the Fifth Circuit has not so limited this

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[61] *See* TEX. LAB. CODE § 21.001(1).

[62] *See, e.g.*, *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 309 (5th Cir. 2004); *Wright v. Southland Corp.*, 187 F.3d 1287, 1290 (11th Cir. 1999); *Greene v. Safeway Stores, Inc.*, 98 F.3d 554, 558 (10th Cir. 1996).

[63] *Price v. Md. Cas. Co.*, 561 F.2d 609, 612 (5th Cir. 1977).

[64] *Elliott v. Grp. Med. & Surgical Serv.*, 714 F.2d 556, 565 (5th Cir. 1983).

final element. In some cases, the court suggests that this replacement/reduction-in-force line is a hard and fast one and that the "otherwise show" option applies only "in circumstances where the plaintiff is not replaced."[65] But in other cases, the court holds that "regardless of how much younger his replacement is, a plaintiff in the protected class may still establish a prima facie case by producing evidence that he was discharged because of his age."[66] In short, we lack clear guidance from the Fifth Circuit on the proper articulation of the fourth element in true replacement cases.

Other federal circuits seem to lean toward the broader, more flexible approach. For example, the First Circuit in *Loeb v. Textron, Inc.* rejected the requirement that the plaintiff show she was replaced by someone younger, noting that "[r]eplacement by someone older would *suggest* no age discrimination but would not disprove it conclusively."[67] Similarly, the Eleventh Circuit in *Wright v. Southland Corp.* held that replacement by an older worker did not rule out age discrimination because, for instance, the "replacement may simply have been an ex post attempt to avoid liability for age discrimination."[68] At the risk of over-generalizing, the most common rationale for these cases seems to be the flexibility inherent in the *McDonnell Douglas* formula. As the U.S. Supreme Court has explained, the precise requirements of the prima facie case can vary depending on the context and were "never intended to be rigid, mechanized, or ritualistic."[69] For its part, the Fifth

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[65] *See Bauer v. Albermarle Corp.*, 169 F.3d 962, 966 (5th Cir. 1999).

[66] *Rachid,* 376 F.3d at 309.

[67] *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1013 n.9 (1st Cir. 1979) (emphasis added).

[68] *Wright*, 187 F.3d at 1305 n.23.

[69] *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978).

Circuit has added: "The necessary elements of a prima facie employment discrimination case are not Platonic forms, pure and unchanging; rather, they vary depending on the facts of a particular case."[70] Garcia contends this need for case-by-case flexibility favors the "otherwise show" formulation of the fourth prong, and argues her suit should proceed even though her replacement is indisputably older. The obvious counterargument is that someone alleging age bias is not entitled to the benefit of the prima facie *presumption* if the employer has replaced the plaintiff with someone even older. Fortunately, our task today is not to determine what the test currently is in each of the federal circuits; our task is to determine, based on that guidance, what the standard will be in Texas.

2. The Answer in Texas

We do not proceed on a clean slate. Though we have never addressed this specific issue, this Court has, at least once before, articulated the elements of an age-discrimination claim under the TCHRA. In *Autozone v. Reyes*, we were presented with a legal sufficiency challenge to a jury finding that age was a motivating factor in Salvador Reyes's firing from Autozone.[71] The ultimate outcome of that case has limited value here because Reyes was not replaced; instead, he argued age discrimination because Autozone's purported rationale for his discharge—that he had sexually harassed a female co-worker—had not been equally applied to younger workers.[72] However, our articulation of the prima facie case in *Autozone* is, at the very least, instructive:

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[70] *Thornbrough v. Columbus & Greenville R.R.*, 760 F.2d 633, 641 (5th Cir. 1985).

[71] 272 S.W.3d 588, 591 (Tex. 2008).

[72] *See id.* at 594.

> To establish a violation of the Act, a plaintiff must show that he or she was (1) a member of the class protected by the Act, (2) qualified for his or her employment position, (3) terminated by the employer, and (4) treated less favorably than similarly situated members of the opposing class.[73]

While we never used the words "prima facie case," the cases we cited for that proposition involved the *McDonnell Douglas* burden-shifting framework.[74] Our articulation of the elements is significant for two reasons. First, it indicates that, despite the flexible nature of the prima facie case, this Court has determined it is important to give concrete guidelines on the basic facts necessary to establish a presumption of discrimination. Second, the limited nature of the fourth element in *Autozone*—which requires evidence of favorable treatment toward those outside the protected class, rather than simply some evidence showing discrimination—weighs against a broad reading of that element here. We could have held in *Autozone* that a plaintiff proves age discrimination by generally presenting evidence that he was treated unfavorably because of age. Instead, we limited that basic fact to proof of less favorable treatment as compared to those outside the protected class. So while *Autozone* doesn't speak directly to the issue before us, it provides some support for a narrower articulation of the prima facie case.

We also find guidance in the U.S. Supreme Court's opinion in *O'Connor v. Consolidated Coin Caterers Corp.*, where the Court actually addressed the fourth element of the prima facie case.[75] That dispute arose from the termination of James O'Connor—age 56 at the time of his

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[73] *Id.* at 592.

[74] *See id.* (citing *Monarrez*, 177 S.W.3d at 917; *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000)).

[75] 517 U.S. 308, 309 (1996).

discharge—and his replacement by a 40-year-old worker.[76] After O'Connor's claim was defeated in the trial court, the Fourth Circuit held that an age-discrimination plaintiff could only establish a prima facie case under *McDonnell Douglas* with proof that "following his discharge or demotion, he was replaced by someone of comparable qualifications outside the protected class."[77] Since O'Connor's replacement was within the protected class under the ADEA, the court of appeals concluded that he had failed to make out a prima facie case.[78] The U.S. Supreme Court reversed, holding that the "outside the protected class" element lacks probative value because "[t]he fact that one person in the protected class has lost out to another person in the protected class is . . . irrelevant, so long as he has lost out *because of his age*."[79]

For our purposes, *O'Connor* is particularly instructive in its discussion of the facts that are relevant to the prima facie case. Importantly, the Court did seem to suggest that concrete elements are proper for individual classes of cases by noting that "the question presented for our determination is *what elements must be shown* in an ADEA case to establish the prima facie case that triggers the employer's burden of production."[80] Generally, the Court held that each element must have a "logical connection" to the illegal discrimination for which it establishes a legally mandatory,

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[76] *Id.*

[77] 56 F.3d 542, 546 (4th Cir. 1995).

[78] *Id.*

[79] *O'Connor*, 517 U.S. at 312 (emphasis in original).

[80] *Id.* at 311 (emphasis added).

rebuttable presumption.[81] As applied to that case, the Court held that the "outside the protected class" element had no such logical connection because there can be no greater inference of age discrimination when a 40-year-old is replaced by a 39-year-old (someone outside the protected class) than when a 56-year-old is replaced by a 40-year-old (someone within the protected class).[82] In fact, the case for age discrimination is stronger in the latter circumstance; as for the former, the Court stated plainly that an inference of age discrimination "cannot be drawn from the replacement of one worker with another worker insignificantly younger."[83]

If an inference of discrimination cannot be drawn from replacement by an "insignificantly younger" worker, then one certainly cannot be drawn from replacement by an *older* worker. That is the situation confronting us today, and that is the reason we hold that a plaintiff in Garcia's situation cannot make out a prima facie case of age discrimination. In a true replacement case, an age-discrimination plaintiff relying on the *McDonnell Douglas* burden-shifting framework must show that he or she was (1) a member of the protected class under the TCHRA, (2) qualified for his or her employment position, (3) terminated by the employer, and (4) replaced by someone younger.[84] This holding is not meant to suggest that a plaintiff who is replaced by someone older can never survive a plea to the jurisdiction and go on to prove age discrimination to the finder of fact; instead, the plaintiff will simply be limited to the traditional method of proof requiring "direct evidence of

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[81] *Id.* at 311–12.

[82] *Id.* at 312.

[83] *Id.* at 312–13.

[84] *See Autozone*, 272 S.W.3d at 592; *Monarrez*, 177 S.W.3d at 917.

discriminatory animus."[85] For instance, Garcia's counsel posed this hypothetical situation at oral argument: one official fires the plaintiff because of age bias, but a different official (independent of the first) hires a replacement who happens to be older.[86] Without expressing an opinion on whether such a claim is indeed actionable under the TCHRA, we acknowledge that it is a logical possibility. However, that plaintiff will be required to prove discriminatory intent on the part of the first official by way of direct evidence; she does not get the benefit of the prima facie presumption because the act of firing one worker and replacing her with someone older is not "more likely than not based on the consideration of impermissible factors."[87] So in essence, our holding today is simply that a plaintiff who is replaced by an older worker does not receive the inference of discrimination that the prima facie case affords. This holding properly limits the role of the prima facie case in TCHRA litigation, while still leaving open the possibility, however rare, that a plaintiff who is replaced by an older worker can still prove age discrimination via direct evidence.

C. Application

In its plea to the jurisdiction, filed 98 days before the hearing, the District presented undisputed evidence that Garcia was replaced by someone three years older. That evidence negated one of the essential elements of the prima facie case, thus triggering Garcia's duty to raise a fact

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[85] *Quantum Chem.*, 47 S.W.3d at 476.

[86] *See Wright*, 187 F.3d at 1292 (noting that a plaintiff may be able to prove discrimination even though the prima facie case does not apply and posing the following hypothetical: "For instance, imagine a situation in which a racist personnel manager for a corporation fires an employee because he is African American. Shortly thereafter, the racist personnel manager is replaced, and the previously terminated employee is replaced by another African American. Under these circumstances, the first individual would have been the victim of illegal discrimination, despite the fact that his replacement was of the same race.").

[87] *Furnco Constr.*, 438 U.S. at 577.

question on the issue of discriminatory intent.[88] She never did, nor did she seek additional time to do so. As we held in *Miranda*, trial courts considering a plea to the jurisdiction have broad discretion to allow "reasonable opportunity for targeted discovery"[89] and to grant parties more time to gather evidence and prepare for such hearings.[90] Garcia had ample opportunity to seek discovery,[91] during the nine months following this Court's remand in *Garcia I* and before the District filed its plea to the jurisdiction refuting her prima facie case, and certainly during the three months that passed before the hearing on that plea. In sum, when presented with (1) undisputed evidence that Garcia's replacement was older, and (2) no countervailing evidence raising a material fact question on discriminatory intent, the trial court should have granted the District's plea to the jurisdiction.

III. Conclusion

We reverse the court of appeals' judgment in part and render judgment dismissing Garcia's suit.[92]

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[88] *See Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 228 (Tex. 2004) (likening our plea to the jurisdiction practice to summary judgment and noting that once the state meets the summary judgment standard of proof, the plaintiff simply has to demonstrate a disputed material fact question).

[89] *Id.* at 233. The dissent laments the lack of discovery at the plea to the jurisdiction stage, urging arguments similar to those raised in the *Miranda* dissent. *See id.* at 235–36 (Jefferson, J., dissenting).

[90] *Id*. at 229 (majority opinion).

[91] Garcia filed this suit in 2004 and before that pursued her allegations at the Texas Workforce Commission's Civil Rights Division, which enforces Texas anti-discrimination laws and investigates to determine if there is reasonable cause to believe the employer violated the TCHRA. *See* TEX. LAB. CODE § 21.204.

[92] Our judgment includes a dismissal of Garcia's retaliation claim, as requested by the District in its briefing. This action expresses no opinion on the merits of the claim, which the court of appeals remanded after determining that Garcia had properly stated a claim for retaliation. We reverse and render on this issue simply because Garcia has apparently abandoned that claim. In her briefing before this Court, Garcia incorrectly states that the retaliation "issue

Don R. Willett
Justice

OPINION DELIVERED: June 29, 2012

was resolved by the Court of Appeals in [the District's] favor" and as a result, she declines to respond or make any argument as to why her retaliation claim should survive. In addition, Garcia indicates that she has no desire to "appeal" on the retaliation issue and in our view, has therefore abandoned any argument thereon. In this unusual situation, we grant the District's requested relief without considering the merits and render judgment dismissing Garcia's retaliation claim.

IN THE SUPREME COURT OF TEXAS

NO. 10-0802

MISSION CONSOLIDATED INDEPENDENT SCHOOL DISTRICT, PETITIONER,

v.

GLORIA GARCIA, RESPONDENT

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

CHIEF JUSTICE JEFFERSON, joined by JUSTICE MEDINA and JUSTICE LEHRMANN, dissenting.

We must decide whether a school district has conclusively negated a trial court's jurisdiction, not simply whether a claimant replaced by an older individual "is ever entitled to a presumption of age discrimination under the *McDonnell Douglas* burden-shifting framework." ___ S.W.3d ___. The answer to the former inquiry does not depend on the latter. The *McDonnell Douglas* framework is a useful mechanism for determining whether discrimination occurred, but it does not apply in every employment discrimination case. That Garcia did not establish the elements of a prima facie case means only that a court will not *presume* discrimination—it does not mean Garcia cannot possibly prevail. By equating the two inquiries, the Court dismisses Garcia's claims prematurely and forces her to prove her case to establish jurisdiction. I respectfully dissent.

I. The District has not met the summary judgment standard of proof for its assertion that the trial court lacks jurisdiction.

Because it presented undisputed evidence that Garcia was replaced by an older worker, the

District contends that her prima facie case fails as a matter of law.[1] If the elements of a prima facie case were essential to proving discrimination, this argument might have merit. But the District's position misconstrues the nature of the prima facie case in employment discrimination cases.

The phrase "prima facie case" has two different meanings. It may denote "[t]he establishment of a legally required rebuttable presumption," BLACK'S LAW DICTIONARY 1310 (9th ed. 2009), or "[i]t may mean evidence that is simply sufficient to get to the jury," 2 KENNETH S. BROUN, MCCORMICK ON EVIDENCE § 342, at 496 n.4 (6th ed. 2006). The Supreme Court has made clear that it uses "prima facie case" in the former sense in the employment discrimination context. *See Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 n.7 (1981) ("The phrase 'prima facie case' not only may denote the establishment of a legally mandatory, rebuttable presumption, but also may be used by courts to describe the plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue. . . . *McDonnell Douglas* should have made it apparent that in the Title VII context we use 'prima facie case' in the former sense." (citations omitted)). Properly understood, this prima facie framework is a device for allocating the burden of production. *Id.* at 255 n.8. Once the presumption is established, the burden shifts to the defendant to produce evidence of some nondiscriminatory reason for the employment action. *Id.* at 253. "If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted, *and the factual inquiry proceeds to a new level of specificity*." *Id.* at 255 (emphasis added). Thus, a prima facie showing is not "the equivalent of a factual finding of discrimination," *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 579 (1978), nor is it a necessary component to establish that finding. It is

[1] Because Garcia does not challenge the court of appeals' dismissal of her race, national origin, and gender discrimination claims, this discussion refers specifically to Garcia's age discrimination claim. But the reasoning is equally applicable to any type of discrimination claim.

simply a mechanism "intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." *Burdine*, 450 U.S. at 255 n.8.

If the plaintiff produces direct evidence of discrimination, the need for a presumption disappears. The Supreme Court made this clear in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511 (2002). There, the employee alleged "that he had been terminated on account of his national origin . . . and on account of his age." *Id.* at 509. The trial court dismissed his claim because he did not "adequately allege[] a prima facie case, in that he ha[d] not adequately alleged circumstances that support an inference of discrimination." *Id.* The Second Circuit affirmed. The Supreme Court reversed, noting that the prima facie case under *McDonnell Douglas* "is an evidentiary standard, not a pleading requirement." *Id.* at 510. The Court explained,

> [U]nder a notice pleading system, it is not appropriate to require a plaintiff to plead facts establishing a prima facie case because the *McDonnell Douglas* framework does not apply in every employment discrimination case. *For instance, if a plaintiff is able to produce direct evidence of discrimination, he may prevail without proving all the elements of a prima facie case*. . . . Under the Second Circuit's heightened pleading standard, a plaintiff without direct evidence of discrimination at the time of his complaint must plead a prima facie case of discrimination, even though discovery might uncover such direct evidence. *It thus seems incongruous to require a plaintiff, in order to survive a motion to dismiss, to plead more facts than he may ultimately need to prove to succeed on the merits if direct evidence of discrimination is discovered.*

Id. at 511–12 (emphasis added) (citation omitted). Thus, because the employee's complaint gave his employer fair notice of his claims and the grounds upon which they rested, the Supreme Court concluded it was sufficient even though the prima facie elements were not present. The standards for Title VII mirror those for the TCHRA. *See* ___ S.W.3d at ___ ("Because one of the purposes of the TCHRA is to 'provide for the execution of the policies of Title VII of the Civil Rights Act of 1964,' we have consistently held that those analogous federal statutes and the cases interpreting them

guide our reading of the TCHRA." (quoting TEX. LAB. CODE § 21.001(1))). Why then is the outcome different in this case?

This is not to say that prima facie elements are irrelevant. They create a presumption precisely because they may establish the presumed fact of discrimination. But "relevant" does not mean "necessary." Federal circuit courts appreciate this distinction. For example, in *Byers v. Dallas Morning News, Inc.*, 209 F.3d 419 (5th Cir. 2000), the Fifth Circuit addressed the weight to be given a plaintiff's inability to establish the elements of a prima facie case at summary judgment. There, a white male sued his employer, alleging race discrimination. *Byers*, 209 F.3d at 423. The court determined that the employee established the first three elements of the prima facie case—(1) that he was a member of a protected group, (2) that he was qualified for the position held, and (3) that he was discharged from the position—but failed to establish the fourth element because he was replaced by someone of the same race. *Id.* at 426–27. The court ultimately upheld summary judgment for the employer but not on the sole basis that the plaintiff failed to establish the fourth element. *Id.* The court noted that it had previously cautioned "district courts against applying the four-part, *prima facie* case test too mechanically," explaining that "'[w]hile the fact that one's replacement is of another national origin "may help to raise an inference of discrimination, it is neither a sufficient nor a necessary condition."'" *Id.* at 427 (quoting *Carson v. Bethlehem Steel Corp.*, 82 F.3d 157, 159 (7th Cir. 1996)). The court explained that a plaintiff could still prove a case of racial discrimination "even where an employee has been replaced by someone of the same race." *Id.* But the plaintiff must then establish it was probable that his race "was a motivating factor in his employer's decision to terminate him." *Id.* Because the employee did not present such evidence, summary judgment was appropriate. *Id.* I do not understand the basis on which the Court rejects

this first-rate analysis.

Thus, a plaintiff can establish a claim without the use of a presumption by presenting other evidence of discrimination. The question here is whether Garcia was required to do so at the earliest stage of the litigation. We emphasized in *Miranda* that a plaintiff is required to raise a fact issue only after the governmental entity has met its burden:

> By requiring the state to meet the summary judgment standard of proof in cases like this one, we protect the plaintiffs from having to 'put on their case simply to establish jurisdiction.' . . . Instead, after the state asserts and supports with evidence that the trial court lacks subject matter jurisdiction, we simply require the plaintiffs, when the facts underlying the merits and subject matter jurisdiction are intertwined, to show that there is a disputed material fact regarding the jurisdictional issue.

Tex. Dep't of Parks & Wildlife v. Miranda, 133 S.W.3d 217, 228 (Tex. 2004) (citations omitted). The Court holds that the District is entitled to dismissal because (1) the elements of a prima facie case of discrimination are "jurisdictional facts" under the TCHRA, and (2) Garcia failed to offer any direct evidence of discriminatory intent or any other evidence of discrimination in response to the District's evidence negating an essential element of her statutory cause of action. ___ S.W.3d at ___. This implies, however, that a plaintiff *must* establish the prima facie elements to prove discrimination, a proposition rejected by federal courts and not to be found in the TCHRA's text. The Court acknowledges that "[t]here is no prima facie requirement in the text of the TCHRA; the statute simply proscribes discrimination 'because of race, color, disability, religion, sex, national origin, or age.'" ___ S.W.3d at ___. Yet the Court sidesteps the issue by restricting its holding to plaintiffs who rely on a presumption to establish liability: "*For a plaintiff who proceeds along the* McDonnell Douglas *burden-shifting framework*, the prima facie case is the necessary first step to bringing a discrimination claim under the TCHRA. Failure to demonstrate those elements means

the plaintiff never gets the presumption of discrimination and never proves his claim." ___ S.W.3d at ___ (emphasis added). But we do not know at the outset whether Garcia, or any other plaintiff, will rely solely on a presumption or present other evidence of discrimination, and nothing in Garcia's original petition confined her pleading to the prima facie framework. How a plaintiff proves her claim will vary with the available evidence in each case. And whether Garcia is entitled to a presumption has no bearing on whether the trial court has jurisdiction to consider this other evidence.

The ultimate inquiry in an employment discrimination case is whether the employer "intentionally discriminated against the plaintiff." *Burdine*, 450 U.S. at 253; *see also* TEX. LAB. CODE § 21.051 ("An employer commits an unlawful employment practice if because of race, color, disability, religion, sex, national origin, or age the employer: . . . discharges an individual . . . ."). Thus, to negate jurisdiction the District must negate discrimination. The only evidence offered by the District to do so is that Garcia was replaced by an older worker. Evidence of an older replacement alone does not disprove discrimination as a matter of law. Garcia can still prove her case if discovery reveals other evidence of discrimination. Assume, for example, that a plaintiff establishes conclusively that the decision to fire her was motivated by age discrimination—a smoking-gun e-mail confirms that motivation unequivocally. It cannot logically follow that the employer's later decision to hire an older worker absolves it of its original sin. Recognizing this possibility, federal courts have refused to confine plaintiffs to the prima facie framework of proof. *See, e.g.*, *Greene v. Safeway Stores, Inc.*, 98 F.3d 554, 559 (10th Cir. 1996) (refusing to hold that the "*prima facie* case approach 'is the only way'" a plaintiff who is replaced by an older worker can establish his claim). Doing so denies the victim of invidious discrimination any hope that a court will set things right.

I do not understand why the Court is unpersuaded by the logic of this writing:

> There are numerous reasons why the replacement of Wright by an older individual does not rule out the possibility that Southland fired Wright because of his age. For instance, the replacement may simply have been an *ex post* attempt to avoid liability for age discrimination . . . . Alternatively, . . . the firing of Wright served to reduce Southland's total number of older store managers and thus could have been part of a systematic attempt by Southland to reduce its number of older store managers. Another theory would be that Southland has higher standards for older store managers than for younger ones; Wright's replacement happened to be one of the few individuals who could attain the higher standards. These are only a few of the possibilities; the point is that the fact that Wright was replaced by an older individual does not necessarily lead to the conclusion that Wright was not a victim of age discrimination.

Wright v. Southland Corp., 187 F.3d 1287, 1305 n.23 (11th Cir. 1999); *see also Loeb v. Textron, Inc.*, 600 F.2d 1003, 1013 n.9 (1st Cir. 1979) ("Replacement by someone older would suggest no age discrimination but would not disprove it conclusively. The older replacement could have been hired, for example, to ward off a threatened discrimination suit.").

Thus, in federal court, this case would survive a motion to dismiss and, if discovery revealed other evidence of discrimination, summary judgment. The Court seems to agree on that. *See* ___ S.W.3d at ___ (recognizing "the possibility, however rare, that a plaintiff who is replaced by an older worker can still prove age discrimination via direct evidence"). So why must Garcia's claim be dismissed? Why does the trial court have no power to consider direct evidence of discrimination? Only because she did not prove a prima facie case. That is wrong. *See State v. Lueck*, 290 S.W.3d 876, 884 (Tex. 2009) (explaining that plaintiffs are not required to "prove [a] claim in order to satisfy the jurisdictional hurdle" and that "the burden of proof with respect to . . . jurisdictional facts 'does not involve a significant inquiry into the substance of the claims'" (citation omitted)). The Court is today establishing a new and oppressive burden in the employment setting: a litigant must prove

her case to establish jurisdiction. *See Miranda*, 133 S.W.3d at 228 ("By requiring the state to meet the summary judgment standard of proof in cases like this one, we protect the plaintiffs from having to 'put on their case simply to establish jurisdiction.'" (citation omitted)); *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000) ("[T]he proper function of a dilatory plea does not authorize an inquiry so far into the substance of the claims presented that plaintiffs are required to put on their case simply to establish jurisdiction. Whether a determination of subject-matter jurisdiction can be made in a preliminary hearing or should await a fuller development of the merits of the case must be left largely to the trial court's sound exercise of discretion.").

The consequence of this approach cannot be overstated. Government employees must now present direct evidence of discrimination "on painfully short notice and before evidence has been developed," *Miranda*, 133 S.W.3d at 235 (Jefferson, J., dissenting), if they are replaced by someone of the same protected class. "There will seldom be 'eyewitness' testimony as to the employer's mental processes," *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983), but that is the type of evidence that will be required for some plaintiffs to demonstrate a court's jurisdiction. The Court reaches this result based on a single affidavit that speaks to nothing more than the availability of a presumption. A factual question this "sensitive and difficult," *id.*, should not be decided this early in a case on such scant evidence.

The Court has given governmental entities a winning blueprint: First, hire a worker of the same protected class. Second, when litigation ensues, tell the court that, because a prima facie case is hopeless, it has no power to proceed. But the TCHRA is meant to eliminate unlawful discrimination. Unnecessary procedural hurdles thwart that purpose.

II. Garcia has adequately alleged a violation of the TCHRA.

Because Garcia is not yet required to present evidence, the only other possible basis for dismissal is if Garcia's pleadings affirmatively negate jurisdiction. For example, in *Lueck*, we held that to affirmatively demonstrate the court's jurisdiction, Lueck had to allege a violation of the Whistleblower Act, which required that he make "a good-faith report of a violation of law to an appropriate law enforcement authority." *Lueck*, 290 S.W.3d at 878. Lueck's pleadings, however, affirmatively negated jurisdiction because he alleged that he warned only of regulatory non-compliance to a supervisor who was not "an appropriate law enforcement authority." *Id.* at 885. Thus, because Lueck failed to allege a violation of the Whistleblower Act, he failed to invoke the court's jurisdiction. *Id.* at 886.

Here, Garcia alleges (1) that she worked for the District for twenty-seven years, (2) that she was wrongfully discharged for discriminatory reasons, (3) that she was discriminated against because of her age, (4) that these actions were in violation of the TCHRA, and (5) that there was no legitimate business justification for her termination because she had always performed satisfactory work. By alleging that she was discharged because of her age, Garcia has adequately alleged a violation of the TCHRA and affirmatively invoked the trial court's jurisdiction. *See* TEX. LAB. CODE § 21.051 ("An employer commits an unlawful employment practice if because of race, color, disability, religion, sex, national origin, or age the employer . . . discharges an individual . . . ."). Additionally, these allegations satisfy our notice pleading standard because the District can ascertain "the nature, basic issues, and the type of evidence that might be relevant to the controversy." *Low v. Henry*, 221 S.W.3d 609, 612 (Tex. 2007); *cf. Swierkiewicz*, 534 U.S. at 514 (holding that the plaintiff's pleadings gave the defendant fair notice of the plaintiff's claims and the grounds upon which they rested because the plaintiff (1) alleged that he had been terminated on account of his

national origin and age, (2) detailed the events leading to his termination, (3) provided relevant dates, and (4) included the ages and nationalities of at least some of the relevant persons involved with his termination). No additional specificity is required.

III. The District's remaining arguments

The District presents two alternative arguments: First, that the TCHRA does not waive immunity for school districts, and, second, that Garcia's failure to comply with the filing and notice requirements of the TCHRA deprived the court of jurisdiction. As the Court notes, however, we have already addressed the first and held that the TCHRA waives immunity. *See* ___ S.W.3d at ___ n.33 (citing *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 659–60 (Tex. 2008)). The second misinterprets the TCHRA's filing requirements.

Labor Code section 21.254 provides that "the complainant may bring a civil action against the respondent" within sixty days of receiving a right-to-sue letter. Garcia filed suit timely on July 2, 2004, fifty-seven days into the sixty-day time period. She completed service seventeen days later. Nonetheless, the District argues that Garcia did not comply with section 21.254 because that section requires both filing and service within the sixty-day time period. Thus, because such compliance is a statutory prerequisite to suit under Government Code section 311.034, which provides that statutory prerequisites to suit "are jurisdictional requirements in all suits against a governmental entity," Garcia has failed to establish jurisdiction. We need not consider, however, the jurisdictional consequences of noncompliance because Garcia has fulfilled her statutory responsibilities.

The statute requires only that suit be filed within sixty days. *See* TEX. LAB. CODE § 21.254 ("Within 60 days after the date a notice of the right to file a civil action is received, the complainant may bring a civil action against the respondent."). While generally, "a timely filed suit will not

interrupt the running of limitations unless the plaintiff exercises due diligence in the issuance and service of citation . . . [i]f service is diligently effected after limitations has expired, the date of service will relate back to the date of filing." *Proulx v. Wells*, 235 S.W.3d 213, 215 (Tex. 2007) (per curiam) (citations omitted).

Even assuming our diligence rule applies to TCHRA claims, the District misreads the rule as requiring both filing and service within the limitations period. All that is required is a timely suit and diligent service. Both were achieved here.

IV. Conclusion

Garcia's allegations affirmatively demonstrate the trial court's jurisdiction, and the District has not met its burden to require Garcia to raise a fact issue regarding its jurisdictional challenge. As a result, the trial court has jurisdiction over Garcia's claim, and she is entitled to proceed with discovery. Because the Court holds otherwise, I respectfully dissent.

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Wallace B. Jefferson
Chief Justice

OPINION DELIVERED: June 29, 2012

IN THE SUPREME COURT OF TEXAS

NO. 10-0831

DIANA L. MORRIS A/K/A DIANA AGUILAR, PETITIONER,

v.

JUAN AGUILAR AND MARGARITA AGUILAR, RESPONDENTS

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

PER CURIAM

In this appeal we determine whether a challenge to a litigant's claim of indigence can be asserted after the 10-day deadline set forth in Texas Rule of Appellate Procedure 20.1. After a custody dispute in the trial court, a mother and her husband filed an affidavit of indigence to allow them to appeal without advance payment of costs. Twenty-four days after the deadline for contesting the affidavit of indigence, the court reporter filed a contest. After a hearing, the trial court ruled that the mother and her husband were not indigent. The court of appeals affirmed. We hold that the Rules of Appellate Procedure do not allow the untimely challenge and reverse and remand to the court of appeals to consider the merits of the appeal.

The underlying lawsuit affects the custody of two of Petitioner Diana L. Morris's daughters, ages 15 and 9. The trial court appointed Morris's parents, respondents Juan and Margarita Aguilar, sole joint managing conservators of the older daughter and granted them visitation rights to the

younger daughter. Morris is married to the father of the younger daughter. The court appointed Diana Morris and Phillip Perez possessory conservators of the older daughter, and the Morrises joint managing conservators of the younger daughter.

An attorney represented Morris and her husband in the trial court. After the court issued its final order, the Morrises timely filed an affidavit of indigence and a notice of appeal. The court reporter filed a contest to the affidavit 24 days after the 10-day deadline.[1] In the contest, the reporter stated that she had first received Morris's affidavit two days earlier. After a hearing, at which Morris was represented by her pro bono counsel, the trial court sustained the contest. Morris appealed that ruling, and the court of appeals affirmed. ___ S.W.3d ___, ___.

Texas Rule of Appellate Procedure 20.1(f) states:

> Unless a contest is timely 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). The court of appeals concluded that because Morris did not object in the trial court to the late filing of the reporter's contest, "thus giving the court the opportunity to consider and correct any timeliness-related errors, [Morris] has not preserved any error related to the untimely contest." ___ S.W.3d at ___. However, a trial court cannot cure the late filing of a contest; the rule mandates that the appeal without advance payment of costs be allowed, as we have previously held.

[1] *See* TEX. R. APP. P. 20.1(e) ("The clerk, the court reporter, the court recorder, or any party may challenge an affidavit . . . by filing . . . a contest . . . within 10 days after the date when the affidavit was filed if the affidavit was filed in the trial court.").

In re C.H.C., 331 S.W.3d 426, 429 (Tex. 2011) (per curiam)[2]; *see also Higgins v. Randall Cnty. Sheriff's Office*, 193 S.W.3d 898, 899 (Tex. 2006) (per curiam). Furthermore, the error in refusing to allow the appeal to proceed was not the trial court's, which should have had no control of the matter here, but was the court of appeals'.[3]

Rule 20.1(f) is mandatory to protect the indigent appellant and uphold the principle that "[c]ourts should be open to all, including those who cannot afford the costs of admission." *In re C.H.C.*, 331 S.W.3d at 429; *accord Higgins v. Randall Cnty. Sheriff's Office ("Higgins II")*, 257 S.W.3d 684, 686 (Tex. 2008). Although Morris was represented in the trial court pro bono, many indigent parties are pro se. To require a pro se party to object to a late-filed contest to an affidavit of indigence in order to preserve error—something the party is not likely to know to do—is to eviscerate the protection Rule 20.1(f) is intended to afford.

The Aguilars argue that Rule 20.1(e)'s 10-day deadline for filing a contest can be extended by the trial court under Texas Rule of Civil Procedure 5 and Texas Rule of Appellate Procedure 2, and should be extended when a court reporter has no actual notice of the filing of an affidavit of

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[2] We held in *In re C.H.C.* that an appellant is entitled to proceed without advance payment of costs if there is no challenge to her affidavit of indigence. 331 S.W.3d at 428–30. For the reasons expressed below, we likewise hold that an appellant is entitled to proceed without advance payment of costs if there is no timely challenge to her affidavit of indigence.

[3] One purpose of preserving error by raising the issue in the trial court is to promote judicial efficiency by allowing the trial court the opportunity to correct its error. *In re C.O.S.*, 988 S.W.2d 760, 765 (Tex. 1999). The purpose of an affidavit of indigence is to allow the party to proceed on appeal without advance payment of costs if the compliant affidavit is not contestable or not contested, or the contest is not sustained by written order. TEX. R. APP. P. 20.1(a)(2). As no contest was timely filed and the trial court cannot cure the untimely contest, the trial court had no authority to hold a hearing or otherwise act on the matter.

indigence within the time to contest it.[4] We disagree. Texas Rule of Civil Procedure 5 states in pertinent part:

> When by *these rules* or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion[,] . . . upon motion permit the act to be done after the expiration of the specified period where good cause is shown for the failure to act.

TEX. R. CIV. P. 5 (emphasis added). By its own terms, Rule 5 only applies to deadlines in the Rules of Civil Procedure. *Id.* The Rules of Appellate Procedure prescribe the deadline for contesting an affidavit of indigence. TEX. R. APP. P. 20.1(e) (establishing 10-day deadline to contest an affidavit of indigence). Texas Rule of Appellate Procedure 2 states in pertinent part:

> On a party's motion or on its own initiative an appellate court may—to expedite a decision or for other good cause—suspend a rule's operation in a particular case and order a different procedure . . . .

TEX. R. APP. P. 2. Although this rule authorizes an appellate court to suspend the deadline for contesting an affidavit of indigence, the rule requires good cause. Lack of actual notice in this context to a court reporter of the filing of an affidavit of indigence is not good cause in light of Rule 20.1.

Former Texas Rule of Appellate Procedure 40(a)(3)(B) provided:

> The appellant or his attorney shall give notice of the filing of the affidavit [of indigence] . . . to the court reporter of the court where the case was tried within two days after the filing; otherwise, he shall not be entitled to prosecute the appeal without paying the costs or giving security therefor.

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[4] Construction of statutes and rules are questions of law, which we review de novo. *See In re Christus Spohn Hosp. Kleberg*, 222 S.W.3d 434, 437 (Tex. 2007) (stating that statutes and procedural rules are subject to the same rules of construction); *State v. Gonzalez*, 82 S.W.3d 322, 327 (Tex. 2002) (stating that statutory construction is a legal question and therefore subject to de novo review).

Former TEX. R. APP. P. 40(a)(3)(B), 49 TEX. B.J. 565 (1986) (repealed 1997). *See Jones v. Stayman*, 747 S.W.2d 369, 370 (Tex. 1987) (per curiam); *see also In re C.M.G.*, 883 S.W.2d 411, 413 (Tex. App.—Austin 1994, no pet.); *Watson v. Hart*, 871 S.W.2d 914, 917–18 (Tex. App.—Austin 1994, orig. proceeding) (per curiam). But in 1997, the obligation to notify the court reporter was removed from the appellant and assigned to the clerk. Rule 20.1(d)(1) now states:

> If the affidavit of indigence is filed with the trial court clerk . . ., the clerk must promptly send a copy of the affidavit to the appropriate court reporter.

TEX. R. APP. P. 20.1(d)(1). The change was made because it is much easier for notice to be given to a court reporter by the clerk (with whom the reporter has a working relationship) than by an indigent party (who is likely to be pro se and unfamiliar with the courthouse). The clerk's failure to comply with the rule is not grounds for denying an indigent appellant the benefit of Rules 20.1(e)-(f). *See Burgess v. Feghhi*, 191 S.W.3d 411, 413-14 (Tex. App.—Tyler 2006, no pet.) ("An appellant should not be punished when the clerk fails to send the required notice to the reporter.").[5]

Texas Rule of Appellate Procedure 20.1(f) requires that when there is no timely contest to an affidavit of indigence, a party must be allowed to proceed on appeal without advance payment of costs. TEX. R. APP. P. 20.1(f); *Higgins II*, 257 S.W.3d at 688 ("Subsection (f), however, does more than 'deem' the affidavit's allegations true; it specifically provides that the allegations 'will be deemed true, *and the party will be allowed to proceed* without advance payment of costs.'"

[5] The court of appeals concluded that the trial court did not err in finding that Morris was not indigent because she and her husband "included in their bills several non-necessities," namely, the truck Morris's husband used in his work, which was the couple's only vehicle, and "items that they find useful but that are not truly necessities, largely those related to [Morris's] husband's deafness." ___ S.W.3d ___, ___. We disagree with the court of appeals that these items are non-necessaries for the Morrises.

(quoting TEX. R. APP. P. 20.1(f)); *Rios v. Calhoon*, 889 S.W.2d 257, 258–59 (Tex. 1994) (per curiam) ("If a party files an affidavit of inability to pay costs . . . and no contest to the affidavit is timely filed . . ., the court is bound to accept the allegations in the affidavit as true. Thereafter, the party is absolutely entitled to the exemption from costs, and the trial court lacks the authority to affect the party's entitlement." (citations omitted)).

Because no contest was timely filed, Morris is entitled to proceed on appeal without advance payment of costs. Accordingly, without hearing oral argument, TEX. R. APP. P. 59.1, we grant Morris's petition for review, reverse the judgment of the court of appeals, and remand this proceeding to the court of appeals to consider the merits of the Morrises' appeal without advance payment of costs.

OPINION DELIVERED: June 8, 2012

IN THE SUPREME COURT OF TEXAS

NO. 10-0854

LYNDA MARINO, PETITIONER,

v.

CHARLES KING, RESPONDENT

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

PER CURIAM

This is an appeal from a summary judgment based on deemed admissions. By rule, a request for admission is considered admitted if a response is not timely served. TEX. R. CIV. P. 198.3. The response in this case was a day late, and the requested admissions were deemed admitted under the rule. The trial court granted a subsequent motion for summary judgment, based on these admissions, after the pro se litigant did not file a written response to the motion asking for them to be withdrawn. The court of appeals likewise affirmed the summary judgment, concluding that the litigant had waived complaint by never formally asking the trial court to withdraw the deemed admissions on which the summary judgment was based. ___ S.W.3d ___, ___ (Tex. App.—Waco 2010) (mem. op.).

The litigant, no longer pro se, complains here that she adequately preserved error in the trial court under prior precedent. *See Wheeler v. Green*, 157 S.W.3d 439, 443 (Tex. 2005) (per curiam).

We agree. We further conclude that good cause existed for the trial court to allow the withdrawal of her deemed admissions and to deny the motion for summary judgment. Accordingly, we reverse the court of appeals' judgment and remand the cause to the trial court for further proceedings.

Charles King hired Lynda Marino to perform accounting services for his company, Charles King Horticultural Services, Inc. Several years later, King discharged Marino claiming that she had improperly taken money from one of the business accounts. King subsequently sued Marino in his own name, asserting conversion, theft, fraud, and other claims. Representing herself, Marino generally and specifically denied King's allegations, asserting that the money in question was for work she had performed for his business. Marino also filed a verified denial, pointing out that the money allegedly taken was from King's corporation, which should therefore be the plaintiff rather than King.

After filing suit, King sent a series of discovery requests that included requests for admissions. Through these requested admissions, King sought to have Marino admit liability for the various claims she had already denied. While assembling the documents and other discovery simultaneously sought with these admissions, Marino notified King's attorneys by letter that she would have everything to them by June 2, 2009, and indeed she responded to all discovery requests on that day. In her responses to the requested admissions, Marino again denied liability.

Ten days later, King moved for summary judgment, asking the trial court to set the summary judgment hearing on the first available date. The sole basis for King's motion was Marino's failure to timely respond to his admission requests; admissions he asserted were deemed admitted because

Marino's answers were one day late. King asked for an award of the funds he claimed Marino had taken plus attorney's fees. The summary judgment hearing was set for August 7, 2009.

Marino did not file a formal response to the motion for summary judgment, but she did file a motion to dismiss and a motion for mediation before the hearing. In her motion to dismiss, Marino asserted that King's corporation had employed her, not King, and that the corporation should therefore be the plaintiff. She also sought discovery in the interim, serving King with requests for disclosure, production, and admissions, as well as interrogatories. King answered some of the interrogatories and objected to others. What became of the rest of this discovery is not revealed by the record. Finally, Marino appeared for the summary judgment hearing on August 7.

At this hearing, the trial court invited Marino to respond to the motion for summary judgment, which resulted in the following exchange:

> MS. MARINO: Okay. I worked on getting the things together that were requested. Some of the requests took a fair [amount] of time. I was trying to comply and get it right. Finding all old tax returns and backup for the checks that were paid to me. When I knew that time was running out—my daughter is a special needs, and she had a couple of Special Olympics events that month. And when I knew I was running out of time, I did send the attorney a letter, which I have a copy. It's been filed. But here it is. On May 22nd I sent him a letter saying that it would be probably June 2nd before I could get it to him. Her events took all two weekends. And I'm doing this in my spare time, trying to keep my job, etc.
>
> MR. MURPHY [King's lawyer]: And, your Honor, of course, I would object to the introduction of the letter.
>
> THE COURT: Well —
>
> MS. MARINO: It's on file.
>
> THE COURT: Well, the fact it's on file doesn't mean it's admissible or not. Ms. Marino, let me sort of — when you undertake to represent yourself, you're

perfectly free to do that. But the problem is when you undertake to represent yourself you have to follow the same rules that we guys who have law degrees do. Okay. And there are methods by which you could have requested an extension of time. Just writing a letter to a lawyer saying, "Gee, I haven't had time to do this," is not sufficient under the rules of civil procedure. There are methods that you could have taken to extend the time; however, you did not do so. And I can't change that fact. I'm sympathetic to you. But the job that I have to do has to be one where sympathy is pushed to the side, and I have to rule on what the law says I am required to do. There were no timely admissions filed. Okay. Either denials or admissions. Under the law once that 30 days goes by, the law deems those to have been admitted whether or not they were, could have been admitted, or denied. You chose to represent yourself, and I understand you have the right to do that. But when you come to me, while I am sympathetic to the fact you have a special needs daughter and while I'm sympathetic to the fact she had Special Olympic matters, that might have been a good enough reason for me to have extended the time had you properly asked to do that. But you didn't.

MS. MARINO: Well, I feel like I have a good defense, and it should be heard. And the money I received from Mr. King was for work I did for his corporation. And that's why I have on file a motion to dismiss this case. I have asked and received some discovery from the plaintiff, although not complete in many places. Complete discovery could help sustain my motion to dismiss. I also have a motion to compel discovery pending before the Court at this time. So I just respectfully ask, your Honor, to not allow the summary judgment and proceed to hear my motion to dismiss.

THE COURT: Well, ma'am, I don't know what lawyer has been writing that for you. That frankly sounds like the language of a lawyer.

MS. MARINO: No.

THE COURT: Ma'am, I'm sympathetic to you, and I understand your position. But I'm bound by what the law says. The law says that a motion for summary judgment is filed based on deemed admissions. And the admissions have been deemed by operation of law. You have not filed any kind of responsive pleading to the motion for summary judgment. You filed a lot of other stuff but not a response to the motion for summary judgment. Under Rule 166 of the rules of civil procedure, I'm obligated to grant the summary judgment. There's nothing else I can do. You have an opportunity to have this case appealed, and you certainly have the right to do so. But I'm bound by what the law is, and I hope you understand that. The summary judgment will be granted.

Marino's argument and pending motions raised a ground for continuing the summary judgment hearing—she needed King's discovery—and a ground to deny the summary judgment—she never worked for King. The trial court also sympathetically agreed that Marino might have had good cause to extend the discovery deadline. But because Marino did not file a response to the summary judgment motion, asking either for an extension of the discovery deadline or the withdrawal of her deemed admissions, the trial court concluded that it could do "nothing else" but grant the motion. The court accordingly rendered summary judgment for King for $33,559.92, plus $5,000 attorney's fees.

Marino thereafter filed a timely motion for new trial in which she repeated her arguments at the summary judgment hearing, adding that she could not afford an attorney but had tried her best "to meet the Court's expectations." In closing, she asked for an opportunity to correct her mistake, if she had failed to meet a procedural requirement or needed to supply additional information. Her motion for new trial was overruled by operation of law, and Marino perfected her appeal. The court of appeals thereupon affirmed the summary judgment, concluding that Marino had waived complaint about the deemed admissions "by failing to raise the issue in any manner, either before or after judgment, to the trial court." ___ S.W.3d at ____.

Requests for admission are intended to simplify trials. They are useful when "addressing uncontroverted matters or evidentiary ones like the authenticity or admissiblilty of documents." *Wheeler*, 157 S.W.3d at 443. They may be used to elicit "statements of opinion or of fact or of the application of law to fact." TEX. R. CIV. P. 198.1. King's requests here, however, asked essentially that Marino admit to the validity of his claims and concede her defenses—matters King knew to be

in dispute. Requests for admission were never intended for this purpose. *Stelly v. Papania*, 927 S.W.2d 620, 622 (Tex. 1996) (per curiam) (quoting *Sanders v. Harder*, 227 S.W.2d 206, 208 (Tex. 1950) (stating that requests for admission were "never intended to be used as a demand upon a plaintiff or defendant to admit that he had no cause of action or ground of defense")).

As we have previously observed, requests for admission should be used as "a tool, not a trapdoor." *U.S. Fid. Guar. Co. v. Goudeau*, 272 S.W.3d 603, 610 (Tex. 2008). And when admissions are deemed as a discovery sanction to preclude a presentation of the merits, they implicate the same due process concerns as other case-ending discovery sanctions. *Wheeler*, 157 S.W.3d at 443 (citing *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 917–18 (Tex. 1991)). Thus, in *Wheeler* we required a showing of "flagrant bad faith or callous disregard for the rules" to substantiate a summary judgment based solely on deemed admissions. *See id.* at 443 (noting that "absent flagrant bad faith or callous disregard for the rules, due process bars merits-preclusive sanctions").

Generally, a party responding to requests for admissions must serve a written response on the requesting party within 30 days after service. TEX. R. CIV. P. 198.2(a). The response time may be modified by agreement or by the court for good cause. *Id.* 191.1. If the response is not served timely, however, the request is deemed admitted without the necessity of a court order. *Id.* 198.2(c). But a trial court may allow the withdrawal of a deemed admission upon a showing of (1) good cause and (2) no undue prejudice. *Id.* 198.3. And this same standard applies to a late summary judgment response. *Wheeler*, 157 S.W.3d at 442 (citing *Carpenter v. Cimarron Hydrocarbons Corp.*, 98 S.W.3d 682, 687–88 (Tex. 2002)).

In *Wheeler*, we described the requisite demonstration of good cause and undue prejudice. *Id.* at 442–43. Good cause, we said, "is established by showing the failure involved was an accident or mistake, not intentional or the result of conscious indifference." *Id.* at 442. Undue prejudice we found to depend "on whether withdrawing an admission or filing a late response will delay trial or significantly hamper the opposing party's ability to prepare for it." *Id.* at 443.

As in this case, the pro se litigant in *Wheeler* did not file a summary judgment response but came to argue her case at the summary judgment hearing "because she was again mistaken as to what a summary judgment 'hearing' was." *Id.* at 442. We concluded that the pro se litigant's genuine confusion over discovery deadlines and summary judgment procedures was evidence of good cause, negating the conscious disregard or deliberate neglect required to support a merits-preclusive sanction. *Id*. at 443. We further found no evidence of undue prejudice because the admission responses, although two days late, had been served months before the summary judgment hearing. *Id*.

Marino argues that her case is materially indistinguishable from *Wheeler*. In both cases, responses to the requested admissions were marginally late but were received before the other party moved for summary judgment on deemed admissions; the pro se litigant did not formally respond to the summary judgment motion but attended the summary judgment hearing believing that was the time for response; the trial court granted summary judgment despite the existence of good cause for the withdrawal of the deemed admissions; the pro se litigant filed a motion for new trial, asserting that summary judgment was improper but not explicitly asking that the admissions be withdrawn; and the court of appeals affirmed the summary judgment because the pro se litigant failed to

specifically ask for the withdrawal of the admissions. In *Wheeler*, we held that "the trial court should have granted a new trial and allowed the deemed admissions to be withdrawn upon learning that the summary judgment was solely because [the] responses were two days late." *Id*. at 444. The result should be no different here.

Although trial courts have broad discretion to permit or deny the withdrawal of deemed admissions, they cannot do so arbitrarily, unreasonably, or without reference to guiding rules or principles. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985). The due process concern recognized in *Wheeler* is one such principle that inheres to a request for merits-preclusive admissions. *See In re Rozelle*, 229 S.W.3d 757, 763 (Tex. App.—San Antonio 2007) (quoting *Wheeler* and observing that this due process concern is a "guiding rule and principle that applies '[w]hen requests for admissions are [not] used as intended,' and 'when a party uses deemed admissions to try to preclude presentation of the merits of a case'"). Constitutional imperatives favor the determination of cases on their merits rather than on harmless procedural defaults. Using deemed admissions as the basis for summary judgment therefore does not avoid the requirement of flagrant bad faith or callous disregard, the showing necessary to support a merits-preclusive sanction; it merely incorporates the requirement as an element of the movant's summary judgment burden. *See Wheeler*, 157 S.W.3d at 443–44.

Good cause for the withdrawal of the deemed admissions exists in this case because there is no evidence of flagrant bad faith or callous disregard for the rules and nothing to justify a presumption that Marino's defense lacks merit. *Id*. Moreover, there is nothing to suggest that King was unable to prepare for trial without the admissions and thus no evidence that their withdrawal

will cause him undue prejudice; rather, "the presentation of the merits of the action will be subserved by permitting [Marino] to withdraw the admission[s]." TEX. R. CIV. P. 198.3(b). The trial court accordingly erred in rendering summary judgment on deemed admissions, and the court of appeals erred in affirming that judgment because Marino did not waive the error.

Without hearing oral argument, we reverse the court of appeals' judgment and remand to the trial court for further proceedings consistent with this opinion. TEX. R. APP. P. 59.1.

Opinion Delivered: October 21, 2011

IN THE SUPREME COURT OF TEXAS

NO. 10-0855

IN RE JEFFREY COOK, RELATOR

ON PETITION FOR WRIT OF MANDAMUS

PER CURIAM

JUSTICE LEHRMANN did not participate in the decision.

The relator asks us to decide whether a trial court abused its discretion when it issued an order granting a motion for new trial "based on all grounds in the motion." While this case was pending, however, the judge who signed the order resigned, and we remanded the case pursuant to Texas Rule of Appellate Procedure 7.2(b). The successor trial judge then entered an order stating only that his predecessor's ruling "should remain unchanged." We recently held that a successor trial court's order reaffirming the original trial court's grant of a motion for new trial was "effectively an order refusing to enter judgment on the jury verdict and affects the rights of the parties no less than did the orders of the original judge," and we concluded that the relator in that case was "entitled to know those reasons just as much as it would be entitled to know the reasons for the orders entered by the former trial judge." *In re Columbia Med. Ctr. of Las Colinas*, 290 S.W.3d 204, 214 (Tex. 2009). Accordingly, we conditionally granted mandamus relief, directing the successor trial court to specify the reasons it refused to enter judgment on the jury verdict and

ordered a new trial. *Id.* at 215. Because the successor trial court judge in this case did not state sufficient reasons for his ruling, contrary to our holding in *In re Columbia*, we conditionally grant relief.

This a divorce action between Barbara and Jeffrey Cook. Barbara sought to enforce an in-court agreement as a contract. The case proceeded to trial to determine whether Jeffrey lacked mental capacity to enter the agreement. After the jury returned a verdict in Jeffrey's favor, Barbara moved for a new trial, alleging: (1) factually insufficient evidence, (2) jury misconduct, (3) improper admission of evidence, (4) jury charge error, (5) improper testimony from witnesses that were not disclosed in discovery, and (6) a new trial was required "in the interest of justice."

The trial court granted Barbara's motion without stating the reasons for doing so. Jeffrey sought mandamus relief from the court of appeals, arguing that the trial court abused its discretion in granting the motion for new trial without clearly articulating reasons. While the mandamus petition was pending, the trial court signed an amended order granting a new trial "based on all grounds in the motion." Shortly thereafter, the trial judge resigned, and a successor judge was appointed.

The court of appeals denied Jeffrey's petition. 2010 WL 2331431, at *1. The court of appeals also denied Jeffrey's motion for rehearing, which sought to abate the case until the successor judge had an opportunity to reconsider the order. *See* TEX. R. APP. P. 7.2(b). Jeffrey then petitioned this Court for a writ of mandamus and asked us to abate the mandamus proceeding and allow the successor judge to reconsider the order granting the motion for a new trial. We abated the case. *See id.*

The trial court issued an order stating that "[t]he Court, having reviewed the record before it, is of the opinion that the orders signed by [the original trial court judge] should remain unchanged." The order specified no reasons for its ruling. On January 7, 2011, we lifted the abatement order and reinstated the original proceeding.

We recently held that a trial court's failure to clearly state the reasons for setting aside a jury verdict and for granting a new trial constitutes an abuse of discretion for which there is no adequate remedy by appeal. *In re Columbia*, 290 S.W.3d at 209–10, 212–13. In that case, the successor trial court judge failed to state specific grounds for reaffirming the grant of a new trial. *See id.* at 206 (noting that successor trial court's order merely stated that it "reaffirmed" original trial court's order).

In *In re Baylor Medical Center at Garland*, the relator challenged the grounds the original trial court judge relied upon in granting a new trial, even after two successor trial court judges had considered the order and reaffirmed the original new trial order without giving independent reasons for doing so. 289 S.W.3d 859, 860 (Tex. 2009) (*Baylor II*). Relying on our holding in *Baylor I* that "[m]andamus will not issue against a new judge for what a former one did," *In re Baylor Med. Ctr. at Garland*, 280 S.W.3d 227, 228 (Tex. 2008)(*Baylor I*), we refused to consider the reasons the first trial court judge gave in his new trial order. *Baylor II*, 289 S.W.3d at 860. In accordance with *Columbia*, we conditionally granted mandamus relief directing the trial court to explain why it affirmed the order granting a new trial. *Id.* at 861.

Jeffrey asserts that the original trial court's order disregarding the jury verdict and granting a new trial "based on all grounds in the motion" was not sufficiently specific under *Columbia*. As

in *Columbia* and *Baylor II*, however, the former trial court's order is no longer at issue here, as the successor trial judge has since issued a subsequent order. Accordingly, we do not decide whether the former trial court's grant of a new trial "based on all grounds in the motion" constitutes an abuse of discretion. *See Baylor II*, 289 S.W.3d at 860. Instead, we focus on whether the most recent order by the successor judge satisfies *Columbia*. *See State v. Olsen*, 360 S.W.2d 402, 403 (Tex. 1962)("A writ of mandamus will not lie against a successor judge in the absence of a refusal by him to grant the relief Relator seeks."). We conclude that it does not.

Reaffirming the former trial court's order was tantamount to granting the motion for new trial. Consequently, the successor trial court must provide its own statement of the reasons for setting aside a jury verdict. *See In re Columbia*, 290 S.W.3d at 212–13. As in *Columbia*, the successor judge's failure to do so was an abuse of discretion for which there is no adequate remedy by appeal. *See id.* at 209–10, 212–13.

Without hearing oral argument, TEX. R. APP. P. 52.8(c), we conditionally grant Jeffrey's petition for writ of mandamus and direct the successor trial court to specify the reasons why it refused to enter judgment on the jury verdict. *See In re Columbia*, 290 S.W.3d at 215 (requiring reasons to be "clearly identified and reasonably specific").

We are confident that the trial court will comply, and our writ will issue only if it does not.

OPINION DELIVERED: December 16, 2011

IN THE SUPREME COURT OF TEXAS

No. 10-0859

IN THE MATTER OF M.P.A., PETITIONER,

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

Argued January 10, 2012

JUSTICE GUZMAN delivered the opinion of the Court.

A jury found that M.P.A. committed sexual assault of a child based on the testimony of two witnesses who have now recanted, and sentenced M.P.A. to twenty years' confinement after hearing false testimony by a State's expert. The district court denied habeas relief and the court of appeals affirmed. M.P.A. asks us to reverse and hold that he is actually innocent, that the false testimony contributed to his sentence, and that his trial counsel rendered ineffective assistance.

We conclude M.P.A. is not entitled to relief on his claims of actual innocence or ineffective assistance of counsel. However, we hold false testimony by the State's expert witness contributed to his sentence and he is therefore entitled to a new disposition (sentencing) hearing.

I. Factual and Procedural History

S.A. and A.A. accused their cousins M.P.A. and J.W.A. of sexually assaulting them. At the time of the alleged acts, S.A. was seven, A.A. was five, M.P.A. was fourteen, and J.W.A. was

fifteen.[1] M.P.A. and J.W.A. were charged with three counts of aggravated sexual assault of a child. J.W.A. entered a plea bargain and pleaded true to the allegations regarding S.A. M.P.A. pleaded not true and went to trial.

At trial, A.A. did not testify that M.P.A. had sexually assaulted him, but both S.A. and A.A. testified that M.P.A. sexually assaulted S.A. In addition, Alice Linder, a sexual assault nurse examiner who had examined S.A. and A.A. testified that they told her that M.P.A. and J.W.A. had sexually assaulted them. M.P.A. was the only defense witness and he testified that he did not sexually assault S.A. The trial court granted a defense motion for a directed verdict regarding the count that M.P.A. had sexually assaulted A.A. The jury found that M.P.A. had sexually assaulted S.A.

At the disposition phase, the State presented two witnesses: Dr. Frederick Willoughby, a licensed psychologist and registered sex offender treatment provider, and Kathie Lewis, a probation officer. Willoughby testified regarding an "Abel Assessment" that he had administered to M.P.A. Willoughby testified that the Abel Assessment is a test that predicts which people have an interest in particular sexes and age groups. One portion of the test consists of a questionnaire. M.P.A.'s answers to this portion of the test were "socially desirable." The portion of the Abel Assessment at issue in this case consists of a series of slides that are shown to the subject. The slides depict individuals of various age and gender, and the subject's sexual interest is measured by how long the

[1] S.A. and A.A. are sister and brother and M.P.A. and J.W.A. are brothers. The four children are related through their fathers, who are brothers. Thus, M.P.A. and J.W.A.'s father is S.A. and A.A.'s uncle, and S.A. and A.A.'s father is M.P.A. and J.W.A.'s uncle.

subject looks at each slide. The results are computerized and sent to Atlanta, where the test is "scored."

After the trial court overruled M.P.A.'s reliability objection to the Abel Assessment, Willoughby testified that M.P.A. was a "pedophile" who had a "significant sexual interest in eight to ten year-old females and two to four and eight to ten year-old males." Lewis testified that probation and home supervision would be inappropriate for M.P.A. The only witness for M.P.A. was his mother, who testified that she would supervise M.P.A. if the jury assessed a sentence of probation. The jury sentenced M.P.A. to twenty years' confinement.

A.A. recanted approximately nine months after the trial and S.A. recanted approximately twenty months after the trial. At the habeas court below, both S.A. and A.A. testified that they falsely accused their cousins because their mother, LaVonna, told them to. J.W.A. also recanted his confession and testified at the habeas court that he did not sexually assault A.A. and S.A. In addition, the evidence at the habeas hearing showed that approximately four years after M.P.A.'s original trial, Willoughby entered into an agreed order with the Texas State Board of Examiners of Psychologists stating that he "misstated in his court testimony the research that had been conducted with respect to the Abel Assessment."

M.P.A. filed the writ of habeas at issue in this case, arguing that he was actually innocent, that Willoughby's false testimony contributed to his sentence, and that his trial counsel rendered ineffective assistance. The habeas court found that the recantations were not credible. In so finding, it relied on J.W.A.'s confession and the testimony from all the witnesses. It also found that

Willoughby's "misstatements, if any," did not contribute to M.P.A.'s sentence, and that M.P.A.'s trial counsel was effective. The court of appeals affirmed and M.P.A. appealed to this Court.[2]

II. Actual Innocence

M.P.A. argues that he is entitled to relief based on the newly discovered evidence of S.A. and A.A.'s recantations. At the habeas hearing, they testified that LaVonna told them to falsely accuse M.P.A. and J.W.A. S.A. testified that LaVonna told her this was necessary to keep LaVonna out of jail. M.P.A. alleges that LaVonna's motive was that these accusations would reflect badly on S.A. and A.A.'s father, Stephan, in their then-ongoing custody proceeding, and that the recantations are corroborated by the record.[3]

To prevail on his actual innocence claim, M.P.A. must show by clear and convincing evidence that no reasonable juror would have convicted him in light of the recantations. *Ex Parte Elizondo*, 947 S.W.2d 202, 209 (Tex. Crim. App. 1996).[4] Almost total deference is accorded to the

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[2] "Although quasi-criminal in nature, proceedings in juvenile court are considered civil cases; thus, this Court, rather than the Court of Criminal Appeals, is the Texas court of last resort for such matters." *In re Hall*, 286 S.W.3d 925, 927 (Tex. 2009). "[T]he Court of Criminal Appeals has concluded that it lacks jurisdiction to issue extraordinary writs in such cases, even those initiated by a juvenile offender who has been transferred to the Texas Department of Criminal Justice because he is now an adult. . . . [I]t is the applicant's age at the time he commits the delinquent acts that determines jurisdiction, rather than his age when applying for habeas corpus." *Id.* at 927 (citing *Ex Parte Valle*, 104 S.W.3d 888, 889 (Tex. Crim. App. 2003) (internal citations omitted).

[3] Evidence corroborating the recantations includes: evidence that the allegations were made after LaVonna left Texas with S.A. and A.A. in violation of a court order and having stolen money from her employer; evidence that the allegations of abuse in the present case coincided with key events in the custody dispute between S.A. and A.A.'s parents; evidence that LaVonna had made false allegations of sexual abuse of children on other occasions; testimony that LaVonna had said she would do anything to maintain custody and that she would hurt M.P.A. and J.W.A.'s family; an affidavit from LaVonna's sister stating that LaVonna would lie about sexual abuse of children to gain an advantage in a custody proceeding; and evidence attacking the inculpatory medical evidence.

[4] An applicant may also present an actual innocence claim that is tied to a showing of constitutional error at trial. To prevail on this type of claim, "[a]n applicant must show that the constitutional error probably resulted in the conviction of one who was actually innocent." *Ex parte Spencer*, 337 S.W.3d 869, 878 (Tex. Crim. App. 2011) (citing *Schlup v. Delo*, 513 U.S. 298 (1995)). M.P.A. has not argued that he is entitled to relief based on a *Schlup*-type claim.

trial court's factual findings in habeas proceedings. *E.g., Ex Parte Amezquita*, 223 S.W.3d 363, 367 (Tex. Crim. App. 2006). Here, the habeas court found that the recantation testimony was "not credible." Because this finding has some support, we cannot grant M.P.A. relief on his actual innocence claim.[5]

In *Keeter v. State*, the Court of Criminal Appeals addressed a recantation of a juvenile's sexual assault allegations in the context of a motion for a new trial. 74 S.W.3d 31, 33 (Tex. Crim. App. 2002). The Court surveyed its cases and summarized the bases for disbelieving a recanting witness:

> Such bases include, but are not limited to: evidence that the recanting witness was subject to pressure by family members or to threats from co-conspirators, evidence showing part of the recantation to be false, circumstances showing that the complainant recanted after moving in with family members of the defendant, and where an accomplice recants after being convicted.

Id. at 38 (citations omitted). The *Keeter* Court affirmed the trial court's rejection of the recantation because, *inter alia*, the complainant recanted after moving into the residence of her mother, with whom the defendant had resided, and there was evidence that the defendant's father had pressured the complainant to recant. *Id.* at 39.

Here, although substantial evidence corroborates the recantations, there is some evidence of pressure to recant by Stephan's family and an investigator hired by Stephan. While we recognize that recantation of sexual assault in the context of custody litigation should be given serious

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[5] In the context of a motion for a new trial, the Court of Criminal Appeals has noted that it is unclear whether a trial court's rejection of a recantation requires record support. *Keeter v. State*, 74 S.W.3d 31, 37–38 (Tex. Crim. App. 2002). Because we find that there is record support for the habeas court's rejection of the recantations, we do not address this issue.

consideration, there is evidence in this record to support the trial court's rejection of the recantation testimony. S.A. first recanted when Stephan's girlfriend told S.A. she did not like her because S.A. was a liar who put people in jail. A.A. and S.A. both testified that the investigator hired by Stephan did not pressure them to recant, but A.A. testified that the investigator gave him "encouragement" to recant and "kept asking" him if the sexual assault allegations were true.

In addition, J.W.A. confessed to the police that he had sexually assaulted S.A. and he subsequently pleaded true to sexually assaulting S.A. We note that J.W.A. recanted his confession and has testified that he did not understand the significance of his confession or plea. We further note that the Court of Criminal Appeals has explained that innocent defendants will sometimes plead guilty. *Ex Parte Tuley*, 109 S.W.3d 388, 393 n.2 (Tex. Crim. App. 2002) (citing *United States v. Timbana* 222 F.3d 688, 718 (9th Cir. 2000) (Kleinfeld, J., dissenting)). However, even if we were to accept J.W.A.'s explanations of his confession and plea as conclusive, his statements to M.P.A.'s trial attorney, Bobby Barina, would nevertheless support the rejection of the recantations.

Barina testified J.W.A. told him he and M.P.A. sexually assaulted S.A. Barina explained M.P.A. and J.W.A.'s family informed him J.W.A. would testify M.P.A. did not commit the alleged assault. Therefore, Barina planned to call J.W.A. to the stand at the original trial to testify M.P.A. was innocent. However, when Barina met with J.W.A. to prepare for trial, J.W.A. implicated M.P.A. in the offense. J.W.A. said he himself "had done it and that he saw [M.P.A.] 'do it.'" If J.W.A. testified M.P.A. did not commit the offense, it could amount to perjury. If J.W.A. testified M.P.A. committed the offense, it could damage M.P.A.'s defense. Barina decided not to call J.W.A. as a witness. This statement by J.W.A. is not negated by J.W.A.'s explanation of his confession to

the police or his decision to plead true—neither his confession nor plea implicated M.P.A. in a sexual assault on S.A. J.W.A. denies telling Barina he and M.P.A. sexually assaulted S.A. But the habeas court was entitled to believe Barina. Hence, JWA's statement to Barina supports the habeas court's decision.

M.P.A. cites several cases with factual similarities to the instant case. However, we defer to habeas courts' credibility determinations and in those cases the habeas courts had credited the recantations. *See Ex parte Calderon*, 309 S.W.3d 64, 65 (Tex. Crim. App. 2010); *Ex Parte Thompson*, 153 S.W.3d 416, 417 (Tex. Crim. App. 2005); *Elizondo*, 947 S.W.2d at 210. In contrast, here the habeas court, with some record support, rejected the credibility of the recantations. Like the *Calderon*, *Thompson*, and *Elizondo* courts, we defer to the habeas court's evaluation of the recantations' credibility because there is some evidence supporting that determination.[6] Therefore, we conclude that M.P.A. has not established his right to relief on grounds of actual innocence.

III. False Testimony

A. Background

As a threshold matter, we must determine whether M.P.A. may bring his false testimony claim via habeas. Defendants are ordinarily barred from raising claims on habeas that could have

[6] The Texas Constitution prohibits our Court from engaging in factual sufficiency review. TEX. CONST. art. V, § 6(a) (stating that courts of appeals' decisions are conclusive on all questions of fact). In the habeas corpus context, we are bound by the trial court's credibility determination if there is record support for that finding. Here, the trial court determined that the recantation testimony was not credible. The trial court heard all the testimony and is best suited to make credibility determinations. *See Wainwright v. Witt*, 469 U.S. 412, 428 (1985) ("such a finding is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province"). We cannot speculate as to how we would hold regarding the credibility of the recantation testimony had we been in the trial court's position. However, because there is some record support for the trial court's determination, M.P.A. has not established his right to relief on actual innocence grounds.

been raised at trial or on direct appeal. *Ex parte Napper*, 322 S.W.3d 202, 228 (Tex. Crim. App. 2010) (citing *Ex parte Pena*, 71 S.W.3d 336, 337–38 (Tex. Crim. App. 2002)). However, while the Court of Criminal Appeals has found that a defendant's failure to complain about false testimony by the State before a habeas proceeding affects the threshold for showing harm, it did not find that the claim was barred. *Ex parte Fierro*, 934 S.W.2d, 374–75 & 374 n.10 (Tex. Crim. App. 1996), *see also Ex parte Ghahremani*, 332 S.W.3d 470, 481 (Tex. Crim. App. 2011) (citing *Fierro*, 934 S.W.2d at 371–74, and noting that, in *Fierro*, evidence showing that testimony was false was available at suppression hearing but not used until habeas).

The State knowingly used false testimony in *Fierro*, 934 S.W.2d at 371–73, but no evidence shows that the State knowingly used the false testimony in the instant case. However, the Court of Criminal Appeals does not distinguish between knowing and unknowing usage of false testimony for purposes of harm analysis. *Ex parte Chabot*, 300 S.W.3d 768, 771 (Tex. Crim. App. 2009).[7] Therefore, M.P.A.'s false testimony claim is properly before us.

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[7] The Court of Criminal Appeals has allowed for the possibility of a lesser threshold for the showing of harm when the State knowingly used false testimony and the defendant did not have the opportunity to discover and raise that claim at trial or on direct review. *Napper*, 322 S.W.3d at 242–43 (citing *Chabot*, 300 S.W.3d at 770–72; *Fierro*, 934 S.W.2d at 372–75 & 375 n.10). This implicitly allows for the possibility of a greater threshold to show harm—or theoretically a stricter preservation of error standard—when there is unknowing use of false testimony and the applicant had an opportunity to raise the issue at trial or on direct review. However, we will not find waiver based on a potential implication in the case law when a plain reading of *Fierro* and *Chabot* indicates that M.P.A. can bring his false testimony claim.

We also note that the Court of Criminal Appeals has stated that there is a question about forfeiting a false testimony claim when an applicant made no complaint about allegedly false testimony at trial. *Napper*, 322 S.W.3d at 241 (citing *Estrada v. State*, 313 S.W.3d 274, 288 (Tex. Crim. App. 2010)). In *Napper*, the Court of Criminal Appeals addressed the merits "[w]ithout expressing any opinion on the preservation of error question." *Id.* Regardless, its current precedent allows M.P.A. to bring the false testimony claim in habeas and we will not find waiver by anticipating future potential decisions. This is consistent with the Legislature's statutory directives that its provisions relating to habeas "shall be most favorably construed in order to give effect to the remedy, and protect the rights of the person seeking relief under it," TEX. CODE CRIM. PRO. art. 11.04, and that the purpose of a habeas appeal is "to do substantial justice to the parties," TEX. R. APP. PROC. 31.2.

A false testimony claim is subject to harmless-error review. *Chabot*, 300 S.W.3d at 771; *Fierro*, 934 S.W.2d at 374. A habeas applicant must establish by a preponderance of the evidence that the error contributed to his conviction or punishment. *Chabot*, 300 S.W.3d at 771; *Fierro*, 934 S.W.2d at 375. This framework applies to the trial's disposition phase as well as the adjudication phase. *Ghahremani*, 332 S.W.3d at 477 (citing *Estrada*, 313 S.W.3d at 287–88). Applying this standard here, M.P.A. must show that Willoughby's testimony would have been excluded had it been truthful and that M.P.A. would have received a different sentence absent Willoughby's testimony.[8] We hold that M.P.A. has met this burden and is entitled to a new disposition hearing.

B. Admission of the Willoughby Testimony

Willoughby testified as an expert in this case. A party offering scientific expert testimony must show by clear and convincing evidence that the science is reliable. *Kelly v. State*, 824 S.W.2d 568, 573 (Tex. Crim. App. 1992); *see also In re D.W.P.*, No. 06-07-00113-CV, 2008 WL 53211, at *1 (Tex. App.—Texarkana Jan. 4, 2008, no pet.) ("Even though appeals of juvenile court orders are generally treated as civil cases, we believe the criminal standard for the admission of scientific evidence should apply in light of the quasi-criminal nature of juvenile proceedings." (footnote and citation omitted)).[9] "'Unreliable . . . scientific evidence simply will not assist the [jury] to understand the evidence or accurately determine a fact in issue; such evidence obfuscates rather than leads to an intelligent evaluation of the facts.'" *Kelly*, 824 S.W.2d at 572 (alterations in original)

[8] Alternatively, M.P.A. could prevail by showing that, even had Willoughby's testimony been admitted, if it was truthful the jury would have handed down a lesser sentence. We do not reach this issue.

[9] *Kelly* applies to all scientific evidence, regardless of whether or not it is novel. *Nenno v. State*, 970 S.W.2d 549, 560 (Tex. Crim. App. 1998).

(quoting Kenneth R. Kreiling, *Scientific Evidence: Toward Providing the Lay Trier With the Comprehensible and Reliable Evidence Necessary to Meet the Goals of the Rules of Evidence*, 32 ARIZ. L. REV. 915, 941–42 (1990)).

Kelly governs the reliability determination and specifies several non-exclusive factors to guide the inquiry.[10] 824 S.W.2d 571–73. Two of these factors, the potential error rate and the existence of supporting literature, are the primary issues in M.P.A.'s false testimony claim and the subjects on which Willoughby testified falsely.

Willoughby testified regarding the Abel Assessment outside the presence of the jury. When asked about the Abel Assessment's error rate, he stated that "[f]or classifying people who have significant sexual interest in female children under the age of fourteen, the accuracy rate is 85 percent." This is particularly significant because at the time of the alleged offense, S.A. fell into this category. In addition, in response to a question regarding the existence of literature supporting or rejecting the Abel Assessment, Willoughby stated that "[t]here is [sic] a number of articles out by Gene Abel and his colleagues. Also researchers at Brigham Young University have established the reliability of the instrument and the classification accuracy of the instrument."

Much of this testimony was false. In 1998, the accuracy rate of the Abel Assessment, according to Abel and his colleagues, for classifying people with a significant sexual interest in

[10] M.P.A. briefed this issue under *E.I. du Pont de Nemours and Co. v. Robinson*, which controls the reliability inquiry in civil cases. 923 S.W.2d 549, 552–58 (Tex. 1995). Because juvenile proceedings are quasi-criminal in nature and criminal law evidentiary rules govern, *In re M.A.F.*, 966 S.W.2d 448, 450 (Tex. 1998), we use the language from *Kelly* rather than *Robinson*. However, neither party suggests that the tests are substantively different as applied to this case. *See also Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 731 (Tex. 1997) (Gonzalez, J., concurring) (calling *Kelly* the Court of Criminal Appeals' "equivalent of *Robinson*"). Reliable evidence should be admitted in both the civil and criminal context, and unreliable evidence or "junk science" should be kept out of court in either context.

female children under fourteen was only 65%, not 85%. This weighs against the reliability of the Abel Assessment.[11]

Furthermore, contrary to Willoughby's testimony, the Brigham Young University (BYU) studies failed to establish the Abel Assessment's reliability as applied to adults and actively established that it was unreliable as applied to adolescents. Regarding adults, they found that it was a "promising instrument based on a sound idea," but concluded that "the evidence of its reliability and validity for use with adults is weak as of yet," labeled it a "nonvalidated instrument," and called for "further research" and "refinement."

Regarding the application of the Abel Assessment to adolescents, they found that no research other than their own had been done and that Abel's initial study only included two adolescents. Their own research led them to conclude that data did "not support the reliability of [the Abel Assessment] for use with adolescents," "that the ability of [the Abel Assessment] to discriminate adolescent offenders from nonoffenders was not significantly better than chance," and the Abel Assessment's "ability to screen or diagnose adolescent perpetrators reliably has not been demonstrated."

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[11] *See United States v. Birdsbill*, 243 F.Supp.2d 1128, 1135–36 (D. Mont. 2003) (describing later version of the Abel Assessment's error rates of 21–22% and 32% as "poor" and finding test unreliable); *United States v. White Horse*, 177 F.Supp.2d 973, 975 (D. S.D. 2001) (stating that 24% false negative on Abel Assessment "does not assist the jury" and finding test inadmissible); *State v. Ericson*, 13 A.3d 777, 781–82 (Me. 2011) (affirming trial court's exclusion of testimony regarding Abel Assessment and stating that error rate between 21% and 32% raises significant concern about reliability); *Figueroa v. State*, No. 04-08-00452-CR, 2009 WL 2183460, at *3–4 (Tex. App.—Amarillo July 22, 2009, no pet.) (citing *Birdsbill*, 243 F.Supp.2d at 1135, and referring to Abel Assessment's "significant potential for error" and affirming exclusion of testimony regarding Abel Assessment); *cf. United States v. Robinson*, 94 F.Supp.2d 751, 753–54 (W.D. La. 2000) (finding Abel Assessment reliable where evidence at hearing indicated 78% or 79% accuracy).

The State argues that the following evidence supports the admission of Willoughby's testimony:

- The statement in one of the BYU articles that "approximately 300 therapists in 36 states and two foreign countries, as well as 8 states' judicial systems" used the assessment;
- Abel's study of the Abel Assessment;
- Four independent studies supporting the theory underlying the Abel Assessment;
- The inability of M.P.A. and J.W.A.'s attorneys to find an expert to attack the Abel Assessment.

With the exception of Abel's own study, the State did not present this evidence to the trial court. Nor would this evidence have been presented to the trial court had Willoughby testified truthfully regarding the Abel Assessment's error rate and the BYU studies' reliability findings. Therefore, we do not consider it in our determination of whether the trial court would have found the Abel Assessment reliable absent Willoughby's false testimony.[12]

The State argues that we should consider the four independent studies because the State would have used them to rebut the criticisms in the BYU studies if Willoughby had testified

[12] For the same reason, we would not consider the numerous published attacks on the Abel Assessment's reliability and cases rejecting the Abel Assessment which were not raised in the trial court but are now cited by M.P.A. and amicus Innocence Project of Texas, even if they were available at the time of trial. To do otherwise would convert a claim attacking false testimony into a general retrial of the reliability of the Abel Assessment. Indeed, the false testimony would be irrelevant under this approach.

truthfully about the BYU studies.[13] The State's framework would require that we assume Willoughby was aware of these studies and speculate as to how he would have testified about them. We reject this approach and do not consider the four studies. *See, e.g.*, *Graves v. Cockrell*, 351 F.3d 143, 156 (5th Cir. 2003) (referencing the largely speculative nature of allegations of what an uncalled witness would have testified to as a reason why complaints of uncalled witnesses are not favored).[14]

The State additionally argues that we should apply the less stringent standard from *Nenno v. State* to this case. 970 S.W.2d 549, 561 (Tex. Crim. App. 1998), *overruled on other grounds by State v. Terrazas*, 4 S.W.3d 720, 727 (Tex. Crim. App. 1999). *Nenno* held that *Kelly*'s reliability requirement applies with less rigor to fields of study aside from the hard sciences. *Id. Nenno* noted that "hard science methods of validation, such as assessing the potential error rate or subjecting a theory to peer review, may often be inappropriate for testing the reliability of fields of expertise outside the hard sciences." *Id.*

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[13] These studies were papers presented at a conference and are not in the record before us. *See* Gene Abel, *The Importance of Meeting Research Standards: A Reply to Fischer and Smith's Articles on the Abel Assessment for Sexual Interest*, 12 Sexual Abuse: J. Res. & Treatment, 155, 161 (No. 2, 2000) (citing papers).

[14] Furthermore, the State does not specify their content or what aspect, if any, of the BYU studies they would have been responsive to. Although they were cited in an article by Abel that was published after M.P.A.'s trial and attacked the BYU studies, he cited the papers referred to by the State in his introduction as studies coming to a different conclusion from the BYU studies. He did not suggest the papers cited by the State were themselves critical of the BYU studies.

Moreover, the titles of at least two of the papers, *A Comparison of the Penile Plethysmograph with The Abel Assessment for Sexual Interest on Incarcerated Military Sex Offenders*, and *Comparing Outcomes of Plethysmographic Assessment with The Abel Assessment in a Prison Based Sex Offender Sample*, indicate they did not address the use of the Abel Assessment on adolescents.

Finally, we note that other courts found the Abel Assessment unreliable and criticized what appear to be the same studies. *See Birdsbill*, 243 F.Supp.2d at 1134–35 (criticizing studies on multiple grounds and finding they do not support the reliability of a later version of the Abel Assessment); *Ready v. Massachusetts*, No. Civ.A. 00-10390 SDP2002, 2002 WL 1255800, at *8–12 (Mass. Super. Ct. May 17, 2002, pet. denied) (same).

This case stands in sharp contrast to *Nenno*. There, an expert testified regarding future dangerousness based on his experience studying cases. *Id.* at 562. That expert "did not contend that he had a particular methodology." *Id.* Here, the Abel Assessment was subject to peer review and testing of its accuracy rate. Therefore, we consider those factors. *See Mendoza v. State*, No. AP–7521, 2008 WL 4803471, at *22 n.62 (Tex. Crim. App. Nov. 5, 2008) (applying peer review factor in the soft science context of predicting future dangerousness because expert claimed to have a methodology, and contrasting *Nenno*); *Nenno*, 970 S.W.2d at 561 & n.9 (stating that *Nenno* does not preclude employing the error rate and peer review factors in appropriate cases).[15]

In sum, had Willoughby testified truthfully, the trial court would have been faced with testimony regarding a test that had only a 65% accuracy rate as applied to this case, was subject to at least some criticism in the literature as applied to this case, and had no support from independent studies as applied to this case. The only evidence to support admission of the testimony regarding the Abel Assessment would have been a study by its creator that did not address the assessment's application to this case. Given the evidence regarding the Abel Assessment's application to adolescents, had Willoughby testified truthfully, the State would not have established the

[15] *Kelly* frames the reliability inquiry as addressing: (1) the validity of the underlying scientific theory; (2) the validity of the technique applying the theory; and (3) the correct application of the technique on the occasion in question. 824 S.W.2d at 573. *Nenno* frames the inquiry as addressing: (1) whether the field of expertise is legitimate; (2) whether the subject matter of the expert's testimony is within the scope of the field; and (3) whether the expert's testimony properly relies on or utilizes the field's principles. 970 S.W.2d at 561. Because the peer review and error rate factors failed to establish the Abel Assessment's reliability, the differences between the tests are immaterial here. *See State v. Medrano*, 127 S.W.3d 781, 785 (Tex. Crim. App. 2004) (stating that "because the objective of both *Kelly* and *Nenno* was to ensure the reliability of expert testimony and scientific evidence, *Nenno* '[did] not categorically rule out employing [the *Kelly*] factors in an appropriate case'") (alterations in original) (quoting *Nenno*, 970 S.W.2d at 561 n.9).

assessment's reliability under *Kelly*. Therefore, we hold that the trial court would have excluded Willoughby's testimony.

C. Harm Analysis

In order to obtain a new sentencing hearing, M.P.A. must prove by a preponderance of the evidence that Willoughby's testimony contributed to his sentence. *Ex parte Williams*, 65 S.W.3d 656, 658 (Tex. Crim. App. 2001).[16] We review a trial court's legal conclusions de novo, but defer to its fact findings if they are supported by the record. *See Reliance Nat'l Indem. Co. v. Advance'd Temporaries, Inc.*, 227 S.W.3d 46, 50 (Tex. 2007) ("Appellate courts review legal determinations de novo, whereas factual determinations receive more deferential review based on the sufficiency of the evidence."). Applying this standard to the instant case, we conclude that the State's use of Willoughby's testimony throughout its closing argument contributed to M.P.A.'s sentence.

The State argues that the testimony of M.P.A.'s trial counsel, Bobby Barina, supports the habeas court's finding that Willoughby's testimony likely did not sway the jury. Barina stated in his affidavit that Willoughby's testimony had "zero impact" on the jury. At the habeas hearing, he explained that Willoughby's testimony was "boring." He stated that it "didn't provide any insight to anybody," but did not remember that Willoughby likened M.P.A. to a pedophile. Barina also

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[16] M.P.A. argues that we should review this determination de novo and cites *Johnson v. Cain*, 215 F.3d 489, 495 (5th Cir. 2000). However, there is no indication that the *Johnson* court reviewed findings of fact de novo. M.P.A. also argues that the Court of Criminal Appeals has stated that it "must independently examine the record." *Burnett v. State*, 88 S.W.3d 633, 638 (Tex. Crim. App. 2002). We note that *Burnett* was in the context of a direct appeal, where there were no relevant findings regarding harmful error to defer to. In contrast, in the context of harmless error analysis in a habeas case, the Court of Criminal Appeals has stated that it generally defers to the lower court's findings of fact and conclusions of law when they are supported by the record. *Chabot*, 300 S.W.3d at 772.

described Willoughby as "arrogant" and stated that the jury did not take "much consideration to anything Dr. Willoughby told them . . . just because of the nature of Willoughby."

Barina's observations do not address the State's use of Willoughby's testimony to refer to M.P.A. as a pedophile throughout its closing argument. *See Serv. Corp. Int'l v. Guerra*, 348 S.W.3d 221, 236 (Tex. 2011) (stating that determination of whether error is harmful includes evaluating closing argument and counsel's emphasis of erroneous evidence); *Mathis v. State*, 67 S.W.3d 918, 929 (Tex. Crim. App. 2002) (Johnson, J., concurring) (separately analyzing admission of testimony and State's use of that testimony during closing statements); *LaPoint v. State*, 750 S.W.2d 180, 192 (Tex. Crim. App. 1988) (analyzing whether the State exploited erroneous instruction during closing argument). Here, the State argued:

- "He's been diagnosed as a pedophile by an expert. He is at a high risk to re-offend."
- "[Y]ou've heard the psychologist tell you he is a pedophile. He is at a high risk to reoffend."
- "You now know he's been classified as a pedophile by an expert. You now know that he is interested in children, interested in children, in fact, in the same age group as little [S.A.]. Think about her and think about that."

These references to Willoughby's testimony bolstered the State's closing theme of protecting the community:

- "[I]f you put him on probation, we've already seen that just allows for victims."

- "Our community simply cannot take that chance by releasing him back in that home. It's a tough decision to make, but it's a decision that's backed up by the evidence and the testimony."
- "How are you going to protect the public? The evidence has shown that the only way you're going to be able to do that is by putting him away for some time. Because you're going to have to protect other children. And with your verdict, you can at least keep him out of your community for a while."
- "[Y]ou're also telling him, 'If I put you on probation, I'm going to walk right out this door with you.' He could be next to you in the parking lot today and in your neighborhood tomorrow. Think about that."

In sum, the State utilized Willoughby's testimony throughout its closing theme of protecting the community. In addition, the State emotionally appealed to the jury to think about Willoughby's classification of M.P.A. as a pedophile with a specific interest in S.A.'s age group. Indeed, the State's closing argument made more express references to Willoughby's testimony than to any other testimony in the case. Therefore, we conclude that the State's use of Willoughby's testimony at closing contributed to M.P.A.'s sentence.

IV. Ineffective Assistance of Counsel

Juveniles are entitled to effective assistance of counsel in adjudication proceedings. *E.g.*, *In re R.D.B.*, 20 S.W.3d 255, 258 (Tex. App.—Texarkana 2000, no pet.). To obtain habeas relief on a claim of ineffective assistance of counsel, M.P.A. must show that Barina's performance was objectively unreasonable and Barina did not function as the "counsel" guaranteed by the Sixth

Amendment. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984). M.P.A. must make this showing by a preponderance of the evidence. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999).

Courts measure reasonableness by prevailing professional norms, *Strickland*, 466 U.S. at 688, and give a heavy measure of deference to counsels' judgments, *id.* at 691. We look to "the totality of the representation and the particular circumstances of each case" in evaluating effectiveness. *Thompson*, 9 S.W.3d at 813. There is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689.

The question of Barina's effectiveness is one of mixed law and fact, *id.* at 698, and we therefore defer to the trial court's factual determinations but review its legal determinations de novo, *Perry Homes v. Cull*, 258 S.W.3d 580, 598 (Tex. 2008). We conclude that Barina's performance was not deficient under *Strickland*.

M.P.A. argues that Barina rendered ineffective assistance at the adjudication phase because he failed to investigate or advance arguments that no sexual abuse occurred. However, at the time of trial, J.W.A. had confessed, which was inconsistent with an argument that no sexual assault occurred. Therefore, Barina could reasonably have believed that a strategy of affirmatively disproving the existence of a sexual assault would not have been effective.

M.P.A. specifically argues that Barina failed to interview a member of Catholic Charities who had noted that S.A. and A.A. denied abuse and showed no definitive indicators of abuse. However, the statement that the children denied abuse was not made until after trial. In addition, Barina stated that he had reviewed a report by Catholic Charities at the time of trial, which stated that

there was no outcry but also discussed reasons why children typically might not volunteer information. Furthermore, pursuing this issue likely would have led the State to put on evidence that S.A. and A.A.'s behavior was consistent with abuse.

M.P.A. additionally argues that Barina failed to follow up on S.A. having to stop an interview in order to practice answering questions with LaVonna. The Iowa Department of Human Services had interviewed S.A. and A.A. at the request of Iowa and Texas police departments. A report from a police detective who was present noted that S.A. wanted to practice the questions with LaVonna. A social worker later interpreted this as S.A. wanting LaVonna to tell her what to say, which Barina viewed as an exaggeration. Barina interpreted the tape as S.A. being nervous and wanting her mother in order to calm down. Barina further stated that the tape referenced other sexual assaults not alleged by the State, so he did not want it admitted into evidence.

M.P.A. also asserts that Barina failed to adequately cross-examine the State's medical expert, Dr. Green. Dr. Green had testified that the physical evidence was consistent with a possible suspicious finding. Barina testified that he thought Green's testimony was as tentative as could have been hoped for, so there would be little benefit to aggressively cross-examing Green and allowing re-direct examination to refute whatever he could have accomplished via cross-examination.

Finally, M.P.A. asserts that Barina should have obtained an expert to refute Green's findings. The Second Circuit Court of Appeals granted relief on a similar claim in *Gersten v. Senkowski*, 426 F.3d 588 (2d Cir. 2005). In *Gersten*, the State's case "rested centrally on the alleged victim's testimony and its corroboration by the indirect physical evidence as interpreted by the medical expert." *Id.* at 608. The petitioner's trial counsel had "essentially conceded that the physical

evidence was indicative of sexual penetration without conducting any investigation to determine whether this was the case." *Id.* The court noted that "medical expert consultation or testimony is particularly critical to an effective defense in sexual abuse cases where direct evidence is limited to the victim's testimony." *Id.* The petitioner's trial counsel unsuccessfully pursued a trial strategy of cross-examining the State's expert. *Id.* at 609–10. The counsel thought that disproving sexual activity had occurred would be fruitless because of hearsay from the petitioner that the victim engaged in sexual conduct with her ex–boyfriend. *Id*.

The general premise of *Gersten* is inapplicable here for two reasons. First, in *Gersten*, the victim had accused the petitioner of "'continuing rape and sodomy over a period of years.'" *Id.* at 608 (quoting *Gersten v. Senkowski*, 299 F.Supp.2d 84, 91 (D. N.Y. 2004)). Therefore, "the medical testimony was central not only because it constituted the most extensive corroboration that any crime occurred, but because to undermine it would undermine the alleged victim's credibility and thus the entire prosecution case as to all charges." *Id.* at 608. Although an expert for M.P.A. could have shown that the evidence did not corroborate the State's claim, it would not have rendered the victim's testimony "demonstrably incredible." *Id.* Second, J.W.A.'s confession and statement to Barina that he had sexually assaulted S.A. provided Barina greater reason to think an exam would support the State's theory than the hearsay from the client in *Gersten*. Because the petitioner's trial counsel in *Gersten* had less reason to think challenging the State's expert would be fruitless, and a successful challenge would have been more powerful in that case, we decline to follow *Gersten*'s finding of ineffective assistance.

In sum, looking at the totality of the representation, *Gersten* does not apply here. Given the heavy discretion afforded trial counsel, we cannot say that M.P.A. has met his burden to show that Barina's representation was objectively unreasonable.

Because we have determined that M.P.A. is entitled to a new disposition hearing, *see* Part III, *supra*, we do not address M.P.A.'s claim of ineffective assistance of counsel at the disposition phase.

V. Conclusion

We hold that M.P.A. has not established his right to relief on his claims of actual innocence or ineffective assistance of counsel at the adjudication phase. However, M.P.A. is entitled to a new disposition hearing because Willoughby's false testimony contributed to his sentence. We remand this cause to the district court to grant M.P.A.'s writ of habeas corpus in accordance with this opinion.

_____

Eva M. Guzman
Justice

OPINION DELIVERED: May 18, 2012

IN THE SUPREME COURT OF TEXAS

NO. 10-0886

IN RE BILLY FREDERICK ALLEN, RELATOR

ON PETITION FOR WRIT OF MANDAMUS

Argued January 12, 2012

JUSTICE WAINWRIGHT delivered the opinion of the Court.

Under the Tim Cole Act (Act or TCA), formerly known as the Texas Wrongful Imprisonment Act, a wrongfully imprisoned person may seek compensation from the state for the period of wrongful imprisonment.[1] TEX. CIV. PRAC. & REM. CODE § 103.001(a). A person is entitled to compensation if the person 1) has served in whole or in part a sentence in prison under the laws of this state, and 2) has been granted habeas relief on a court determination that he is "actually innocent" of the crime for which he was sentenced.[2] TEX. CIV. PRAC. & REM. CODE § 103.001(a)(1), (a)(2)(B). Additionally, the applicant's supporting documentation must clearly indicate on its face that the person is entitled to compensation. TEX. CIV. PRAC. & REM. CODE § 103.051 (b-1). For the

[1] The statute's namesake, Timothy Cole, was convicted and sentenced to twenty-five years in prison for aggravated sexual assault. He maintained his innocence, but died of an asthma attack in 1999 while incarcerated. He was exonerated years later by DNA evidence, and in 2010, Governor Rick Perry granted him the state's first posthumous pardon. *See In re Smith*, 333 S.W.3d 582, 583 n.1 (Tex. 2011); Act of May 27, 2009, 81st Leg., R.S., ch. 180, § 1, 2009 Tex. Gen. Laws 523 (naming the Act after Tim Cole).

[2] Relator seeks compensation solely on the basis of 103.001(a)(2)(B). A wrongfully imprisoned person may also seek compensation on other grounds under the TCA, but they are not at issue in this case.

reasons that follow, we hold that Billy Frederick Allen is entitled to compensation under the TCA, and we conditionally grant the petition for writ of mandamus.

Relator Billy Frederick Allen seeks compensation from the state following the Texas Court of Criminal Appeals' grant of habeas relief. *See Ex parte Allen*, Nos. AP-75580, AP-75581, 2009 WL 282739 (Tex. Crim. App. 2009) (not designated for publication). The first requirement of serving time in a Texas prison is not at issue in this original proceeding, as Allen served almost twenty-six years in prison under the laws of this state. On the second requirement, Allen asserts that the Court of Criminal Appeals granted relief on the basis of "actual innocence," and that he, therefore, is eligible for compensation from the state. This is the crux of the dispute: What does the legal term "actual innocence" in the TCA mean?

Allen sought habeas relief from the Court of Criminal Appeals on a *Schlup*-type claim of actual innocence based on alleged constitutional violations and his actual innocence. *See Schlup v. Delo*, 513 U.S. 298 (1995); *Ex Parte Elizondo*, 947 S.W.2d 202 (Tex. Crim. App. 1996). The Court of Criminal Appeals recognizes two types of "actual innocence" claims. The first—a *Herrera* claim—is a substantive claim in which the person asserts a "bare claim of innocence based solely on newly discovered evidence." *Ex parte Franklin,* 72 S.W.3d 671, 675 (Tex. Crim. App. 2002); *see also Elizondo,* 947 S.W.2d at 208. A court finding that a *Herrera* claim has been established means that the applicant has shown "by clear and convincing evidence that, despite the evidence of guilt that supports the conviction, no reasonable juror could have found the applicant guilty in light of the new evidence," and that the claimant should be exonerated. *Ex parte Brown*, 205 S.W.3d 538, 545 (Tex. Crim. App. 2006) (citations omitted).

The other "actual innocence" claim, a *Schlup*-type claim, is a procedural gateway through which a petitioner must pass to have his otherwise barred constitutional claim considered on the merits. *Schlup*, 513 U.S. at 315. A court finding that a *Schlup* claim has been established means that the applicant has shown that the constitutional error at trial probably resulted in the conviction of one who was actually innocent. *Ex parte Spencer*, 337 S.W.3d 869, 878 (Tex. Crim. App. 2011).

Application is made to the Texas Comptroller of Public Accounts, who is authorized to determine eligibility and the amount of monetary compensation owed to the claimant. TEX. CIV. PRAC. & REM. CODE § 103.051(a), (b). After receiving habeas relief from the Court of Criminal Appeals, Allen applied for compensation from the Comptroller. To establish his claim, Allen included in his application verified copies of the Court of Criminal Appeals' opinion, the mandate issued by the Court of Criminal Appeals, a letter written by Charley Valdez of the Texas Department of Criminal Justice verifying the length of incarceration, copies of Allen's birth certificate, a divorce decree, a birth certificate of his child, and a copy of *State v. Young*, 265 S.W.3d 697 (Tex. App.—Austin 2008, pet. denied). The Comptroller denied the claim, asserting that it did not meet the requirements of the TCA. The Comptroller contends that the court order (the Court of Criminal Appeals' opinion) did not establish Allen's actual innocence as required by Section 103.051(b-1). Allen submitted an application to cure to the Comptroller, and the Comptroller again denied his application as not meeting the actual innocence requirement of Section 103.051(b-1). TEX. CIV. PRAC. & REM. CODE § 103.051 (d). Allen submitted the same enclosures with his application to cure, but provided the Comptroller with a letter brief supporting his belief that *Schlup*-type claimants also are eligible for compensation.

The Comptroller's duty in determining eligibility is purely ministerial. TEX. CIV. PRAC. & REM. CODE § 103.051(b-1). The Comptroller's denial of a claim is not reviewable by appeal, but a claimant may seek review through a mandamus proceeding. TEX. CIV. PRAC. & REM. CODE § 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." *In re Smith*, 333 S.W.3d 582, 585 (Tex. 2011) (citing *A & T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 672 (Tex. 1995)); *see* TEX. CONST. art. V, § 3 (a), TEX. GOV'T CODE § 22.002(c). This Court's general authority to issue a writ of mandamus 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." *Smith*, 333 S.W.3d at 585 (quoting TEX. GOV'T CODE § 22.002(c)); TEX. CONST. art. V, § 3 (a). Together with the TCA, the Constitution and the Government Code vest this Court with authority over this original mandamus proceeding. *See Smith*, 333 S.W.3d at 585.

We decide 1) whether a grant of habeas relief on a *Schlup*-type claim merits compensation under the TCA as a writ based on a court finding of actual innocence, and if so, 2) whether the Court of Criminal Appeals' decision clearly indicated on its face that the writ was based on a court finding or determination of actual innocence.

BACKGROUND & PROCEDURAL HISTORY

In 1983, the City of University Park Police Department arrested and charged Allen with the murders of Raven Dannelle Lashbrook and James Perry Sewell. After a jury trial, Allen was convicted of both murders and received 99-year concurrent sentences. Allen appealed, and the court of appeals affirmed the convictions. *Allen v. State*, Nos. 05-83-01297-CR, 05-83-01298-CR

(Tex. App.—Dallas 1985, pet. ref'd). The Court of Criminal Appeals denied his petition to review the convictions. *See* TEX. R. APP. P. 69.1.

The writ of habeas corpus is provided by the Texas Constitution and "is the remedy to be used when any person is restrained in his liberty." TEX. CONST. art. I, §12; TEX. CODE CRIM. PROC. art. 11.01. The purpose of a writ of habeas corpus is to obtain a speedy and effective adjudication of a person's right to liberty from unlawful or unconstitutional restraint. *Ex parte Kerr*, 64 S.W.3d 414, 419 (Tex. Crim. App. 2002) (citing *Blackledge v. Allison*, 431 U.S. 63, 71 (1977) ("the very purpose of the writ of habeas corpus [is] to safeguard a person's freedom from detention in violation of constitutional guarantees")).

Over his twenty-five years in prison, Allen filed several writs of habeas corpus challenging the convictions. In May 2004, Allen filed the underlying habeas application pro se with the Court of Criminal Appeals, alleging ineffective assistance of counsel and denial of a fair trial. *Ex parte Allen*, Nos. AP-75580, AP-75581, 2009 WL 282739, at *3 (Tex. Crim. App. 2009) (not designated for publication). In a December 2005 order, the Court of Criminal Appeals recognized that this was the first writ that Allen had filed since its decision in *Ex parte Elizondo*, 947 S.W.2d 202 (Tex. Crim. App. 1996). In *Elizondo,* the Court of Criminal Appeals held for the first time that "claims of actual innocence are cognizable by this Court in a postconviction habeas corpus proceeding where the punishment assessed is death or confinement." *Id.* at 205. The Court of Criminal Appeals then remanded the matter to the trial court, as the trial court had recommended a new trial with one of Allen's previous writs. *Allen*, 2009 WL 282739, at *3. The trial court issued supplemental findings, but "did not make any specific findings regarding the issues in this case." *Id.* The trial court stated that 1) trial counsel had not been ineffective, but that 2) applicant should be granted a new trial

because actual innocence claims were now cognizable, and 3) because the evidence of innocence was "so strong that the Court cannot have confidence in the outcome of the trial." *Id.*

Later in 2009, the Court of Criminal Appeals considered Allen's application on the basis of actual innocence, holding that the claims "were not barred by the Texas Code of Criminal Procedure, Article 11.07, Section 4, '[b]ecause Applicant's prior or actual innocence claims were denied at a time when such claims were not cognizable on habeas review.'" *Id.* (citing the December 2005 order). Allen "presented a *Schlup*-type claim of actual innocence as a procedural gateway through which to raise his otherwise barred constitutional claim of ineffective assistance of trial counsel." *Id.* at *1. On February 4, 2009, the Court of Criminal Appeals held "that applicant is entitled to relief" on his *Schlup*-type claim. *Id*. The Court of Criminal Appeals held that "it is not surprising that the habeas court found that the newly discovered evidence 'of innocence [was] so strong that [it could not] have confidence in the outcome of the trial.' We agree." *Id.* at *9. After the Court of Criminal Appeals granted habeas relief, Allen filed an application for compensation with the Comptroller.

DISCUSSION

This Court is the only court holding original jurisdiction over the matter as the Respondent Comptroller is an executive officer of the state. *Smith*, 333 S.W.3d at 585; *see* TEX. GOV'T CODE § 22.002(c). Although mandamus will not issue to control an officer's legitimate exercise of discretion, it may issue to enforce the performance of a ministerial act. *Smith*, 333 S.W.3d at 585 (citations omitted). In determining eligibility of a claimant for compensation, the Comptroller shall only consider the verified copies of the pardon, court order, motion to dismiss, and affidavit, if applicable. TEX. CIV. PRAC. & REM. CODE § 103.051 (a)(2), (b-1). The Comptroller's eligibility

determination is ministerial and mandamus may issue to review the denial of a claim. TEX. CIV. PRAC. & REM. CODE § 103.051 (b-1), (e).

This case turns on construction of the Tim Cole Act. The construction of a statute is a question of law that we review de novo. *Atmos Energy Corp. v. Cities of Allen*, 353 S.W.3d 156, 160 (Tex. 2011) (citation omitted). Our task is to effectuate the Legislature's expressed intent. *Id.*

1. Whether a *Schlup*-type Claim Merits Compensation Under the TCA

The first issue presented to this Court is whether habeas relief from a *Schlup*-type claim is a writ based on a court finding of actual innocence. If it is, it merits compensation under the TCA. A claimant is entitled to compensation if relief has been granted "in accordance with a writ of habeas corpus that is based on a court finding or determination that the person is actually innocent of the crime for which the person was sentenced." TEX. CIV. PRAC. & REM. CODE § 103.001(a)(2)(B). The Comptroller asserts that the Legislature never intended persons like Allen, claimants who present *Schlup*-type claims, to be eligible for compensation under the TCA. Instead, the Comptroller argues that only *Herrera*-type claimants are eligible for compensation, as their claims are "bare-innocence" claims of actual innocence.

Whether compensation may be awarded under the TCA depends, in the first instance, on determinations in the criminal courts of the merits of the applicant's conviction. The judgments of the criminal courts are taken as established for our purpose, and we thereafter apply the civil law component of the TCA. We, therefore, first review the relevant criminal law.

"Claims of actual innocence are categorized either as *Herrera*-type claims or *Schlup*-type claims." *Ex parte Franklin*, 72 S.W.3d 671, 675 (Tex. Crim. App. 2002). A *Herrera* claim is a substantive claim in which the person asserts a "bare claim of innocence" based solely on newly

discovered evidence. *Brown*, 205 S.W.3d at 544 (citing *Ex parte Tuley*, 109 S.W.3d 388, 390 (Tex. Crim. App. 2002)). A *Herrera* petitioner asserts that newly discovered evidence establishes an applicant's innocence. *See Herrera*, 506 U.S. at 390. The most familiar *Herrera*-type cases are those in which DNA testing leads to exoneration of the applicant.

In addition to *Herrera*, a habeas applicant may raise actual innocence claims that are asserted constitutional violations in his trial but are procedurally barred by Article 11.07 of the Code of Criminal Procedure. Review of subsequent applications for habeas corpus relief are prohibited, as Section 4 of Article 11.07, Texas Code of Criminal Procedure, "restricts habeas applicants to 'one bite of the apple' except in specified circumstances . . . ." *Ex parte Santana*, 227 S.W.3d 700, 703 (Tex. Crim. App. 2007) (quoting *Ex parte Torres*, 943 S.W.2d 469, 473–74 (Tex. Crim. App. 1997); *see also Ex parte Brooks*, 219 S.W.3d 396, 399 (Tex. Crim. App. 2007). The subsequent-application provision "limits an inmate to one application for writ of habeas corpus except in exceptional circumstances." *Brooks*, 219 S.W.3d at 399. Once an applicant files an application challenging the conviction, all subsequent applications regarding the same conviction must meet one of the two conditions set forth in § 4(a)(1) & (2). *Santana,* 227 S.W.3d at 703; TEX. CODE CRIM. PROC. art. 11.07, § 4(a)(1), (2).[3]

This second type of innocence claim—a *Schlup* claim—is one that "'does not by itself provide a basis for relief,' but is intertwined with constitutional error that renders a person's

[3] Article 11.07, section 4(a) prohibits review of subsequent applications for a writ of habeas corpus except in limited circumstances. The application must establish one of the following exceptions: 1) the current claims and issues have not been and could not have been presented previously in an original application or in a previously considered application filed under this article because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application; or 2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt. TEX. CODE CRIM. PROC. art. 11.07, § 4(a)(1), (2).

conviction constitutionally invalid." *Brown,* 205 S.W.3d at 544–45 (citing *Schlup v. Delo*, 513 U.S. 298, 315 (1995)). Unlike a *Herrera* claim, which is substantive, a *Schlup*-type claim is procedural: it provides a "gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Schlup*, 513 U.S. at 315. Allen pursued a *Schlup*-type claim in the Court of Criminal Appeals. He asserted a constitutional claim for ineffective assistance of counsel, which coupled with a proper defense of his case at trial would probably have concluded in a not guilty verdict.

The Supreme Court defined actual innocence in a *Schlup*-type claim. According to *Schlup v. Delo*, actual innocence:

> does not merely require a showing that a reasonable doubt exists in the light of the new evidence, but rather that no reasonable juror would have found the defendant guilty. It is not the district court's independent judgment as to whether reasonable doubt exists that the standard addresses; rather the standard requires the district court to make a probabilistic determination about what reasonable, properly instructed jurors would do. Thus, a petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.

513 U.S. 298, 329 (1995). In *Schlup*, "the petitioner raised a claim of actual innocence in an effort to bring himself within 'the narrow class of cases' implicating a fundamental miscarriage of justice as an exception to a showing of cause and prejudice for failure to raise the claim in an earlier writ." *Elizondo*, 947 S.W.2d at 208 (citing *Schlup*, 513 U.S. at 298). Successful *Schlup* claimants are the "extraordinary" cases. *Brooks*, 219 S.W.3d at 400. The Court of Criminal Appeals recognizes that Texas law "allows review of the merits in the exceptional circumstances of a constitutional violation resulting in the conviction of one who is actually innocent of the offense." *Id.* at 401. To grant *Schlup* relief, an applicant must meet the threshold requirement of showing that a constitutional

violation led to a miscarriage of justice due to the incarceration of someone who is actually innocent. *Id*.; *see also Ex parte Thompson*, 179 S.W.3d 549, 557 n.19 (Tex. Crim. App. 2005) ("Applicant argues that his 'factual innocence' claim is cognizable under *Schlup v. Delo* . . . . But it is not. Applicant makes no showing that *he* is innocent of capital murder or that the State violated his constitutional rights by trying him before his accomplice, Sammy Butler.").

The two claims require applicants to meet different burdens of proof to obtain habeas relief. Establishing a bare claim of actual innocence, or a *Herrera* claim, is a "Herculean task." *Brown*, 205 S.W.3d at 545. To succeed on a *Herrera* claim, the habeas applicant must "unquestionably establish" his actual innocence, and show "*clear and convincing evidence* that no reasonable juror would have convicted him in light of the new evidence." *Elizondo*, 947 S.W.2d at 209. *Herrera* applicants are "required to meet a higher threshold to obtain relief because, when the trial has been constitutionally error free, the conviction is entitled to the utmost respect." *Ex parte Spencer*, 337 S.W.3d 869, 877–78 (Tex. Crim. App. 2011).

A *Schlup* claimant, on the other hand, need only show that he is "probably" actually innocent, meaning "more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Elizondo,* 947 S.W.2d at 209; *see also Schlup*, 513 U.S. at 326–27. The lower standard is justified because the conviction "may not be entitled to the same degree of respect of one, such as Herrera's, that is the product of an error-free trial." *Schlup*, 513 U.S. at 316. To obtain relief on a *Schlup* claim, the claimant must therefore show that the constitutional error at trial probably resulted in the conviction of one who was actually innocent. *Spencer*, 337 S.W.3d at 878.

a) Compensation for Wrongfully Imprisoned Persons in Texas

Wrongfully imprisoned persons have not always been entitled to compensation from the state. *In re Smith*, 333 S.W.3d at 585. In 1955, the people adopted a constitutional amendment granting the Legislature power to grant aid and compensation to persons who have served prison sentences for offenses of which they were not guilty, "under such regulations and limitations that the Legislature may deem expedient." TEX. CONST. art. III, § 51-c. Ten years later, the Legislature enacted the first wrongful-imprisonment compensation statute. Act of May 28, 1965, 59th Leg., R.S., ch. 507, 1965 Tex. Gen. Laws 1022, 1022–1024. A person was entitled to compensation if "he is not guilty of the crime for which he was sentenced." *Id.* at 1022. Almost thirty years later, the Supreme Court decided *Herrera v. Collins* and *Schlup v. Delo*. 506 U.S. 390 (1993); 513 U.S. 298 (1995).

Following the Supreme Court's lead, in 1996 the Court of Criminal Appeals recognized in Texas that the "incarceration of an innocent person is as much a violation of the Due Process Clause as is the execution of such a person." *Elizondo*, 947 S.W.2d at 205. The applicant presented the Court of Criminal Appeals with a *Herrera*-type claim, and the Court turned to *Schlup* for guidance and modified the standard to be applied in *Herrera*-type claims. *Id.* at 208–09*; Franklin*, 72 S.W.3d at 677. The Court of Criminal Appeals granted relief based on the *Herrera*-type claim at issue, and confirmed that "claims of actual innocence" include both *Herrera*-type claims and *Schlup*-type claims. *Id.* at 675 (citing *Elizondo*, 947 S.W.2d at 208).

The Legislature amended the TCA following the Supreme Court's decisions in *Herrera* and *Schlup* and after the Court of Criminal Appeals recognized both types of habeas "actual innocence" claims. In 2001, the Legislature changed the language of the Act to compensate a person who has

been "granted relief on the basis of actual innocence of the crime for which the person was committed." Act of May 18, 2001, 77th Leg., R.S., ch. 1488, 2001 Tex. Gen. Laws 5280, 5280–5284. No longer did the legislation require "not guilty," but instead adopted the term "actual innocence," used in *Herrera*, *Schlup*, and *Elizondo*.

The TCA does not define the term "actual innocence." Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly. *City of Rockwall v. Hughes*, 246 S.W.3d 621, 625 (Tex. 2008); TEX. GOV'T CODE § 311.011 (b). The Comptroller also admits that the Legislature intended the technical meaning of the term "actual innocence" when it changed the TCA in 2001. "Actual innocence" is a legal term of art, which has acquired a technical meaning in the habeas corpus context.[4]

We presume the Legislature is aware of relevant case law when it enacts or modifies statutes. "A statute is presumed to have been enacted by the legislature with complete knowledge of the existing law and with reference to it." *Acker v. Tex. Water Comm'n*, 790 S.W.2d 299, 301 (Tex. 1990) (citation omitted). "Language in a statute is presumed to have been selected and used with care, and every word or phrase in a statute is presumed to have been intentionally used with a meaning and a purpose." *State v. K.E.W.*, 315 S.W.3d 16, 21 (Tex. 2010) (citations omitted). The term "actual innocence" has a particular meaning within habeas corpus jurisprudence, in that it is a particular type of claim "that may be raised in a collateral attack on a conviction." *Ex parte Tuley*, 109 S.W.3d at 390; *see also Ex parte Brown*, 205 S.W.3d at 545 ("We have stated that 'any person who has once been finally convicted in a fair trial should not be permitted to wage, and we do not

[4] A "term of art" is a word or phrase having a specific, precise meaning in a given specialty, apart from its general meaning in ordinary contexts. BLACK'S LAW DICTIONARY 1610 (9th ed. 2009).

permit him to wage, a collateral attack on that conviction without making an exceedingly persuasive case that he is actually innocent.'") (citing *Elizondo*, 947 S.W.2d at 205).

The Legislature is presumed to have known about both types of "actual innocence" claims in habeas corpus jurisprudence when it modified the Act to change "not guilty" to "actual innocence," since, before the 2001 Amendment, the Supreme Court had decided both *Herrera* (1993) and *Schlup* (1995) and the Court of Criminal Appeals had recognized both types of habeas claims in Texas. *Herrera*, 506 U.S. at 390; *Schlup*, 513 U.S. at 298; *Elizondo*, 947 S.W.2d at 202.

Even more to the point, we need not presume legislative awareness of the changing habeas jurisprudence because in 1999 the Legislature amended the subsequent application provisions in the Code of Criminal Procedure to accommodate *Schlup*-type claims. Act of May 18, 1999, 76th Leg., R.S., ch. 803, 1999 Tex. Gen. Laws 3431, 3431–3436. The Legislature responded to *Schlup* by updating Articles 11.07 and 11.071 of the Habeas Corpus Reform Act to provide exceptions allowing review of subsequent habeas writs if the legal basis for the writ had not existed in federal or state appellate courts previously.[5] TEX. CODE CRIM. PROC. art. 11.07 § 4(a); TEX. CODE CRIM. PROC. art. 11.071 § 5(a)(2); *Ex parte Reed*, 271 S.W.3d 698, 733 (Tex. Crim. App. 2008) (citing *Ex parte Brooks*, 219 S.W.3d at 399). The Court of Criminal Appeals noted that "[b]ecause Article 11.071 Section 5(a)(2) was enacted in response to the Supreme Court's decision in *Schlup*, we conclude that the standards set forth for evaluating a gateway-actual-innocence claim announced by the Supreme Court should guide our consideration of such claims under Section 5(a)(2)." *Ex parte Reed*, 271 S.W.3d at 733. The Court of Criminal Appeals determined that the Legislature amended

[5] "Article 11.071 provides the procedure for death-penalty cases. The language in Article 11.071, section 5(a)(2) is identical to that in Article 11.07, section 4(a)." *Brooks*, 219 S.W.3d at 399 n.6.

the Code of Criminal Procedure in recognition of and to provide for consideration of *Schlup*-type habeas claims.

Because the Legislature changed the statutory term "not guilty" to "actual innocence" following federal and state jurisprudence, from both the United States Supreme Court and the Texas Court of Criminal Appeals, and adopted writ provisions in the Code of Criminal Procedure in response to *Schlup*, we conclude the Legislature intended the legal term of art, "actual innocence," to include both *Herrera* and *Schlup* claims in the TCA.

b) Respondent's Policy Arguments

The Comptroller argues that, as a matter of policy, the state should only compensate persons who were wrongfully imprisoned and subsequently found not guilty of the crime for which they served time. In other words, she contends the state should only compensate applicants who establish *Herrera*-type actual innocence claims. That is a plausible policy. However, the Legislature has drawn no distinctions between the two types of "actual innocence" claims. The "actual innocence" language of the TCA includes both types of claims and provides no indication that *Schlup*-type claims are precluded.

We acknowledge that there are potential problems in the TCA—such as compensating someone now who later could be retried and found guilty, that may result in compensating someone temporarily who is actually guilty of the crime. The TCA addresses this concern to a degree by terminating compensation payments if the person is convicted of a crime punishable as a felony. TEX. CIV. PRAC. & REM. CODE § 103.154(a) (providing that payments terminate on the date of the subsequent conviction). Still, while unlikely, it is conceivable that the state could compensate someone who is later found guilty of the crime. Just as someone could be imprisoned for a crime

he did not commit, the state could erroneously compensate someone who committed the crime for which he was incarcerated. The imperfection of humanity means that the state may make mistakes, but that possibility does not vitiate the government's interest in avoiding injustice. *See Schlup*, 513 U.S. at 324–25.

Here, it appears unlikely that Allen will be retried or found guilty. In granting habeas relief to Allen, the Court of Criminal Appeals also "remand[ed] him to the custody of the Sheriff of Dallas County."[6] 2009 WL 282739, at *9. Since the Court of Criminal Appeals granted habeas relief and Allen filed his application with the Comptroller, the 195th Judicial District Court of Dallas County, in which his case had been tried, dismissed all pending criminal charges against Allen. The District Attorney of Dallas filed a Motion to Dismiss the charges based on the destruction in 2007 of all physical evidence, the death of one fact witness, the failing memory of another fact witness, and the effect of the passage of time from the trial on the memory of other fact witnesses and the health of yet other surviving witnesses. The District Attorney concluded that these circumstances "render the State unable to prosecute the Defendant for the offense at this time."

The Comptroller correctly points out that these are important policy issues, and they may be addressed with the Legislature because her policy arguments cannot prevail over the words of the

[6] The Court of Criminal Appeals remanded Allen to the custody of the Sheriff of Dallas County. While Allen received habeas relief on a *Schlup*-type claim, the Court of Criminal Appeals consistently utilizes a similar procedure for *Herrera*-claimants as well. *See, e.g.*, *Ex parte Henton*, 2006 WL 362331, at *1 (Tex. Crim. App. 2006) (vacating the judgment and sentence of a successful *Herrera* claimant yet ordering that applicant be "remanded to the custody of the Sheriff of Dallas County so that he may answer the charges against him."); *Ex parte Byars*, 176 S.W.3d 841, 842 (Tex. Crim. App. 2005) (granting *Herrera* relief and instructing applicant to be "remanded to the custody of the Sheriff of Jefferson County to answer to the indictment."); *Ex parte Tuley*, 109 S.W.3d 388, 397 (Tex. Crim. App. 2002) (granting *Herrera* relief but returning applicant to "the custody of the convicting court so that he may answer the charges against him."); *Ex parte Elizondo*, 947 S.W.2d 202, 210 (Tex. Crim. App. 1996) (granting *Herrera* relief but returning "applicant to the custody of the county from which he was received so that he may answer the charges against him.").

statute.[7] The role of the judicial branch in our government is important but that 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). "[T]he Court must adopt the interpretation of the statute that is most faithful to its text . . . . 'If Congress enacted into law something different from what it intended, then it should amend the statute to conform to its intent.'" *Harbison v. Bell*, 556 U.S. 180, 199 (2009) (Thomas, J., concurring) (quoting *Lamie v. United States Trustee*, 540 U.S. 526, 542 (2004)).

The Legislature changed the key statutory language from "not guilty" to "actual innocence" following the Court of Criminal Appeals' recognition of both *Herrera* and *Schlup* as "actual innocence" claims in Texas. Since then, the Legislature has amended the Act three times, in 2007, 2009, and 2011, giving itself ample opportunities to distinguish between *Herrera* and *Schlup* if so desired, but it did not.[8] Where legislative enactments unambiguously direct our path, we must follow. Therefore, we conclude that habeas relief from a *Schlup*-type claim merits compensation under the Act as a writ based on a court finding of actual innocence.

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[7] Allen submits documentation that the Comptroller made these policy arguments to the Legislature and they were not adopted. However, the language of the TCA renders it unnecessary to consider legislative history.

[8] The Legislature has amended the TCA numerous times to make significant changes for claimants, including, but not limited to, raising the level of compensation, removing the cap on compensation, allowing child support payments, offering tuition aids, and limiting excessive fees charged by attorneys who assist those seeking compensation. The Innocence Project lauds the Legislature for its improvements to the TCA: "Social services provided by Texas are also the best in the nation, including job training, tuition credits and access to medical and dental treatment." Executive Summary: "Making Up For Lost Time: What the Wrongfully Convicted Endure and How to Provide Fair Compensation," The Innocence Project, at 22, *available at:* www.innocenceproject.org/docs/Innocence_Project_Compensation_Report.pdf. All Internet materials as visited May 15, 2012 and available in clerk of Court's file. Additionally, The Innocence Project recognizes that Texas, along with only four other states, meets the recommended compensation standard. *Id.* at 20.

The Legislature has provided for compensation to individuals who have been granted habeas relief based on "actual innocence." This is a narrow class of claimants within a larger class of individuals who obtain habeas relief.[9] The Court of Criminal Appeals has emphasized that Texas recognizes only two types of "innocence" claims—*Herrera* and *Schlup* claims. *Brown*, 205 S.W.3d at 544. Recognizing only two types of "innocence" claims is consistent with the legislatively-identified narrow class of claimants who are entitled to compensation. Indeed, a number of other types of habeas claims fall outside compensable actual innocence claims. *See e.g.*, *Ex parte Vaughn,* 2003 WL 21467074 (Tex. Crim. App. 2003) (not designated for publication) (granting habeas relief to file petition for discretionary review); *Puckett v. State,* 801 S.W.2d 188 (Tex.App.—Houston [14th Dist.] 1990, writ denied) (challenging the penal statute); *Ex parte Wagner*, 905 S.W.2d 799 (Tex.App.—Houston [14th Dist.] 1995, no writ) (challenging a void judgment); TEX. CODE CRIM. PROC. art. 11.07.

2. Whether the Order Clearly Indicated on its Face that it was Based on Actual Innocence

The second issue is whether the Court of Criminal Appeals' decision clearly indicated on its face that the writ was based on a court finding or determination of actual innocence. The Comptroller argues that the habeas order does not clearly indicate on its face that Allen was granted relief based on actual innocence. Rather, the Comptroller argues Allen was granted relief, at most, for his ineffective assistance of counsel claim. According to the Comptroller, *Schlup* never satisfies

[9] The parties did not supply this Court with the number of persons compensated by the state for wrongful imprisonment. According to The Innocence Project, through the year 2009, there had been forty people in Texas exonerated for crimes they did not commit. "250 Exonerated: Too Many Wrongfully Convicted." The Innocence Project, *available at* www.innocenceproject.org/news/250.php. This statistic, however, does not indicate whether the person received compensation from the state.

§ 103.001(a)(2)(B) because the claim is not based on actual innocence, but is instead a gateway claim to escape a procedural bar.

The Act states that a person is entitled to compensation if the person "has been granted relief in accordance with a writ of habeas corpus that is based on a court finding or determination that the person is actually innocent of the crime for which the person was sentenced." TEX. CIV. PRAC. & REM. CODE § 103.001(a)(2)(B). Further, the documents must clearly indicate on their face that the person is entitled to compensation. TEX. CIV. PRAC. & REM. CODE § 103.051 (b-1). Therefore, in order for Allen to be eligible for compensation under the TCA, the Court of Criminal Appeals' determination must be based on actual innocence. We consider whether the court order was granted or rendered on the basis of the claimant's actual innocence. *See* TEX. CIV. PRAC. & REM. CODE § 103.051 (b-1).

The Court of Criminal Appeals' opinion on its face determines that Allen was actually innocent. The grant of habeas relief means that the Court of Criminal Appeals held that Allen showed actual innocence by a preponderance of the evidence, passing through the gateway to have his ineffective assistance of counsel claim considered on the merits. Actual innocence remains an essential part of the *Schlup* claim, for without the court finding actual innocence, the writ would be denied. *Brooks*, 219 S.W.3d at 400–01. This credible claim of actual innocence "serves to bring the petitioner within the 'narrow class of cases' implicating a fundamental miscarriage of justice." *Id.* at 400 (citing *Schlup*, 513 U.S. at 315). The Court of Criminal Appeals held that "it is not surprising that the habeas court found that the newly discovered evidence 'of innocence [was] so strong that [it could not] have confidence in the outcome of the trial.' We agree." *Allen*, 2009 WL 282739, at *9.

The Court of Criminal Appeals granted habeas relief to Allen based on his *Schlup*-type claim, bringing him into the narrow class of cases that satisfy the actual innocence standard. We do not agree with the Comptroller that Allen's relief is based, at most, on ineffective assistance of counsel, because that finding alone would be insufficient to grant habeas relief under *Schlup*. Even if a court does not explicitly state that its holding is based on actual innocence, implicitly the court must find that the applicant is actually innocent to grant relief on a *Schlup* claim. *See Brooks*, 219 S.W.3d at 401. We do not read the Court of Criminal Appeals' opinion as indicating it failed to find actual innocence as to Allen's conviction. Therefore, because the Court of Criminal Appeals granted habeas relief on a *Schlup* claim, Allen's court order clearly indicates on its face that relief was based on actual innocence.

CONCLUSION

The petition for writ of mandamus is conditionally granted, and we instruct the Comptroller to comply with this opinion and compensate Allen under the terms of the Tim Cole Act. A writ of mandamus will issue only upon the failure to do so.

Dale Wainwright
Justice

OPINION DELIVERED: May 18, 2012

IN THE SUPREME COURT OF TEXAS

NO. 10-0887

WENDELL REEDER, PETITIONER

v.

WOOD COUNTY ENERGY, LLC, WOOD COUNTY OIL & GAS, LTD., NELSON OPERATING, INC., DEKRFOUR, INC., BOBBY NOBLE, EXZENA OIL CORPORATION, DAVID FRY AND PATRICIA FRY, RESPONDENTS

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

Argued February 27, 2012

JUSTICE WAINWRIGHT delivered the opinion of the Court.

This case involves the duties and standard of care of an oil and gas operator under an exculpatory clause in a joint operating agreement (JOA). The language of the exculpatory clause in the JOA exempts the operator from liability for activities under the agreement unless it arises from gross negligence or willful misconduct. Based on that language in the exculpatory clause, the trial court instructed the jury that to find a breach of the JOA the operator's conduct must have risen to the level of gross negligence or willful misconduct. The jury found that the operator, Petitioner Wendell Reeder (Reeder), breached his duties under the JOA to the working interest owners. The trial court signed a final judgment that Reeder take nothing on his claims for exclusive possession

of the wellbores, and instead awarded damages to Patricia Fry, Dekrfour, Inc., Nelson Operating, Inc., Bobby Noble, Wood County Energy, LLC, and Wood County Oil & Gas, Ltd.[1]

The court of appeals disagreed that the exculpatory clause applies to the claims, holding that the "standard[] of care provided in the exculpatory clause do[es] not apply to what this case was all about—a breach of contract. Thus, the gross negligence and willful misconduct instruction should not have been included in the charge." 320 S.W.3d 433, 444.

We decide whether 1) the exculpatory clause in the JOA applies to the claims against Reeder, and if so, 2) whether there is legally sufficient evidence that Reeder was grossly negligent or acted with willful misconduct. We hold that the clause applies to the claims against Reeder. Because there is legally insufficient evidence that Reeder acted with gross negligence or willful misconduct, we reverse the judgment of the court of appeals.

Background Facts and Procedural History

The Forest Hill Field in Wood County encompasses two oil-bearing formations, the Sub-Clarksville Unit and the Harris Sand Unit. The two units overlap, and oil was being produced from both units. Through his company, Dekrfour, Inc. (Dekrfour), David Fry bought a working interest in the Sub-Clarksville Unit. The next year Dekrfour entered into a mutual agreement with Secondary Oil Corporation (Secondary) and the mutual agreement became part of a JOA that the parties executed eleven days later. *Id.* at 439. Under the JOA, Dekrfour, Secondary, and Secondary's sister

[1] Wood County Energy, LLC and Wood County Oil & Gas, Ltd. no longer wish to prosecute any claims in this lawsuit or to execute on or otherwise enforce any judgment in their names. They consider their claims resolved and we do not address any of their claims in this opinion. Bobby Noble passed away during the pendency of this appeal and his wife is the estate's independent executrix pursuing this appeal on his behalf. *See* TEX. R. APP. P. 7.1(a)(1).

corporation would share the existing wellbores in the production of the Sub-Clarksville and the Harris Sand Units. Dekrfour transferred an 85% working interest to Secondary, transferred a 10% carried working interest to Nelson Operating, Inc. (Nelson), another of David Fry's companies, and transferred its interest in all other formations in the wells to Nelson. Wendell Reeder became the operator of the Harris Sand Unit when he and Don Dacus purchased 87.5% of the working interest in the unit wells previously transferred to Secondary. Reeder then formed a limited partnership, Wood County Oil and Gas, Ltd. (Wood County), with James Wade and Hattie Scherbach in which Reeder and Wade each owned 45% and Scherbach owned 10%.

Reeder continued to act as operator, but the relationship with his partners and David Fry became strained. Reeder alleged that four wells required expensive testing or repairs and he sought funding from Wood County. Wade, as President of Wood County, denied his requests. Reeder claims that because those repairs were not made, the Texas Railroad Commission (Commission) severed the Harris Sand Unit and eventually suspended its production. Reeder alleges that he spent at least $150,000 of his own money in an attempt to pay bills and preserve operations.

In May 2004, Reeder filed suit against Dekrfour, Nelson, and Bobby Noble (collectively the "Fry Interests"),[2] asserting he was the operator and had the exclusive right of possession of the wellbores for the purpose of producing oil. *Id*. at 440. Reeder sued on claims of trespass, ouster, conversion, violation of the Theft Liability Act, physical damage to existing wells, and sought both declaratory and injunctive relief.

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[2] In April 2003, Bobby Noble purchased a portion of Dekrfour's and Nelson's Sub-Clarksville interest. Noble aligned himself with Dekrfour and Nelson throughout the trial, and he is, therefore, included in the "Fry Interests." 320 S.W.3d at 439 n.2.

The Fry Interests filed a counterclaim against Reeder, alleging that Reeder "illegally produced oil from the Sub-Clarksville formation" and "fraudulently reported it as production from the Harris Sand Unit to the Railroad Commission." They claimed that Reeder removed oil and concealed production in the Harris Sand Unit, giving rise to claims for conversion and violations of the Theft Liability Act. They alleged that Reeder failed to obtain production in paying quantities, as required by the JOA, and converted their personal property. Patricia Fry alleged that she had been fined by the Commission because Reeder failed to file a document with the Commission. They claimed that while Reeder promised to comply with the Commission and get the unit producing again, he did nothing.

Wood County later asserted that if the Fry Interests suffered any damages, those damages were caused by Reeder as operator of the Harris Sand Unit. *Id*. Wood County filed a cross claim against Reeder, seeking damages for his actions as operator, lost leases, and loss of the unit. Wood County also nonsuited its damages claims against the Fry Interests but continued to seek declaratory relief. Reeder's partner Wade asserted that he invested time and money to increase production, only to have Reeder squander the effort, knowing that he would cause the loss of millions of dollars worth of valuable leasehold rights.

The case proceeded to trial, and a jury found that Reeder breached his duty as operator "by failing to maintain production in paying quantities or other operations in the Forest Hill Field." The trial court entered a final judgment ordering Reeder take nothing, awarding damages to Dekrfour, Nelson, Noble, Patricia Fry, and Wood County, and declaring that Reeder owned no mineral interest in the leases covering the Harris Sand Unit or the Sub-Clarksville Unit.

Reeder timely appealed the damages award against him, raising seventeen issues challenging the trial court's conclusion that he was bound by the JOA, the jury's findings that he breached the JOA, and the award of damages. *Id*. at 439. The court of appeals disagreed that the exculpatory clause applied to the claim, instead holding that the gross negligence and willful misconduct instruction should not have been included in the charge. *Id*. at 444. The court of appeals held that the evidence is legally and factually sufficient to support the jury's findings that Reeder breached his duty as operator when measured against the elements of breach of contract. *Id*. at 452–53. The court also held that the evidence is legally and factually sufficient to support the damage awards, but held that the trial court's judgment did not conform to the jury's damage awards. *Id.* at 453.

The court of appeals affirmed the trial court's judgment but modified the prejudgment interest, suggested a remittitur in attorneys' fees, and conformed the damage awards to the jury's findings. *Id*. Reeder filed a petition for review with this Court challenging the court of appeals' judgment.

Discussion

A. Applicability of the Joint Operating Agreement's Exculpatory Clause

We begin by deciding whether the exculpatory clause in the JOA sets the standard to adjudicate the breach of contract claims against Reeder. An exculpatory clause is a "clause in a contract designed to relieve one party of liability to the other for specified injury or loss incurred in the performance of the contract." Howard Williams & Charles Meyers, *Manual of Oil and Gas Terms* 372, 373 (12th ed. 2003, updated and revised by Patrick Martin & Bruce Kramer); *see, e.g., Interstate Contracting Corp. v. City of Dallas*, 135 S.W.3d 605, 612–13 (Tex. 2004); *Dresser Indus.,*

Inc. v. Page Petroleum, Inc., 853 S.W.2d 505, 507 n.1, 508–11 (Tex. 1993); *Tex. Gas Utils. Co. v. Barrett*, 460 S.W.2d 409, 413 (Tex. 1970). The court of appeals held that this exculpatory clause does not apply to the breach of contract claims and, therefore, the gross negligence and willful misconduct instructions should not have been included in the jury charge. 320 S.W.3d at 444. Reeder argues, however, that the operator's exculpatory clause must be interpreted as written.

The exculpatory clause in the JOA provides, in relevant part:

> Operator shall conduct its activities under this agreement as a reasonable prudent operator, in a good and workmanlike manner, with due diligence and in accordance with good oilfield practice, but in no event shall it have any liability as Operator to the other parties for losses sustained or liabilities incurred except such as may result from gross negligence or willful misconduct.

In a prior case, the court of appeals considered a similar exculpatory clause and saw "no meaningful difference between the two exculpatory clauses." *Id.* (citing *Castle Tex. Prod. Ltd. P'ship v. Long Trusts*, 134 S.W.3d 267, 283 n.4 (Tex. App.—Tyler 2003, pet. denied)). The similar exculpatory clause from the prior case reads, in relevant part:

> [Operator] . . . shall conduct and direct and have full control of all operations on the Contract Area as permitted and required by, and within the limits of, this agreement. It shall conduct all such operations in a good and workmanlike manner, but it shall have no liability as Operator to the other parties for losses sustained or liabilities incurred, except such as may result from gross negligence or willful misconduct.

Id. (citing *Long Trusts*, 134 S.W.3d at 283 n.4). The court of appeals noted that the exculpatory clause in this case contains the phrase "its activities under this agreement" while the contract in the prior case used the terms "all such operations." *Id.* The court of appeals nevertheless held that the exculpatory clause applies only to claims that Reeder breached his duty in operations and not to

claims that he otherwise breached the JOA, because the clause is located within the paragraph describing "operations on the contract area." *Id*.

Other courts of appeal have similarly considered the previous exculpatory clause language requiring the operator to "conduct all such operations in a good and workmanlike manner." Those courts of appeal have held that the clause extends only to claims that the operator failed to act as a reasonably prudent operator for operations under the contract, and not for other breaches of the JOA. *See, e.g., Long Trusts*, 134 S.W.3d at 267; *IP Petroleum Co., Inc. v. Wevanco Energy, L.L.C.*, 116 S.W.3d 888 (Tex. App.—Houston [1st Dist.] 2003, no pet.); *Cone v. Fagadau Energy Corp.*, 68 S.W.3d 147 (Tex. App.—Eastland 2001, pet. denied); *Abraxas Petroleum Corp. v. Hornburg*, 20 S.W.3d 741 (Tex. App.—El Paso 2000, no pet.). In *Abraxas*, the court of appeals held that "the operator's limitation of liability is linked directly to imposition of the duty to act as a reasonably prudent operator, which strictly concerns the manner in which the operator conducts drilling operations on the lease." 20 S.W.3d at 759. The court held that "the exculpatory clause is limited to claims based upon an allegation that Abraxas failed to act as a reasonably prudent operator and does not apply to a claim that it breached the JOA." *Id*.

The Fifth Circuit analyzed the same language and stated, contrary to the direction of the courts of appeal, that the clause's "protection clearly extends to breaches of the JOA." *Stine v. Marathon Oil Co.*, 976 F.2d 254, 261 (5th Cir. 1992). "It is clear to us that the protection of the exculpatory clause extends not only to 'acts unique to the operator,' as the district court expressed it, but also to any acts done under the authority of the JOA 'as Operator.'" *Id*. The Court held that

the clause protects Marathon from liability "for any act taken in its capacity as 'Operator' under the JOA (except for gross negligence or willful misconduct)." *Id*.

The exculpatory clauses that the courts of appeal and the Fifth Circuit considered were modeled after either the 1977 or 1982 Model Form Operating Agreement of the American Association of Petroleum Landmen. The exculpatory clause in the 1977 Model Form JOA stated that operator "shall conduct all such operations in a good and workmanlike manner . . . ." A.A.P.I. Form 610, Model Form Operating Agreement-1977, American Association of Petroleum Landmen, at 3. The 1982 Model Form provided that operator "shall conduct all such operations in a good and workmanlike manner," mirroring the language from the 1977 Model Form JOA. A.A.P.I. Form 610, Model Form Operating Agreement-1982, American Association of Petroleum Landmen, at 4. The cases limiting the scope of the exculpatory clauses in JOAs were interpreting language in either the 1977 Model Form JOA or the 1982 Model Form JOA. *See, e.g.*, *Abraxas*, 20 S.W.3d at 758–59 (construing "shall conduct all such operations" and holding that clause does not extend to claims that operator breached the JOA); *Long Trusts,* 134 S.W.3d at 283 (construing "shall conduct all such operations" and applying *Abraxas*); *IP Petroleum*, 116 S.W.3d at 894–96 (construing "shall conduct such operations," and applying *Abraxas*)*; Cone*, 68 S.W.3d at 154–55 (construing "shall conduct all such operations" and applying *Abraxas*).

The exculpatory clause in this case, however, is taken from the 1989 Model Form JOA, referring to "its activities under this agreement" instead of "all such operations." A.A.P.I. Form 610, Model Form Operating Agreement-1989, American Association of Petroleum Landmen. Legal commentators conclude there is a meaningful difference in the change in language from "all such

operations" to "its activities." "By way of contrast, the 1982 Form and prior forms differ markedly . . . . Because 'such operations' refers to operations on the Contract Area, the 1989 Form provides for more expansive exoneration of the Operator." Robert C. Bledsoe, *The Operating Agreement: Matters Not Covered or Inadequately Covered*, 47 ROCKY MTN. MIN. L. INST. § 15.03[1] (2001). Under the 1977 agreement, the language "conduct all such operations" applied to activities conducted by an operator on the "Contract Area" or at the well site, but "the 1989 [version] language seems to provide a broader spectrum of coverage." Wilson Woods, Comment, *The Effect of Exculpatory Clauses in Joint Operating Agreements: What Protections Do Operators Really Have in the Oil Patch?*, 38 TEX. TECH. L. REV. 211, 214–15 (2005).

"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." *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 662 (Tex. 2005) (citations omitted). To achieve this objective, contract terms are given "their plain and ordinary meaning unless the instrument indicates the parties intended a different meaning." *Dynegy Midstream Servs., Ltd. P'ship v. Apache Corp.*, 294 S.W.3d 164, 168 (Tex. 2009) (citation omitted).

Reading the clause as written, we conclude that the model form transformation is significant, as the change in language broadens the clause's protection of operators. The model forms from 1977 and 1982 both contained clauses that protected operators from "all such operations," while the 1989 model form protects "its activities." Here, the parties modeled their JOA after the 1989 model form—recognizing the distinction between "such operations" and "its activities." The modifier "such" references operations under the JOA, while the deletion of that word and use of the term "its

activities" includes actions under the JOA that are not limited to operations. The modification implicates a broader scope of conduct following the language of the contract. The agreed standard exempts the operator from liability for its activities unless its liability-causing conduct is due to gross negligence or willful misconduct.

B. Legal Sufficiency of the Evidence of Gross Negligence or Willful Misconduct

We turn next to determine whether there is legally sufficient evidence that Reeder was grossly negligent or acted with willful misconduct. Reeder argues that there is no evidence that gross negligence or willful misconduct caused the loss of production in paying quantities, and terminated the leases. The court of appeals held that the exculpatory clause did not apply to the claims addressed by the breach of contract Questions 8 and 18,[3] and therefore measured legal and factual sufficiency against the elements of breach of contract, not gross negligence or willful misconduct. 320 S.W.3d at 444.

In reviewing a verdict for legal sufficiency, we "must view the evidence in the light most favorable to the verdict, crediting favorable evidence if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not." *City of Keller v. Wilson*, 168 S.W.3d 802, 807 (Tex. 2005). A legal sufficiency challenge will be sustained when, inter alia, the evidence offered to prove a vital fact is no more than a mere scintilla. *Volkswagen of Amer., Inc. v. Ramirez,*

[3] Question 8 asks: "Do you find that Wendell Reeder breached his duty as operator to Dekrfour, Inc., Nelson Operating, Inc. and/or Wood County Oil & Gas Ltd. by failing to maintain production in paying quantities or other operations in the Forest Hill Field?" Question 18 asks: "Do you find that Wendell Reeder breached his duty to Dekrfour, Inc., Nelson Operating, Inc., and/or Wood County Oil & Gas, Ltd., by failing to offer Well No. 116 to them prior to plugging the well?"

159 S.W.3d 897, 903 (Tex. 2004) (citing *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997)).

Reeder challenges the jury's affirmative answers and the court of appeals' holding that he breached his duty as operator. The jury was given the same instruction to Questions 8 and 18 regarding his duty as operator:

> You are instructed that the joint operating agreement requires the Operator to conduct operations in a good and workmanlike manner. A good and workmanlike manner requires the operator to act as "a reasonably prudent operator."
>
> You are further instructed that the Operator is not liable under this standard unless Operator's conduct amounts to gross negligence or willful misconduct.
>
> You are further instructed that "gross negligence" means that entire want of care which would raise the belief that the act or omission complained or [sic] was a result of a conscious indifference to the right or welfare of the person or persons to be affected by it.

320 S.W.3d at 443. In holding that the exculpatory clause did not apply to the claims against Reeder, the court of appeals measured the sufficiency of the evidence against the elements of breach of contract. *Id*. at 444–45.

On appeal, Reeder contended that the evidence is legally and factually insufficient to support the jury's answer to Question 8 that he breached his duty as operator by failing to maintain production in paying quantities or other operations in the Forest Hill Field. *Id*. at 445. The court held that his challenge was without merit because there was some evidence that Reeder did not maintain production in paying quantities or take necessary action to maintain the leases. *Id*. at 446.

The court reasoned that it need not address Reeder's arguments regarding the gross negligence and willful misconduct standards. *Id*.

Because the exculpatory clause applies to these claims, however, our task is to determine whether there is legally sufficient evidence that Reeder acted with gross negligence or willful misconduct in breaching his duty as operator. The parties agreed by the language of the JOA that liability for a failure to perform contractual obligations requires more than a mere breach; rather, it requires a breach attended by gross negligence or willful misconduct. The jury was properly instructed. But we disagree that there is legally sufficient evidence to support the proper standard. The court of appeals emphasized that the "evidence shows that Reeder had no production from the Harris Sand Unit from September 2006 forward and that production had begun declining precipitously in the preceding months." *Id*. Further, "Reeder presented no evidence of any actions he undertook or other operations he attempted that would maintain the leases and the unit." *Id*.

Gross negligence has both an objective and a subjective component. *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 21–22 (Tex. 1994) (citation omitted). In examining proof of the subjective component, courts focus on the defendant's state of mind, examining whether the defendant knew about the peril caused by his conduct but acted in a way that demonstrates he did not care about the consequences to others. *Diamond Shamrock Ref. Co., L.P. v. Hall*, 168 S.W.3d 164, 173 (Tex. 2005) ("[T]he plaintiff must show that the defendant knew about the peril, but his acts or omissions demonstrate that he did not care."); *Tex. Dept. of Parks and Wildlife v. Miranda*, 133 S.W.3d 217, 232 (Tex. 2004) (citation omitted). Determining whether an act or omission involves peril requires

"an examination of the events and circumstances from the viewpoint of the defendant at the time the events occurred, without viewing the matter in hindsight." *Moriel*, 879 S.W.2d at 23.

The court of appeals noted that Reeder testified that he maintained production as long as he could before he had to spend his money on other pressing business interests that he owned and admitted to his partners that he did not have the money to fund his share of the operations. 320 S.W.3d at 446. The Fry Interests point to Reeder's absence from the well-sites, Reeder's failure to file a form with the Commission after he assumed duties as operator, the Commission's severance of the Harris Sand and Sub-Clarksville Units due to failed fluid tests for certain wells, and the cessation of production in September 2006 as examples of Reeder's gross negligence and willful misconduct. We consider this evidence in the context of the entire record for evidence of gross negligence or willful misconduct. *Mobil Oil Corp. v. Ellender*, 968 S.W.2d 917, 922 (Tex. 1998) (citing *Moriel*, 879 S.W.2d at 25 (further citation omitted)); *see City of Keller*, 168 S.W.3d at 817; *see also Burk Royalty Co. v. Walls*, 616 S.W.2d 911, 922 (Tex. 1981) ("In determining whether there is some evidence of the jury's finding of gross negligence, the reviewing court must look to all of the surrounding facts, circumstances, and conditions, not just individual elements or facts.").

The Operating Agreement expressly forbade Reeder from "undertak[ing] any project" expected "to cost more than $5,000," except in emergencies. Reeder was notified that remaining wells required testing and repairs, costing well in excess of $5,000, but he could not authorize the repairs without the consent of the other owners. Reeder testified that his partners Wade and Scherback refused his request for additional funding for the repairs. Fry testified that Reeder should have made his partners pay for the repairs, but Reeder testified that he tried and was rebuffed.

Reeder testified that he "put in [$]154,000" of his own money to bring the wells back into compliance with Commission requirements before running out of funds. An act or omission that is merely ineffective, thoughtless, careless, or not inordinately risky is not grossly negligent. *Moriel*, 879 S.W.2d at 22. "Only if the defendant's act or omission is unjustifiable and likely to cause serious harm can it be grossly negligent." *Id*. After reviewing the record, we find no evidence that Reeder knew about the peril but did not care about the consequences.

Reeder also contended on appeal that the evidence is legally and factually insufficient to support the jury's answer to Question 18 that he breached a duty with gross negligence or willful misconduct to Dekrfour, Nelson, and Wood County by failing to offer Well No. 116 to them prior to plugging the well. 320 S.W.3d at 446. Reeder argued that he was ordered to plug the well by the Commission and that he neither elected to abandon nor plug the well. *Id*. at 447. The court of appeals did not address Reeder's argument that the evidence is legally and factually insufficient to support a finding that his actions amounted to gross negligence or willful misconduct, but found that the evidence was legally and factually sufficient to support the elements of a breach of contract. *Id*. at 447–48. That may be so, but we find no evidence that Reeder acted with gross negligence or willful misconduct when he breached a duty to offer Well No. 116 prior to plugging the well.

Conclusion

Because the parties modeled their joint operating agreement after the revised exculpatory clause in the 1989 Form, the operator is exempted from liability for activities under the agreement unless the liability arises from gross negligence or willful misconduct. We hold that the exculpatory clause establishes the standard for the claims against Wendell Reeder. Because there is legally

insufficient evidence that Reeder acted with gross negligence or with willful misconduct, we reverse the judgment of the court of appeals and render a take-nothing judgment.

_____

Dale Wainwright
Justice

OPINION DELIVERED: August 31, 2012

IN THE SUPREME COURT OF TEXAS

NO. 10-0928

RAUL ERNESTO LOAISIGA, M.D., AND RAUL ERNESTO LOAISIGA, M.D., P.A., PETITIONERS,

v.

GUADALUPE CERDA, INDIVIDUALLY AND AS NEXT FRIEND OF MARISSA CERDA, A MINOR, AND CINDY VELEZ, RESPONDENTS

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

Argued February 29, 2012

JUSTICE JOHNSON delivered the opinion of the Court in which CHIEF JUSTICE JEFFERSON, JUSTICE WAINWRIGHT, JUSTICE GREEN, and JUSTICE GUZMAN joined, and in Parts I through V.A. and VI.A. of which JUSTICE WILLETT joined.

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

JUSTICE WILLETT filed a concurring and dissenting opinion.

JUSTICE LEHRMANN filed a concurring and dissenting opinion.

The Texas Medical Liability Act (TMLA) requires plaintiffs asserting health care liability claims (HCLCs) to timely serve each defendant with an expert report meeting certain requirements. In this case we consider whether claims that a doctor assaulted patients by exceeding the proper scope of physical examinations are subject to the TMLA's expert report requirements.

Two female patients sued a medical doctor, the professional association bearing his name, and a clinic, alleging the doctor assaulted the patients by groping their breasts while examining them for sinus and flu symptoms. Although they maintained that the claims were not HCLCs, the patients served the doctor and professional association with reports from a physician who, based only on the assumption that allegations in the plaintiffs' pleadings were true, opined that the defendant doctor's alleged actions did not fall within any appropriate standard of care. The defendants argued that the claims were HCLCs and moved for dismissal of the suit on the basis that the reports were deficient. The trial court denied the motions. The court of appeals held that the claims were not HCLCs, expert reports were not required, and affirmed the trial court's order without considering the reports' adequacy.

We hold that the TMLA creates a rebuttable presumption that a patient's claims against a physician or health care provider based on facts implicating the defendant's conduct during the patient's care, treatment, or confinement are HCLCs. The record before us does not rebut the presumption as it relates to the TMLA's expert report requirements, nor are the expert reports served by the plaintiffs adequate under the TMLA. We reverse the judgment of the court of appeals and remand the case to the trial court for further proceedings.

I. Background

Guadalupe Cerda, individually and as next friend of her daughter Marissa Cerda, and Cindy Velez (collectively, the plaintiffs) sued Raul Ernesto Loaisiga, M.D., Raul Ernesto Loaisiga, M.D., P.A. (hereinafter, the P.A.), and Sunshine Pediatrics, LLP. The plaintiffs' claims are based on two separate incidents. Guadalupe alleges that she took Marissa, then age seventeen, to Sunshine

Pediatrics for treatment of a sinus problem. According to the pleadings, Dr. Loaisiga examined Marissa and "under the guise of listening to [Marissa's] heart through the stethoscope . . . cupped [Marissa's] breast with the palm of his hand." Velez, who was employed as a nurse at Sunshine Pediatrics, alleges that Dr. Loaisiga offered to examine her when she arrived at work with flu-like symptoms. She further alleges that during the examination Dr. Loaisiga had her take off her upper garment, then "he undid her bra from the front . . . [and] palmed her breast with one hand during his entire examination."

The plaintiffs sued for assault, medical negligence, negligence, gross negligence, and intentional infliction of emotional distress. They allege that Dr. Loaisiga knew or reasonably should have believed that Marissa and Velez would regard his touching of their breasts as offensive or provocative and Sunshine Pediatrics breached its duty and the appropriate standard of care by allowing Dr. Loaisiga to fondle them. The plaintiffs assert that although the case is actually for assault, in an "abundance of caution and in the alternative," they claim Dr. Loaisiga's actions "fell below the standard of care" for a doctor treating female patients. The pleadings of medical negligence specifically reference "Chapter 74 of the CPRC"—the TMLA. *See* TEX. CIV. PRAC. & REM. CODE §§ 74.001–.507. The plaintiffs pray for judgment against the three defendants, but they do not specifically allege any type of claim, either direct or vicarious, against the P.A.

Within 120 days after filing their petition, the plaintiffs served Dr. Loaisiga and the P.A. with a report and curriculum vitae from Michael R. Kilgore, M.D., a family practitioner. *See id.* § 74.351(a), (b). Dr. Kilgore stated in the report that he had reviewed the plaintiffs' petition. He recited allegations from the petition and stated that if they were true, then Dr. Loaisiga's actions were

not within any appropriate standard of care, comprised an assault, and harmed the plaintiffs. In a supplemental report, Dr. Kilgore stated that the opinions he expressed as to Dr. Loaisiga also applied to the P.A.

Dr. Loaisiga and the P.A. filed objections to the reports and motions to dismiss. They argued that the reports were deficient because they failed to (1) implicate conduct of either Dr. Loaisiga or the P.A., (2) set out the applicable standard of care, (3) identify a breach of the standard of care, or (4) identify how the actions of Dr. Loaisiga or the P.A. proximately caused the alleged injuries. The motions also asserted that Dr. Kilgore's report was "based upon pure speculation and assumption" and Dr. Kilgore, as a family practitioner, was not qualified to render an expert opinion regarding Dr. Loaisiga's conduct as a pediatrician. The P.A. separately argued that neither the original nor the supplemental report addressed any theories of liability as to it and, in any event, the supplemental report was deficient because it gave no explanation of why the opinions in the original report applied to the P.A. The plaintiffs' response to each motion maintained that Dr. Kilgore's reports were adequate; Dr. Loaisiga was acting both individually and as the P.A., so there was no difference between the actions of the two; and Dr. Kilgore's reports were directed to both. In the alternative, the plaintiffs requested thirty-day extensions to cure any defects in the reports. *See id.* § 74.351(c) (stating that if an expert report is not timely served "because the elements of the report are found deficient, the court may grant one 30-day extension to the claimant in order to cure the deficiency").

The trial court held a hearing on the motions to dismiss and denied them without stating why. Dr. Loaisiga and the P.A. appealed. *See id.* § 51.014(a)(9) (permitting immediate appeal of a trial court order denying all or part of a motion to dismiss for failure to serve an expert report in an

HCLC). The court of appeals affirmed. ___ S.W.3d ___. The court reasoned that the plaintiffs were not required to file expert reports because their claims against Dr. Loaisiga are assault claims, not HCLCs. *See id.* at ___. It did not reach the question of whether Dr. Kilgore's reports were deficient. The court also concluded that the TMLA does not apply to the plaintiffs' claims against the P.A. because the plaintiffs refer to the P.A. only in the introductory part of their pleadings and do not assert liability claims against it. *See id.* at ___.

We granted the petition for review of Dr. Loaisiga and the P.A. 55 Tex. Sup. Ct. J. 145 (Dec. 16, 2011). Before turning to the parties' arguments on the merits, we address our jurisdiction to consider this interlocutory appeal.

II. Jurisdiction

Texas appellate courts generally have jurisdiction only over final judgments. *Bally Total Fitness Corp. v. Jackson*, 53 S.W.3d 352, 355 (Tex. 2001). But an exception exists for certain interlocutory orders. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a); *Jackson*, 53 S.W.3d at 355. Section 51.014(a) provides in relevant part:

> A person may appeal from an interlocutory order of a district court, county court at law, or county court that:
> . . .
> (9) denies all or part of the relief sought by a motion under Section 74.351(b), except that an appeal may not be taken from an order granting an extension under Section 74.351.

TEX. CIV. PRAC. & REM. CODE § 51.014(a)(9).

A court of appeals' judgment ordinarily is conclusive when an interlocutory appeal is taken pursuant to section 51.014(a)(9). *See* TEX. GOV'T CODE § 22.225(b)(3). However, we may consider

an interlocutory appeal when the court of appeals' decision creates an inconsistency in the law that should be clarified to remove unnecessary uncertainty and unfairness to litigants. *Id.* §§ 22.001(a)(2), (e); 22.225(c), (e). This case involves an issue on which the courts of appeals have issued inconsistent decisions. *Compare* ___ S.W.3d at ___ (holding that a doctor's alleged fondling of the plaintiffs' breasts during medical examinations could not feasibly be explained as a necessary part of medical treatment and therefore does not give rise to an HCLC), *with Vanderwerff v. Beathard*, 239 S.W.3d 406, 409 (Tex. App.—Dallas 2007, no pet.) (concluding that a chiropractor's alleged rubbing of a plaintiff's genitals during a chiropractic examination gave rise to an HCLC because whether the chiropractor's actions were within the scope of a chiropractic examination could not be answered without reference to the standard of care required of a chiropractic provider). We have jurisdiction to resolve this issue. TEX. GOV'T CODE § 22.001(a)(2).

III. Health Care Liability Claims

A. General

Determining whether claims are HCLCs requires courts to construe the TMLA. We review issues of statutory interpretation de novo. *Molinet v. Kimbrell*, 356 S.W.3d 407, 411 (Tex. 2011).

The TMLA defines an HCLC 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.

TEX. CIV. PRAC. & REM. CODE § 74.001(a)(13). According to its definition, an HCLC has three elements: (1) the defendant is a health care provider or physician; (2) the claimant's cause of action

is for treatment, lack of treatment, or other claimed departure from accepted standards of medical care, health care, or safety or professional or administrative services directly related to health care; and (3) the defendant's alleged departure from accepted standards proximately caused the claimant's injury or death. *Marks v. St. Luke's Episcopal Hosp.*, 319 S.W.3d 658, 662 (Tex. 2010) (plurality opinion).

This case focuses on the second element which concerns the nature of a claimant's "cause of action" and the definitions of medical care, health care, safety and professional or administrative services directly related to health care. *See* TEX. CIV. PRAC. & REM. CODE § 74.001(a)(13). The TMLA does not define the term "cause of action," but the generally accepted meaning of that phrase refers to the "'fact or facts entitling one to institute and maintain an action, which must be alleged and proved in order to obtain relief.'" *In re Jorden*, 249 S.W.3d 416, 421 (Tex. 2008) (quoting *A.H. Belo Corp. v. Blanton*, 129 S.W.2d 619, 621 (1939)). "Health care" is broadly defined as "any act . . . performed . . . by any health care provider for [or] to . . . a patient during the patient's medical care, treatment, or confinement." TEX. CIV. PRAC. & REM. CODE § 74.001(a)(10). And "medical care" is defined as "any act defined as practicing medicine under Section 151.002, Occupations Code, performed or furnished, or which should have been performed, by one licensed to practice medicine in this state for, to, or on behalf of a patient during the patient's care, treatment, or confinement." *Id.* § 74.001(a)(19). The Occupations Code, in turn, defines "practicing medicine" as "the diagnosis, treatment, or offer to treat a mental or physical disease or disorder or a physical deformity or injury by any system or method, or the attempt to effect cures of those conditions by a person who . . . publicly professes to be a physician." TEX. OCC. CODE § 151.002(a)(13).

Analysis of the second element—the cause of action—focuses on the facts underlying the claim, not the form of, or artfully-phrased language in, the plaintiff's pleadings describing the facts or legal theories asserted. *See, e.g.*, *Yamada v. Friend*, 335 S.W.3d 192, 196-97 (Tex. 2010); *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 847, 854 (Tex. 2005). We have previously determined that a claim based on one set of facts cannot be spliced or divided into both an HCLC and another type of claim. *See Yamada*, 335 S.W.3d at 197; *Diversicare*, 185 S.W.3d at 854. It follows that claims premised on facts that *could* support claims against a physician or health care provider for departures from accepted standards of medical care, health care, or safety or professional or administrative services directly related to health care are HCLCs, regardless of whether the plaintiff alleges the defendant is liable for breach of any of those standards. *See* TEX. CIV. PRAC. & REM. CODE § 74.001(a)(13).

The broad language of the TMLA evidences legislative intent for the statute to have expansive application. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE § 74.001(a)(10) (defining "health care" to include "*any* act . . . by *any* health care provider for, to, or on behalf of a patient during the patient's medical care, treatment, or confinement." (emphasis added)); *see also Molinet*, 356 S.W.3d at 411 (noting that when interpreting statutes we strive to ascertain and give effect to the Legislature's intent). The breadth of the statute's text essentially creates a presumption that a claim is an HCLC if it is against a physician or health care provider and is based on facts implicating the defendant's conduct during the course of a patient's care, treatment, or confinement. *See Marks*, 319 S.W.3d at 662. But the presumption is necessarily rebuttable. In some instances the only possible relationship between the conduct underlying a claim and the rendition of medical services or

healthcare will be the healthcare setting (*i.e.*, the physical location of the conduct in a health care facility), the defendant's status as a doctor or health care provider, or both.

B. Assaults and the TMLA

The elements of a civil assault mirror those of a criminal assault. *See Waffle House, Inc. v. Williams*, 313 S.W.3d 796, 801 n.4 (Tex. 2010). Under the Penal Code, an assault occurs if a person:

> (1) intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse;
> (2) intentionally or knowingly threatens another with imminent bodily injury, including the person's spouse; or
> (3) intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative.

TEX. PENAL CODE § 22.01(a). As relevant to the case before us, an assault occurs if a person "intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative." *Id.* § 22.01(a)(3).

Distinguishing between claims to which the TMLA applies and those to which it does not apply can be difficult when the plaintiff alleges an assault took place during a physical examination to which the patient consented. The scope of medical examinations generally are informed, and largely guided, by a combination of the patient's complaints and the examiner's training and professional judgment. During an examination for the purpose of diagnosing or treating a patient's condition, a medical or health care provider almost always will touch the patient intentionally. Frequently, examinations involve examiners touching the patient's body in places and in ways that

would be assaults were it not for the actual or implied consent of the patient in the context of the medical or health care relationship. And the examiner may need to examine parts of the patient's body that might not be anticipated by a person without medical or health care training. Such a situation is demonstrated by *Vanderwerff*, a case in which no expert report was filed. There, Kristina Beathard sought treatment from Eric Vanderwerff, a chiropractor, complaining of pain in various parts of her body. 239 S.W.3d at 407. Beathard later sued Vanderwerff, alleging that "during the course of a routine examination of her knee" he rubbed her genitals. *Id.* at 409. The trial court denied Vanderwerff's motion to dismiss for Beathard's failure to serve an expert report, but the court of appeals reversed. *Id.* In doing so, it noted that Beathard had marked an anatomical drawing to show her areas of pain, and those markings indicated she was having pain not only in her neck, wrists, ankle, and left knee, but also running from her knee to her upper thigh. *Id.* The court of appeals set out the issue and its conclusion as follows:

> The threshold questions raised by Beathard's pleadings are whether she consented to treatment and whether Vanderwerff's examination was within the scope of a chiropractic examination. Was the examination a "routine" examination as Beathard contends? These questions cannot be answered without reference to the standard of care required of a chiropractic provider.

Id. In essence, the court of appeals recognized that an expert report was necessary because Vanderwerff's conduct in the overall context of the chiropractic examination could have been part of the care he was rendering pursuant to Beathard's consent to be examined and treated for pain which, in part, she reported extended from her knee to the upper thigh.

In balancing the respective rights of and burdens on claimants and medical and healthcare defendants, the Legislature has determined that requiring claimants to bear the expense of obtaining

and serving expert reports early in HCLCs is preferable to having parties incur substantial expense and devote considerable time to developing claims through discovery and trial preparation before a trial court determines which ones are meritless. *See Scoresby*, 346 S.W.3d at 552, 556; *Palacios*, 46 S.W.3d at 877. However, we fail to see how the Legislature could have intended the requirement of an expert report to apply under circumstances where the conduct of which a plaintiff complains is wholly and conclusively inconsistent with, and thus separable from, the rendition of "medical care, or health care, or safety or professional or administrative services directly related to health care" even though the conduct occurred in a health care context. *See* TEX. CIV. PRAC. & REM. CODE § 74.001(a)(13); *see also* TEX. GOV'T CODE § 311.021 ("In enacting a statute, it is presumed that . . . a just and reasonable result is intended . . . .").

We conclude that a claim against a medical or health care provider for assault is not an HCLC if the record conclusively shows that (1) there is no complaint about any act of the provider related to medical or health care services other than the alleged offensive contact, (2) the alleged offensive contact was not pursuant to actual or implied consent by the plaintiff, and (3) the only possible relationship between the alleged offensive contact and the rendition of medical services or healthcare was the setting in which the act took place. *See Murphy v. Russell*, 167 S.W.3d 835, 838 (Tex. 2005) (per curiam) (holding that a plaintiff's battery claim was an HCLC because "[t]here may [have] be[en] reasons for providing treatment without specific consent that do not breach any applicable standard of care[, and] [t]he existence or nonexistence of such reasons is necessarily the subject of expert testimony"); *Buck v. Blum*, 130 S.W.3d 285, 289-90 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (concluding that a neurologist's conduct was not in the course and scope of his

employment when a patient complained that the neurologist placed his penis instead of a metal weight in the patient's hand during a neurological examination).

IV. Expert Reports

The TMLA's expert report requirements do not require a trial court to make a merits determination regarding whether the claim is an HCLC. *See Murphy*, 167 S.W.3d at 838 (explaining that the requirement is a threshold over which a plaintiff must proceed); *Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 878 (Tex. 2001) ("[T]he expert report must represent only a good-faith effort to provide a fair summary of the expert's opinions. A report need not marshal all the plaintiff's proof, but it must include the expert's opinion on each of the elements identified in the statute."). Nor does a determination that the TMLA's expert report requirements apply to a claim affect other matters such as whether a physician or health care provider may be subject to professional sanctions or criminal prosecution for the conduct on which a plaintiff bases a claim. *See Vanderwerff*, 239 S.W.3d at 407 n.1 (noting that in addition to a civil case alleging sexual assault against a chiropractor for rubbing the patient's genitals during an examination, a criminal complaint was filed against the defendant). The requirements are meant to identify frivolous claims and reduce the expense and time to dispose of any that are filed. *See Scoresby v. Santillan*, 346 S.W.3d 546, 554 (Tex. 2011) ("The purpose of the expert report requirement is to deter frivolous claims, not to dispose of claims regardless of their merits." (citation omitted)); *see also* TEX. CIV. PRAC. & REM. CODE § 74.351(k), (t) (providing that an expert report is not admissible in and shall not be used during depositions, trial, or other proceedings, nor shall it be referred to for any purpose absent the plaintiff's using it in a way other than serving it pursuant to the 120-day service requirement of

section 74.351(a)); *id.* § 74.351(s) (limiting discovery until the expert report and curriculum vitae of the expert have been served).

In *Palacios* we held that the TMLA's language requires a trial court to determine a report's adequacy from its four corners. 46 S.W.3d at 878. The statute does not similarly limit what a trial court may consider when the question is whether a claim is subject to the TMLA's expert report requirements. Thus, when making that determination courts should consider the entire court record, including the pleadings, motions and responses, and relevant evidence properly admitted. This could include, but is not limited to, reports such as those the plaintiffs served here, medical records regarding examination or treatment of the plaintiff, if any, and the defendant's pleadings and explanation for how the contact at issue was part of medical care, or health care, or safety or professional or administrative services directly related to health care.

In light of the foregoing, we turn to the parties' contentions. We address the defendants separately, beginning with Dr. Loaisiga.

V. Dr. Loaisiga

A. Was an Expert Report Required?

Dr. Loaisiga argues that the plaintiffs were required to file an expert report because the alleged assaults occurred during the course of his administering medical services and all his actions were inseparable from the rendition of those medical services. The plaintiffs urge that, as the court of appeals held, their assault claims are not subject to the TMLA's expert report requirements because Dr. Loaisiga's acts do not implicate medical or health care services, regardless of whether medical treatment was occurring at the time of the assaults. Rather, they say the alleged acts of

assault are so inconsistent with the medical services Dr. Loaisiga was rendering, that the TMLA does not apply. In analyzing these arguments, we consider the entire record before the trial court and the overall context of the plaintiffs' suit, including the nature of the factual allegations in their pleadings, Dr. Loaisiga's contentions, and the motions to dismiss and responses.

We look first to the pleadings. The plaintiffs' pleadings contain allegations that except for Dr. Loaisiga's touching of their breasts, the examinations were routine. The pleadings do not assert a lack of proper care by Dr. Loaisiga other than his touching of their breasts. Further, the plaintiffs' brief on the merits posits that their pleadings made "no factual allegations that they were injured by any deficiencies in the medical care provided by Dr. Loaisiga."

The plaintiffs' claims are qualitatively similar to the claims in *Vanderwerff*. *See* 239 S.W.3d at 407. Like the plaintiff in *Vanderwerff*, the plaintiffs here allege an examining doctor inappropriately touched parts of their bodies during the course of otherwise routine examinations. *See id.* But because the determination of whether the plaintiffs were required to serve an expert report is to be made based on the whole record, we must also consider other relevant documents in the record and Dr. Loaisiga's contentions. In that regard, this case is distinguishable from *Vanderwerff*.

One distinguishing factor is that the plaintiff in *Vanderwerff* did not serve an expert report. Here the plaintiffs served a report that stated, in part:

> During a routine "sick" visit with a physician, a stethoscope may be utilized to listen to the heartbeat of the patient. However, in all applicable medical standards of care, it is unnecessary that a patient remove their brazier, nor is it necessary to cup, palm or touch the breast of a female patient either with the hand holding the stethoscope or the other hand not holding the instrument to listen to a heart beat.

Another distinction is that the record in *Vanderwerff* contained an anatomical drawing on which the plaintiff indicated to the chiropractor that she had pain running from her knee to her upper thigh. *Id.* at 409. Based on that document, the court of appeals recognized that the chiropractor's touching of, or near, the patient's genitals could have been part of the examination. *See id.* Here, the record does not contain any documents other than the plaintiffs' pleadings to shed light on the plaintiffs' symptoms or their complaints to Dr. Loaisiga. As discussed in more detail below, apart from allegations in the plaintiffs' pleadings, Dr. Kilgore's reports make no reference to the plaintiffs' medical records or the complaints they made to Dr. Loaisiga in the clinical setting.

The substance of the plaintiffs' complaint is that Dr. Loaisiga's conduct exceeded the scope of the examinations to which they consented, and Dr. Kilgore's report shows that it is unnecessary for a physician to touch a female patient's breasts during routine examinations of the type Dr. Loaisiga was performing. But even taken together, these aspects of the record do not conclusively rebut the presumptive application of the TMLA's expert report requirements. The lack of information to give context to Dr. Loaisiga's actions during the examinations—such as medical records, if any, reference to the medical records by Dr. Kilgore in his reports, or other information regarding the plaintiffs' symptoms and complaints to Dr. Loaisiga—prevents the plaintiffs from showing conclusively that the only relationship between the alleged touching of their breasts and Dr. Loaisiga's rendition of medical services was the physical location of the examinations at the offices of Sunshine Pediatrics and his status as a doctor or health care provider.

We conclude that the record does not contain sufficient information to conclusively show that Dr. Loaisiga's conduct could not have been part of the examination he was performing. But because

we are clarifying the standard for whether claims are subject to the TMLA's expert report requirements and the plaintiffs maintain that theirs are not, we conclude it is appropriate to remand the case to the trial court for further proceedings regarding that issue. *See Low v. Henry*, 221 S.W.3d 609, 621 (Tex. 2007) (remanding "to allow the parties to present evidence responsive to our guidelines").

B. Adequacy of the Reports

The court of appeals did not consider whether Dr. Kilgore's reports are adequate to meet the requirements of section 74.351 because it concluded that no expert reports were necessary. ___ S.W.3d at ___. If, on remand, the trial court determines expert reports are necessary under the TMLA, the adequacy of Dr. Kilgore's reports must be determined. Dr. Loaisiga preserved the adequacy issue in the courts below and briefed and argued it here. Therefore, without expressing any opinion as to whether the TMLA's expert report requirements will ultimately apply to this case, in the interest of judicial efficiency we address whether Dr. Kilgore's reports comply with the TMLA's requirements. *See* TEX. R. APP. P. 53.4; *Reid Road Mun. Util. Dist. No. 2 v. Speedy Stop Food Stores, Ltd.*, 337 S.W.3d 846, 855 (Tex. 2011).

When a document purporting to be an expert report is timely served in an HCLC and is properly challenged, the trial 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).

TEX. CIV. PRAC. & REM. CODE § 74.351(*l*). To qualify as an objective good faith effort the report must (1) inform the defendant of the specific conduct the plaintiff questions, and (2) provide a basis

for the trial court to conclude that the plaintiff's claims have merit. *Scoresby*, 346 S.W.3d at 556 (citing *Palacios*, 46 S.W.3d at 879). A report meets the minimum qualifications for an expert report under the statute "if it contains the opinion of an individual with expertise that the claim has merit, and if the defendant's conduct is implicated." *Id.* at 557. If a report meets these qualifications but is deficient, and an extension to cure is requested, the trial court may grant one thirty-day extension to cure the deficiencies. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(c). But if a report does not meet the standard set in *Scoresby*, it is not an expert report under the statute, and the trial court must dismiss the plaintiff's claims if the defendant has properly moved for dismissal. TEX. CIV. PRAC. & REM. CODE § 74.351(b).

Dr. Loaisiga advances three arguments why the case should be dismissed if the TMLA's expert report requirements apply. The arguments all substantively rely on his position that Dr. Kilgore's reports cannot be good faith attempts to provide expert reports because they merely assume the truth of what is in the plaintiffs' pleadings. Dr. Loaisiga first argues that Dr. Kilgore's assuming the truth of the plaintiffs' pleadings results in the reports being wholly speculative because the pleadings are merely unverified allegations. He also asserts that the reports (1) improperly require the trial court to assume facts outside their four corners and (2) do not in good faith identify and state the breach and causation elements required to be contained in expert reports because they are conditioned on certain facts being true. In response, the plaintiffs maintain that Dr. Kilgore was entitled to rely on their pleadings as true. They posit that whether their allegations are credible is a matter for the jury to decide, not a matter for the trial judge in passing on whether the reports are a

good faith effort to comply with the TMLA requirements. To a certain extent we agree with both parties.

The fact that pleadings are not verified does not relieve attorneys and parties from their obligation to avoid including groundless or bad faith allegations in them. To the contrary, including such allegations in pleadings is sanctionable. *See* TEX. R. CIV. P. 13. Thus, we do not see why an expert, in formulating an opinion, should be precluded from considering and assuming the validity of matters set out in pleadings in the suit, absent a showing that the pleadings are groundless or in bad faith or rebutted by evidence in the record.

On the other hand, the purpose of an expert report is to give the trial court sufficient information within the four corners of the report to determine if the plaintiff's claim has merit. *Scoresby*, 346 S.W.3d at 554, 556. If an expert could formulate an adequate expert report by merely reviewing the plaintiff's pleadings and assuming them to be true, then artful pleading could neutralize the Legislature's requirement that expert reports demonstrate the plaintiff's claims have merit. *See id.* That is because the facts and circumstances alleged in the plaintiff's pleadings might omit or misstate, inadvertently or otherwise, matters critical to a valid expert opinion. An expert report based only on the plaintiff's pleadings could mask the context of the medical services or health care rendered. Significant matters involved in the rendition of the care, such as the patient's complaints or the health care provider's findings, could warrant investigation and examination beyond that which might otherwise seem to have been appropriate, yet be unknown to the expert. If such matters were not in the plaintiff's pleadings the expert would not have considered them, the expert report would not reference them, and because they are outside the four corners of the report,

the trial court could not consider them in deciding whether the plaintiff's claims have merit. That is not what we believe the Legislature intended. *See id.* at 552-54.

We conclude that in formulating an adequate expert report under section 74.351, an expert may consider and rely on the plaintiff's pleadings, but the expert must consider more than the pleadings. How much more will depend on the particular circumstances of the claim. But we fail to see how in most instances, and particularly in claims involving the scope of an examination, an expert report could be adequate unless the expert at least considered and commented on the patient's medical records to the extent the records and their contents—or lack of appropriate contents—are relevant to the expert's opinion.

In this case Dr. Kilgore's reports and curriculum vitae demonstrate that he is a trained and practicing physician. He has sufficient expertise in the medical field to be qualified to provide an adequate expert report. *See Scoresby*, 346 S.W.3d at 557. The reports also demonstrate that he is of the opinion the plaintiffs' claims have merit. *See id.* But his failure to consider any matters other than the plaintiffs' pleadings in formulating his opinion make his existing reports inadequate to comply with section 74.351's expert report requirements. On the other hand, we disagree with Dr. Loaisiga's position that the deficiencies in Dr. Kilgore's reports require dismissal of the plaintiffs' claims against him. The reports meet the standard set out in *Scoresby*, and the plaintiffs requested a thirty-day extension to cure defects in them in the event they were deficient. Accordingly, if on remand the trial court determines that the TMLA's expert report requirements apply to this case, the court should consider the plaintiffs' request for an extension of time to cure deficiencies in the reports as to Dr. Loaisiga. *See id.*

VI. The P.A.

A. Was an Expert Report Required?

The plaintiffs' petition names the P.A. as a defendant and prays for judgment against it, but the pleading does not mention the P.A. otherwise. The court of appeals concluded that the TMLA did not apply to the P.A., given the lack of "allegations of medical negligence or otherwise" against the P.A. ___ S.W.3d at ___. We disagree with that conclusion.

The court of appeals focused on the latter part of the first sentence of section 74.351(a), emphasizing the requirement of an expert report "for each physician or health care provider *against whom a liability claim is asserted*." ___ S.W.3d at ___ (quoting TEX. CIV. PRAC. & REM. CODE § 74.351(a)). However, that portion of the statute's text must be read in conjunction with the words that surround it. *See Omaha Healthcare Ctr., LLC v. Johnson*, 344 S.W.3d 392, 395 (Tex. 2011) (explaining that we interpret statutory text according to its plain meaning and context unless such a construction leads to absurd or nonsensical results). The beginning of the sentence the court of appeals quoted refers to "a health care liability claim." TEX. CIV. PRAC. & REM. CODE § 74.351(a). Reading the sentence as a whole shows that "a liability claim" is merely an abbreviated reference to "a health care liability claim," which is elsewhere defined in the TMLA as "a cause of action." *Id.* § 74.001(a)(13); *see also Mokkala v. Mead*, 178 S.W.3d 66, 71 (Tex. App.—Houston [14th Dist.] 2005, pet. denied) ("A 'health care liability claim' is a 'cause of action,' not a lawsuit."). And as we have explained, a "cause of action" means the "fact or facts entitling one to institute and maintain an action, which must be alleged and proved in order to obtain relief." *In re Jorden*, 249 S.W.3d at 421 (citation omitted). Therefore, the expert report requirements are triggered when a plaintiff

names a person or entity as a defendant and seeks to obtain relief from that defendant based on facts that possibly implicate the TMLA.

This construction of the statute furthers the purpose of the expert report requirements. *See Scoresby*, 346 S.W.3d at 554; *see also Molinet*, 356 S.W.3d at 411 (stating that our objective in construing a statute is to ascertain and give effect to the Legislature's intent). If a plaintiff could name and seek judgment against a medical or health care provider based on facts that fall within the TMLA's coverage without triggering the 120-day deadline for serving an expert report, it would open the door to artful pleading and undermine the Legislature's goal of accelerating the disposition of non-meritorious HCLCs. *See Scoresby*, 346 S.W.3d at 554; *Diversicare*, 185 S.W.3d at 854.

In this case the plaintiffs made the P.A. a party to the case and sought judgment against it based on no facts other than those underlying their claims against Dr. Loaisiga. The P.A. is named after Dr. Loaisiga, and he has not disputed the plaintiffs' allegation that he was and is its sole officer and director. The plaintiffs' response to the P.A.'s motion to dismiss alleged that Dr. Loaisiga acted both individually and as the P.A. when he assaulted the plaintiffs and there "is no differentiation between the two."

As we discuss above, the determination of whether a plaintiff's expert report is adequate is not a merits determination, but rather a preliminary determination designed to expeditiously weed out claims that have no merit. In this case the pleadings and record were sufficient to make the plaintiffs' claims as to the P.A. clear: they claimed it was vicariously liable for Dr. Loaisiga's conduct. The P.A. could have excepted to and sought clarification of the pleadings if it desired to have them clarified, but it did not do so.

We conclude that if the plaintiffs' claims assert HCLCs, then the TMLA's expert report requirements apply to the claims against the P.A. just as they do to the claims against Dr. Loaisiga individually.

B. Adequacy of the Reports

The court of appeals did not consider whether Dr. Kilgore's reports are adequate to meet the requirements of section 74.351 as to the P.A. ___ S.W.3d at ___. We address the issue for the same reasons expressed above as to Dr. Loaisiga. *See* TEX. R. APP. P. 53.4; *Reid Road Mun. Util. Dist. No. 2*, 337 S.W.3d at 855.

Dr. Kilgore stated in his September 3, 2009 report that "[a]ll opinions expressed and contained in my previous report are adopted in this supplemental report and are also applicable to [the P.A.]." His previous report demonstrated that he is a trained and practicing physician who holds the opinion that Dr. Loaisiga's conduct is implicated and the plaintiffs' claims against Dr. Loaisiga have merit. *See supra* Part V.B. But, as we explain above, Dr. Kilgore's previous report is not adequate to comply with section 74.351 because he considered only the plaintiffs' pleadings in formulating his opinions. By adopting the previous report, the supplemental report meets the minimal standard set out in *Scoresby*, just as the original report did, but it is deficient as to the P.A., just as the original report was deficient as to Dr. Loaisiga. So, if on remand the plaintiffs' claims are determined to be HCLCs subject to the TMLA's expert report requirements, the trial court should consider the plaintiffs' request for an extension of time to cure the reports as to the P.A. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(c).

VII. Conclusion

We reverse the judgment of the court of appeals. We remand the case to the trial court for further proceedings in accordance with this opinion. *See id.*; *Scoresby*, 346 S.W.3d at 557.

_____

Phil Johnson
Justice

OPINION DELIVERED: August 31, 2012

IN THE SUPREME COURT OF TEXAS

NO. 10-0928

RAUL ERNESTO LOAISIGA AND
RAUL ERNESTO LOAISIGA, M.D., P.A., PETITIONERS,

v.

GUADALUPE CERDA, INDIVIDUALLY AND AS NEXT FRIEND OF
MARISSA CERDA, A MINOR, AND CINDY VELEZ, RESPONDENTS

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

JUSTICE HECHT, joined by JUSTICE MEDINA, concurring in part and dissenting in part.

Principal among the Legislature's stated purposes in enacting the Medical Liability Act was decreasing the cost of health care liability claims without unduly restricting a claimant's rights.[1] But disagreements over the Act's expert report requirement,[2] which is merely intended to weed out

[1] Act of June 2, 2003, 78th Leg., R.S., ch. 204, §§ 10.01, 10.11(b) (2), (3), 2003 Tex. Gen. Laws 847, 864, 884-885 (adopting the Medical Liability Act as Chapter 74 of the Texas Civil Practice & Remedies Code, and providing that "it is the purpose of [the Act] to improve and modify the system by which health care liability claims are determined in order to . . . decrease the cost of those claims and . . . do so in a manner that will not unduly restrict a claimant's rights . . . ."); *see also Scoresby v. Santillan*, 346 S.W.3d 546, 552 (Tex. 2011) ("Fundamentally, the goal of [the Act] has been to make health care in Texas more available and less expensive by reducing the cost of health care liability claims.").

[2] The Act requires that within 120 days of filing suit, a claimant must serve a defendant with an expert report setting out the applicable standard of care, how the defendant breached it, and how that breach caused the claimant's damages. TEX. CIV. PRAC. & REM. CODE § 74.351(a), (r)(6).

frivolous claims early on,[3] have resulted in protracted pretrial proceedings and multiple interlocutory appeals, threatening to defeat the Act's purpose by increasing costs and delay that do nothing to advance claim resolution. In an effort to staunch this waste of time and money, we have tried to minimize the grounds for such disagreements. We have held that the standard for adequacy of a report is lenient,[4] and that leave to cure any deficiencies in a report must be freely given.[5] As a result, objections and appeals should be fewer.

With the same goal in mind, the Court today tackles the issue of when an expert report is required. The Court concludes that "[t]he breadth of the statute's text essentially creates a presumption that a claim is an HCLC if it is against a physician or health care provider and is based on facts implicating the defendant's conduct during the course of a patient's care, treatment, or confinement."[6] I agree that the Act creates such a presumption and that it is, as the Court says, "necessarily rebuttable".[7]

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[3] *Scoresby*, 346 S.W.3d at 552 (stating that the Act seeks "to deter frivolous lawsuits by requiring a claimant early in litigation to produce the opinion of a suitable expert that his claim has merit").

[4] *Id*. at 549 ("[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 delay of multiple interlocutory appeals and assures a claimant a fair opportunity to demonstrate that his claim is not frivolous.").

[5] *Id*. ("[The Act] 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. The trial court should err on the side of granting the additional time and must grant it if the deficiencies are curable." (footnotes omitted)).

[6] *Ante* at ___.

[7] *Ante* at ___.

For the claimant who contends his claim is not an HCLC, obtaining an expert report should not present a major obstacle, as this case illustrates. The expert report here says, in essence, that sexual assault is not a part of health care. One need not turn to the Mayo Clinic for such an opinion. An expert report, as we have interpreted it, is a low threshold a person claiming against a health care provider must cross merely to show that his claim is not frivolous. Occasionally there will be cases — this may be one — in which an expert report is required even though evidence later shows that the claim is not an HCLC. While the requirement is thus not perfect, it is nevertheless a reasonable effort by the Legislature to address what it found to be a crisis in HCLCs. But the Act's limitations on damages and other restrictions are far more severe. A conclusion made early in the case that an expert report must be produced does not preclude a later determination, after the case is more fully developed, that the Act's provisions do not apply after all.

The claimants in this case proceeded exactly as they should have. Insisting that their claims are not HCLCs but claims for assault, they nevertheless produced an expert report. I agree with the Court that the expert could not rely entirely on the claimants' petition. A requirement that an expert do no more than opine that a pleaded claim, if true, has merit would do little to forestall frivolous claims. In most instances, medical records will be enough to support an expert's opinion. In this case, it seems unlikely that a chart notation, "groped patient unnecessarily", will be found, and the expert may need to base his opinion on an interview with the claimants. In any event, the deficiency should be simple to cure. The expert's review of records showing that the claimants' medical or physical conditions did not warrant the alleged touching will suffice. Thus, it is unnecessary for the Court to allow the claimants on remand to attempt to show, again, that an expert report is not

required. The Court's suggestion that they might succeed contradicts the standard the Court announces. I would not allow further proceedings on the issue and risk another appeal. In all other respects, I join the Court's opinion.

Nathan L. Hecht
Justice

Opinion delivered: August 31, 2012

IN THE SUPREME COURT OF TEXAS

NO. 10-0928

RAUL ERNESTO LOAISIGA, M.D., AND RAUL ERNESTO LOAISIGA, M.D., P.A., PETITIONERS,

v.

GUADALUPE CERDA, INDIVIDUALLY AND AS NEXT FRIEND OF MARISSA CERDA, A MINOR, AND CINDY VELEZ, RESPONDENTS

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

JUSTICE WILLETT, concurring in part and dissenting in part.

I join today's well-reasoned decision save one quibble: Because I find Parts V.B and VI.B of the Court's opinion advisory—and thus inadvisable—I respectfully dissent from those sections.

Today the Court clarifies the standard for defining a healthcare liability claim (HCLC) and remands so the trial court can apply our new guidance. So far so good. *If* the trial court concludes these claims are *not* HCLCs, then no expert report is necessary. The Court, however, proceeds to (p)review the reports' sufficiency just in case the trial court goes the other way.

This analysis is premature. The trial court hasn't even applied our new test to determine whether these are HCLCs in the first place. I wouldn't short-circuit its review by pre-deciding an issue that might never need deciding at all and that might benefit immensely from lower-court analysis.

As a judiciary, our constitutional role dictates that we decide concrete cases and not dispense contingent advice. "[T]he judicial power does not embrace the giving of advisory opinions,"[1] and prudent development of the law requires that courts refrain from speculating on situations that may never arise.

The Court's motivation, of course, is commendable: to advance judicial efficiency and squeeze out inordinate delay. But unless and until the lower courts conclude that plaintiffs' claims are indeed HCLCs, I would not suggest a premature predecision that presupposes—if not predestines—a certain lower-court path.

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Don R. Willett
Justice

OPINION DELIVERED: August 31, 2012

[1] *Firemen's Ins. Co. of Newark, N.J. v. Burch*, 442 S.W.2d 331, 333 (Tex. 1968).

IN THE SUPREME COURT OF TEXAS

NO. 10-0928

RAUL ERNESTO LOAISIGA, M.D., AND RAUL ERNESTO LOAISIGA, M.D., P.A., PETITIONERS,

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GUADALUPE CERDA, INDIVIDUALLY AND AS NEXT FRIEND OF MARISSA CERDA, A MINOR, AND CINDY VELEZ, RESPONDENTS

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

JUSTICE LEHRMANN, concurring and dissenting.

Whether a claim against a health care provider is a health care liability claim is a knotty issue this Court has repeatedly struggled with. *See, e.g.*, *Tex. W. Oaks Hosp., LP v. Williams*, ___ S.W.3d ___, 2012 WL 2476807 (Tex. 2012); *St. David's Healthcare P'ship v. Esparza*, 348 S.W.3d 904 (Tex. 2011); *Omaha Healthcare Ctr., LLC v. Johnson*, 344 S.W.3d 392 (Tex. 2011); *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842 (Tex. 2005). Claims alleging that a physician's actions in examining a patient amounted to an assault can be particularly confounding, for the reasons the Court discusses: the physical examination of a patient necessarily involves touching, which may be uncomfortable, unexpected, and misunderstood. I concur in the Court's judgment remanding this case to allow the plaintiffs an opportunity to establish that their assault claims are not health care liability claims. I write separately, however, because I believe the Court places too onerous a burden

on claimants by requiring them to conclusively establish that their claims are not health care liability claims. I would require a claimant to satisfy a standard comparable to a "clear and convincing" standard of proof. Under that standard, a trial court should require a claimant asserting claims against a health care provider arising in the context of the delivery of medical services to file an expert report unless the record justifies a firm conviction or belief that the claims presented are not health care liability claims.

Unquestionably, the Legislature intended to alleviate what it deemed a "health care liability crisis" when it enacted the Texas Medical Liability Act, TEX. CIV. PRAC. & REM. CODE §§ 74.001–.507. Accordingly, I agree that claims arising in the context of the delivery of health care services are presumptively health care liability claims. But, as the Court recognizes, nothing in the Act signals an intent to shield physicians from liability for sexual assaults or similar intentional misconduct. I fear that the requirement the Court imposes, that a claimant conclusively establish that a claim is not a health care liability claim in order to rebut the Act's presumptive application, may force assault victims to submit expert reports or see their cases dismissed.

In describing the expert report requirement imposed by the Act's predecessor, we have noted on more than one occasion that claimants are not required to marshal their proof to comply with the statute. *Bowie Mem'l Hosp. v. Wright*, 79 S.W.3d 48, 52 (Tex. 2002); *Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 878 (Tex. 2001). The policy underlying the expert report requirement in the current Act remains unchanged; not to shield health care providers from legitimate claims, but to weed out frivolous claims at an early stage, before the parties and the courts have expended extensive resources. *Scoresby v. Santillan*, 346 S.W.3d 546, 554 (Tex. 2011). It

makes sense not to place a heavy burden on claimants early in the process, in part, because the Act greatly restricts the discovery that is available before an expert report is filed. TEX. CIV. PRAC. & REM. CODE § 74.351(s). In my view, the Court's imposition of a requirement that claimants conclusively establish that their allegations do not amount to health care liability claims is inconsistent with those considerations.

In light of the Act's purposes and its broad application, I agree that claimants must to do more than establish that their claims are plausibly, or even likely, not health care liability claims. But I would not go so far as the Court. Instead, I would hold that plaintiffs whose claims arise in the medical context are not required to provide expert reports if the record justifies a firm belief or conviction that the claims are not health care liability claims. This is essentially the same as the burden of proof required to terminate parental rights. *See Santosky v. Kramer*, 455 U.S. 745, 769 (1982); *In re G.M.*, 596 S.W.2d 846, 847 (Tex. 1980). Surely a burden sufficient to protect parents' constitutional rights in raising their children should be sufficiently stringent to protect any interest medical providers might enjoy in having a cause of action alleging assault proceed as a health care liability claim. Accordingly, I respectfully concur in the Court's judgment but disagree with the standard the Court imposes.

_____

Debra H. Lehrmann
Justice

OPINION DELIVERED: August 31, 2012

IN THE SUPREME COURT OF TEXAS

NO. 10-0953

FORD MOTOR COMPANY, PETITIONER,

v.

RICHARD H. GARCIA, RESPONDENT

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

Argued December 8, 2011

JUSTICE JOHNSON delivered the opinion of the Court.

This is a dispute over fees awarded to an ad litem appointed in connection with the proposed division of a personal injury settlement between an incapacitated plaintiff and his guardian. The court-appointed attorney requested fees based on an unsworn invoice that specified numerous tasks performed, but did not specify when they were performed, who performed them or the amount of time spent on them. The ad litem testified about who performed some of the tasks, but he did not testify about how much time was spent on the tasks, other than specifying that a minimum of one-quarter hour was invoiced for each one, nor did he testify about any unusual circumstances that made it necessary for persons other than him to perform tasks for which compensation was sought. The trial court awarded the full amount requested and assessed the fees as court costs. The court

of appeals affirmed. We reverse the judgment of the court of appeals and remand the case to the trial court for further proceedings.

I. Background

Jesus Gonzalez was a passenger in a Ford pickup when a tire tread separated and the truck rolled over. The driver was killed and Gonzalez suffered an incapacitating brain injury. Several plaintiffs sued multiple defendants as a result of the accident. Relevant to the issues before us, Gonzalez's wife, Ramona, sued Ford Motor Company individually and as guardian of her husband. After the Gonzalezes and Ford reached a confidential settlement agreement, their attorney filed an "Unopposed Motion for Appointment of Guardian Ad Litem" for Gonzalez because of the conflict of interest between the Gonzalezes regarding division of the settlement. Pursuant to that motion, the trial court appointed attorney Richard Garcia. Garcia concluded that the agreed-upon division of the settlement between Ramona and Gonzalez should be approved by the court, and the court did so.

Ford and Garcia were unable to agree on a fee for his services, so the trial court held a hearing. At the hearing Garcia produced an unverified invoice for $28,260.00 and requested that amount as compensation. The invoice listed sixty-five separate tasks that were completed from December 9, 2008, when Garcia was appointed, to December 19, 2008, when the settlement with Ford was approved. The invoice did not set out who performed the tasks, the dates on which the tasks were performed, the time expended on any task, or a total amount of time spent on all of the tasks. Garcia testified, in relevant part, that (1) his billing rate for this matter was $300.00 per hour, (2) he performed most of the invoiced tasks but not all of them, (3) he did not know how much time

it took to perform each invoiced task, and (4) he billed in quarter-hour increments. The trial court awarded the full $28,260.00 and charged the fee to Ford as court costs. The court of appeals affirmed. ___ S.W.3d ___. We granted Ford's petition for review. 54 Tex. Sup. Ct. J. 1578 (Aug. 26, 2011).

Ford argues that Garcia was appointed as a guardian ad litem subject to Rule 173 of the Texas Rules of Civil Procedure; the fee award compensates him for tasks not within the scope of his limited role as guardian ad litem; and even as to tasks within the scope of his limited role, there is neither evidence of how much time was spent on them nor who performed them.[1] Garcia counters that he was appointed as attorney ad litem, not guardian ad litem; as attorney ad litem he was entitled to be compensated for services he performed individually as well as services he was assisted with by "his staff including other lawyers;" and his invoice and testimony were sufficient evidence of reasonableness and necessity to support the compensation award whether he was functioning as an attorney ad litem or guardian ad litem.

We first address the nature of Garcia's role.

II. Garcia's Role

Relying on *City of Houston v. Woods*, 138 S.W.3d 574, 582 (Tex. App.—Houston [14th Dist.] 2004, no pet.), Garcia contends the fee award is proper because the trial court's appointment

[1] Ford does not argue that the trial court abused its discretion by awarding compensation even though Garcia failed to file a verified application. *See* TEX. R. CIV. P. 173.6(b). Accordingly, we do not address the question. However, we note that the rule's language was not lightly chosen. Filing of the application allows defendants to see exactly what is being requested and why, and gives the parties a better opportunity to agree on a fee without the necessity of a court hearing. And if a fee cannot be agreed upon, the filing of an application in advance of the evidentiary hearing will give notice to the defendant of the specifics of the fee request so it may prepare for the hearing, and also will allow the trial court opportunity to prepare for the hearing.

order states he was appointed "to serve as Attorney Ad Litem in this litigation as independent counsel for the benefit of Plaintiff Jesus Gonzalez in connection with effectuating Plaintiffs' settlement with Defendant Ford Motor Company." Working from that premise, he maintains that he was properly compensated both for "his services in fulfilling his role as independent counsel to the ward, and his role as an officer and advisor to the trial court." He cites *Woods* for the proposition that an attorney ad litem is to "perform the same services as any attorney, giving legal advice, doing research and conducting litigation for an incapacitated party," and that all the activities on his invoice were proper because they were directed toward determining both whether (1) the proposed settlement was generally appropriate for Gonzalez and (2) the division and structure of the settlement was appropriate given the conflict of interest between Gonzalez and Ramona. We disagree that Garcia was entitled to be compensated for tasks that were not compensable as a guardian ad litem under Rule 173, even though some of those tasks might have been compensable had he truly been appointed as attorney ad litem.[2]

First, *Woods*, a case involving fees for representation of minors, does not support his position. Garcia references only part of a passage in *Woods* in which the court of appeals distinguished the role of a guardian ad litem from that of an attorney ad litem. The full passage gives context to the statement on which he relies:

[2] The parties do not disagree about the factors to be considered in determining the reasonableness of compensation awarded to attorneys ad litem and guardians ad litem. *See Garcia v. Martinez*, 988 S.W.2d 219, 222 (Tex. 1999) (noting that generally the same factors used to determine the reasonableness of attorney's fees are used to ascertain the reasonableness of guardian ad litem fees); *see also Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997) (listing several factors courts should consider when determining the reasonableness of attorney's fees).

> Guardian ad litems and attorney ad litems serve different roles in the representation of minors. A guardian ad litem is not an attorney for the child, but an officer appointed by the court to assist in properly protecting the child's interests. An attorney ad litem, on the other hand, performs the same services as any other attorney—giving advice, doing research, and conducting litigation.

Id. at 582 (citations omitted). The court also noted that the source of fees for attorneys ad litem is different from that for guardians ad litem:

> A guardian ad litem is entitled to a reasonable fee for his services to be taxed as costs . . . . However, there is no provision to tax attorney fees as costs to the opposing party. Indeed, attorney fees may not be recovered unless provided for by statute or by contract between the parties. More specifically, no statute provides for the recovery of attorney fees in a negligence action. Instead, attorneys in personal injury cases are compensated out of the funds recovered by the plaintiff on a contingency basis.

Id. at 582–83 (citations omitted). Although attorneys representing personal injury plaintiffs in negligence suits are not always compensated on a contingency fee basis as the *Woods* court suggested, the court was correct that while a guardian ad litem's fee may be taxed as court costs pursuant to the rules of procedure, *see*, *e.g.*, TEX. R. CIV. P. 173.6(c), there is no provision for shifting a plaintiff's attorney's fee to the defendant absent a statute or contract allowing for shifting them. *See 1/2 Price Checks Cashed v. United Auto. Ins. Co.*, 344 S.W.3d 378, 382 (Tex. 2011) ("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.").[3] Here, Garcia does not base his claim for attorney's fees on either a statute or contract. And in *Woods*, the court of appeals held that the trial court abused its discretion by assessing attorney ad litem fees as costs to be paid by the

[3] Federal courts apply a similar analysis regarding shifting attorney ad litem fees. *E.g.*, *Gaddis v. United States*, 381 F.3d 444, 449 n.6, 454 (5th Cir. 2004) (en banc); *Kollsman v. Cohen*, 996 F.2d 702, 706 (4th Cir. 1993).

defendant where the attorney represented minor plaintiffs in a negligence suit for personal injuries—the opposite of what Garcia contends for here. 138 S.W.3d at 583.

Second, a guardian ad litem's duties under the circumstances covered by Rule 173 are those of an officer of the court assisting in properly protecting the incapacitated person's interests when a conflict of interest has arisen between the incapacitated person and the guardian or next friend. The duty of such a guardian ad litem is not the duty of a plaintiff's attorney generally representing the incapacitated person in regard to the cause of action. *See Land Rover U.K., Ltd. v. Hinojosa,* 210 S.W.3d 604, 607 (Tex. 2006) (per curiam) ("[A] guardian ad litem . . . should not duplicate the work performed by the plaintiff's attorney."); *see also Am. Gen. Fire & Cas. Co. v. Vandewater,* 907 S.W.2d 491, 493 n.2 (Tex. 1995) (per curiam). The context of the appointment and duties assigned to the ad litem determine the nature of the appointment and the duties of the ad litem. The burden to ensure that a guardian ad litem's services do not exceed the scope of the role assigned by the trial court is on the ad litem. *See Goodyear Dunlop Tires N. Am., Ltd. v. Gamez,* 151 S.W.3d 574, 582 (Tex. App.—San Antonio 2004, no pet.). An improper designation of the ad litem by the trial court is not controlling as to the nature of the appointment. *See Brownsville-Valley Reg. Med. Ctr., Inc. v. Gamez*, 894 S.W.2d 753, 755 n.4 (Tex. 1995) ("The trial court's improper designation of the ad litem 'is not of controlling import.'") (citation omitted).

Garcia does not claim that he was appointed because Ramona, acting as Gonzalez's guardian, and the attorney she hired, failed to properly represent Gonzalez's interests and Gonzalez needed a separate attorney to prosecute his personal injury claim. *See Vandewater*, 907 S.W.2d at 493 n.2 ("In the event that the next friend takes actions sufficiently adverse to a [ward's] interests, the next

friend and her attorney may be replaced."). To the contrary, Garcia's appointment was requested only after Ramona and her attorney reached a settlement with Ford that was to be divided between the Gonzalezes, and the necessity of the division created a conflict. A division was tentatively agreed upon before Ramona's lawyer filed the unopposed motion for appointment of an ad litem to "assist [Jesus Gonzalez] with the issues relating to effectuating the settlement of his claims against Ford Motor Company." The motion used the term attorney ad litem in one sentence, but as the caption and body of the motion made clear, the trial court was being asked to appoint an ad litem only to protect Jesus's interest in relation to division of the settlement. The trial court order stated that Garcia was appointed "to serve as Attorney Ad Litem in this litigation as independent counsel for the benefit of Plaintiff Jesus Gonzalez *in connection with effectuating Plaintiffs' settlement with Defendant Ford Motor Company*." (emphasis added). The judgment awarding fees to Garcia stated that he was appointed as guardian ad litem. And Garcia's testimony at the evidentiary hearing on his compensation request confirmed his understanding that the appointment was as a guardian ad litem, not attorney ad litem:

> Q. Mr. Garcia, you are the same Judge Richard Garcia that was appointed by this Honorable Court as guardian ad litem for an incapacitated person in the proceeding that we're here on today? That would be Jesus Gonzalez?
>
> A. That's correct.

The evidence is conclusive that Garcia was not appointed to act as an attorney ad litem to generally represent Gonzalez in prosecuting his personal injury claim. Rather, he was appointed as a guardian ad litem with the limited role of assisting the trial court in protecting Gonzalez's interest because of the conflict of interest that arose between the Gonzalezes. The appointment substantively

falls within the provisions of Rule 173 of the Texas Rules of Civil Procedure. Garcia's contention that his compensation request should be reviewed differently from the manner provided for by Rule 173 lacks merit.

III. The Fees

The trial court awarded Garcia $28,260.00. Ford challenges the amount for three related reasons. First, some of the activities on the invoice were admittedly performed by persons other than Garcia and the court order appointed only Garcia as ad litem. Second, there is no evidence of how much time was spent performing each invoiced task, so there is no evidence of either how much time is compensable for individual tasks or how much total time is compensable. Third, even if there had been evidence to show which of the invoiced activities Garcia individually performed and how long they took, compensation cannot be awarded for many of those tasks because they were not necessary given the purpose of his appointment.

A. Standard of Review

The amount a guardian ad litem is awarded as compensation is within the trial court's discretion and an award will not be set aside except for abuse of that discretion. *See Land Rover U.K.*, 210 S.W.3d at 607. A trial court abuses its discretion by ruling (1) arbitrarily, unreasonably, or without regard to guiding legal principles; or (2) without supporting evidence. *See Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998).

B. Rule 173 Guardian Appointments

When construing rules of procedure, we apply the same rules of construction that govern the interpretation of statutes. *In re Christus Spohn Hosp. Kleberg*, 222 S.W.3d 434, 437 (Tex. 2007).

We first look to the plain language of the rule and construe it according to its plain or literal meaning. *See, e.g.*, *In re E.A.*, 287 S.W.3d 1, 5 (Tex. 2009). In doing so we keep in mind that the rules of civil procedure are given a liberal construction so as "to obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law." TEX. R. CIV. P. 1.

When a guardian ad litem is appointed under circumstances covered by Rule 173, as opposed to other rules or statutes,[4] the guardian has a limited role in the litigation and may be compensated only for limited types of activities. *See* TEX. R. CIV. P. 173.4(b), (c), (d); *Vandewater*, 907 S.W.2d at 493 n.2. Garcia's role falls under Rule 173.4(c) which provides:

> (c) *When Settlement Proposed*. When an offer has been made to settle the claim of a party represented by a next friend or guardian, a guardian ad litem has the limited duty to determine and advise the court whether the settlement is in the party's best interest.

TEX. R. CIV. P. 173.4(c). The rule contemplates appointment of a guardian ad litem "when a party's next friend or guardian appears to have an interest adverse to the party because of the division of settlement proceeds." TEX. R. CIV. P. 173 cmt. 3. The comments to Rule 173 elaborate on the guardian's role and compensation under those circumstances:

> [T]he responsibility of the guardian ad litem as prescribed by the rule is very limited, and no reason exists for the guardian ad litem to participate in the conduct of the

---

[4] *See* TEX. R. CIV. P. 173.1 ("This rule does not apply to an appointment of a guardian ad litem governed by statute or other rules."). Comment 2 to Rule 173 also provides:

> This rule does not apply when the procedures and purposes for appointment of guardians ad litem (as well as attorneys ad litem) are prescribed by statutes, such as the Family Code and the Probate Code, or by other rules, such as the Parental Notification Rules.

TEX. R. CIV. P. 173, cmt. 2.

> litigation in any other way or to review the discovery or the litigation file except to the limited extent that it may bear on the division of settlement proceeds. A guardian ad litem may, of course, choose to review the file or attend proceedings when it is unnecessary, but the guardian ad litem may not be compensated for unnecessary expenses or services.

Id. (citation omitted). Not all Rule 173 guardians ad litem seek compensation, but for those who do, Rule 173.6 prescribes how compensation is to be determined:

> 173.6. Compensation
>
> (a) *Amount.* If a guardian ad litem requests compensation, he or she may be reimbursed for reasonable and necessary expenses incurred and may be paid a reasonable hourly fee for necessary services performed.
>
> (b) *Procedure*. At the conclusion of the appointment, a guardian ad litem may file an application for compensation. The application must be verified and must detail the basis for the compensation requested. Unless all parties agree to the application, the court must conduct an evidentiary hearing to determine the total amount of fees and expenses that are reasonable and necessary. In making this determination, the court must not consider compensation as a percentage of any judgment or settlement.
>
> (c) *Taxation as Costs*. The court may tax a guardian ad litem's compensation as costs of court.

TEX. R. CIV. P. 173.6(a)–(c).

We stated in *Land Rover U.K.* that "[a] reasonable hourly rate multiplied by the number of hours spent performing necessary services within the guardian ad litem's role yields a reasonable fee." 210 S.W.3d at 608. While necessary services within the proper, limited scope of the Rule 173 guardian ad litem's role are compensable, including those legal services necessarily performed by a lawyer appointed as guardian ad litem, compensation cannot be awarded for legal or other services outside that role, even if they are performed. *See* TEX. R. CIV. P. 173.4 (defining the role of a guardian ad litem); *Land Rover U.K.*, 210 S.W.3d at 607 ("If a guardian ad litem performs work

beyond the scope of this role, such work is non-compensable."). Ordinarily only the person appointed as guardian ad litem should be compensated for services under Rule 173. *See* TEX. R. CIV. P. 173.6 & 173 cmt. 7; *Gamez*, 151 S.W.3d at 588. However, Rule 173.6 does not preclude awarding compensation for persons other than the person designated in the trial court's order as guardian ad litem if the evidence shows particular, unusual circumstances making services of other persons necessary for the ad litem's duties to be fulfilled. Such circumstances might exist, for example, if paralegals or other staff under the supervision of the appointed guardian ad litem could perform tasks necessary for the ad litem to properly fulfill his or her appointed role, but at a lesser hourly rate than the ad litem, or an unexpected emergency requires the guardian ad litem to miss a mandatory hearing and an associated attorney familiar with the matter appears instead.[5] *See*, *e.g.*, TEX. R. CIV. P. 173.4(d)(2). But if a guardian ad litem such as Garcia seeks compensation for activities of persons not authorized in advance by the trial court to act on behalf of the incapacitated person, he or she should identify the persons with particularity and prove the particular, unusual circumstances making the services of the persons necessary for the ad litem's duties to be fulfilled, the specific services they performed, when the services were performed, the amount of time spent performing the services, the necessity of the services in light of the ad litem's appointment, and a reasonable hourly rate for each person. *See Jocson v. Crabb*, 133 S.W.3d 268, 270 (Tex. 2004) (per curiam) (recognizing that parties would be wise to seek direction from the trial court if they disagree

[5] In addition, a Rule 173 guardian ad litem might need to incur unusual expenses in order to properly advise the court. For example, expenses for an actuary or accountant to evaluate the economics of a structured settlement may be necessary. Prudence counsels a guardian ad litem to obtain the appointing court's authorization before incurring such expenses. The guardian ad litem should be prepared to prove the necessity of such expenses and their reasonableness if request is made for their payment.

about an ad litem's role, but also recognizing that it could be expensive and disruptive if they had to pursue every disagreement to a hearing). Once that is done the trial court will have evidence on which to determine whether to award compensation for the activities of those persons, and if so, how much.

C. Application

Garcia's invoice and testimony are not legally sufficient evidence to support the amount of compensation he was awarded. First, Garcia was the only person the trial court's order designated to act as Gonzalez's guardian ad litem. His appointment was for a particular, narrow role: protecting Gonzalez's interest in dividing the settlement. *See* TEX. R. CIV. P. 173.4(c). As a guardian ad litem under Rule 173, he was to exercise his independent judgment about the division. That warranted his personal attention to the matter, and ordinarily it would have required only his personal involvement. Garcia does not claim there is evidence of particular, unusual circumstances showing services of other persons were necessary for his ad litem duties to be fulfilled. Even if he did, there is no evidence of who the persons were that performed services, what services they performed, why it was necessary for them to perform the services for Garcia's limited role to be fulfilled, the necessity of the services, the time it took to perform the services, and the reasonable hourly rate for each person.

Garcia admittedly did not perform all of the tasks listed on his invoice, so even if all the tasks were compensable under Rule 173 and the time for each task was proved, matters we address below, there is no evidence to support the amount of compensation awarded to Garcia for having done them. Thus, the evidence is legally insufficient to support the amount he was awarded. The trial

court abused its discretion by awarding it, and the court of appeals erred by affirming the award. *See Bocquet*, 972 S.W.2d at 21.

Second, the invoice did not set out the amount of time each task took. Nor did Garcia supply the necessary evidence:

> Q. Now, in this [invoice], you don't have any actual times or dates, do you?
>
> A. No, I don't.
>
> Q. Okay. So, it's really impossible for somebody to decipher what days you supposedly did this and how long this took, correct, because there's no information relating to those entries, right?
>
> A. As to what you're making reference to, there's not.
>
> . . . .
>
> Q. Yeah, if I went through each one of these activities as we sit here today, could you put in the time that you have expended on these activities? . . . .
>
> A. I don't have that information with me. Perhaps it could be reconstructed. I will tell you that on any action or matter or document that I review, I do charge a minimum of a quarter hour on anything that you may see listed here.
>
> . . . .
>
> Q. Did you keep time? Drove to Rio Grande City, whatever, met with her, 1.5 hours, two hours, anything like that?
>
> A. I don't have anything like that with me. I can go back and check.

The only evidence of the time spent is Garcia's testimony that he invoiced a minimum of a quarter-hour for each activity, but manifestly, more than a quarter-hour was spent performing some of the activities such as traveling to where the Gonzalezes lived and conferring with them. Although there is evidence that Garcia necessarily spent time in performing his duties as ad litem, the evidence is

such that the total number of hours he spent in the representation cannot be calculated on the record before us. Under Rule 173 compensation is to be based on the hours necessarily spent on the representation multiplied by a reasonable hourly fee. TEX. R. CIV. P. 173.6(a) ("If a guardian ad litem requests compensation, he or she may be . . . paid a reasonable hourly fee for necessary services performed."); *Land Rover U.K.*, 210 S.W.3d at 608. The evidence is legally insufficient to support the fees awarded, and the trial court abused its discretion by awarding them. *See Bocquet*, 972 S.W.2d at 21.

The court of appeals calculated a number of hours for the tasks listed on the invoice by dividing the total amount requested ($28,260.00) by the invoiced hourly rate of $300.00. It held that "[w]hen the total number of hours billed is mathematically determinable in this way," direct evidence of total hours is not required and the trial court could simply assess whether that number of hours was reasonable to complete the tasks performed. ___ S.W.3d at ___. We disagree. Such a calculation does not comport with the requirements of Rule 173. *See Land Rover U.K.*, 210 S.W.3d at 607–08. The court of appeals erred by affirming the compensation award.

Third, many of the tasks shown on the invoice were not compensable under Rule 173 because they were not necessary to fulfill the limited role to which Garcia was appointed. *See* TEX. R. CIV. P. 173.4 (defining the role of a guardian ad litem); *Land Rover U.K.*, 210 S.W.3d at 607 ("If a guardian ad litem performs work beyond the scope of this role, such work is non-compensable."). Only those tasks directly and materially bearing on the conflict of interest between Ramona and Gonzalez regarding division of the settlement were necessary. Some of the non-compensable tasks demonstrated by this record were "Receiv[ing] and Review[ing]" (1) multiple motions to transfer

venue, responses to those, orders setting hearings on the motions and correspondence relating to the motions and responses; (2) superseded petitions; (3) sundry discovery requests and responses; (4) a motion relating to admission of an attorney to practice *pro hac vice*; (5) correspondence about postponed hearings; (6) pleadings relating to already-settled claims; (7) notices of settlement of minor plaintiffs' claims; and (8) copies of citations issued for defendants. Garcia testified, in part, that the activities he performed were for the purpose of becoming familiar with the lawsuit, representing Gonzalez's interests, and advising the court. But tasks such as those enumerated above were not necessary to fulfilling the limited role for which he was appointed. The trial court did not conform to guiding rules and principles when it awarded compensation for non-necessary activities, thus it abused its discretion. *See, e.g.*, TEX. R. CIV. P. 173 & cmts. 3–4, 7; *Land Rover U.K.*, 210 S.W.3d at 607–08. The court of appeals erred by holding otherwise.

IV. Conclusion

The evidence is legally insufficient to support the full amount awarded to Garcia as compensation, although it is sufficient to show he necessarily spent some amount of time fulfilling his role as guardian ad litem. We reverse the judgment of the court of appeals and remand the case to the trial court for further proceedings consistent with this opinion. *See Guevara v. Ferrer*, 247 S.W.3d 662, 669–70 (Tex. 2007) (holding that when there is evidence to support damages other than the full amount awarded in the trial court and an appropriate remittitur could not be determined by the court of appeals, the case will be remanded to the trial court); *accord Wagner & Brown, Ltd. v. Sheppard*, 282 S.W.3d 419, 425, 430 (Tex. 2008) (reversing and remanding to the trial court for a reassessment of damages where there was at least some evidence to support an award of damages).

_____

Phil Johnson
Justice

OPINION DELIVERED: March 30, 2012

IN THE SUPREME COURT OF TEXAS

NO. 10-0960

IN RE XL SPECIALTY INSURANCE COMPANY AND CAMBRIDGE INTEGRATED SERVICES GROUP, INC., RELATORS

ON PETITION FOR WRIT OF MANDAMUS

Argued November 10, 2011

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

JUSTICE WILLETT delivered a dissenting opinion.

We must decide whether, in a bad faith action brought by an injured employee against a workers' compensation insurer, the attorney–client privilege protects communications between the insurer's lawyer and the employer during the underlying administrative proceedings. We hold that the privilege does not apply.

I. Background

XL Specialty Insurance Company is Cintas Corporation's workers' compensation insurer. XL's policy included standard provisions requiring Cintas to cooperate in the investigation, settlement, and defense of a claim. The policy also provided for a one million dollar deductible per claim.

Jerome Wagner, a Cintas employee, sought workers' compensation benefits for a work-related injury. Melissa Martinez, a claims adjuster with XL's third party administrator, Cambridge Integrated Services Group, Inc., denied the claim. In a contested case hearing before the Division of Workers' Compensation, the hearing officer determined that Wagner sustained a compensable injury and was entitled to medical and temporary income benefits. During the course of the administrative litigation, XL's outside counsel, Rebecca Strandwitz of Flahive, Ogden & Latson, P.C., sent communications about the status and the evaluation of the proceedings to Cambridge and Cintas.

After the workers' compensation dispute was resolved, Wagner sued XL, Cambridge, and Martinez for breach of the common law duty of good faith and fair dealing and violations of the Insurance Code and Texas Deceptive Trade Practices Act. During discovery, Wagner sought the communications made between Strandwitz and the insured, Cintas, during the administrative proceedings. XL and Cambridge argued that the attorney–client privilege protected those communications. After an in-camera inspection, the trial court held that the privilege did not apply.

XL and Cambridge sought mandamus relief from the court of appeals, which denied the petition. ___ S.W.3d ___, ___. They then petitioned this Court for a writ of mandamus, arguing that the attorney-client privilege protects the communications.

II. Attorney–Client Privilege in Multi-Party Litigation

Confidential communications between client and counsel made to facilitate legal services are generally insulated from disclosure. *See* TEX. R. EVID. 503(b); *Huie v. DeShazo*, 922 S.W.2d 920, 922 (Tex. 1996). Recognized as "the oldest of the privileges for confidential communications

known to the common law," *United States v. Zolin*, 491 U.S. 554, 562 (1989) (citation omitted), the attorney–client privilege promotes free discourse between attorney and client, which advances the effective administration of justice. *Republic Ins. Co. v. Davis*, 856 S.W.2d 158, 160 (Tex. 1993). But a strict rule of confidentiality may also suppress relevant evidence. *Id.* For that reason, "[c]ourts balance this conflict between the desire for openness and the need for confidentiality in attorney–client relations by restricting the scope of the attorney–client privilege." *Id*. The privilege belongs to the client and must be invoked on its behalf. *West v. Solito*, 563 S.W.2d 240, 244 n.2 (Tex. 1978).

Texas evidentiary rules define the privilege as follows:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:
>
> (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
>
> (B) between the lawyer and the lawyer's representative;
>
> (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
>
> (D) between representatives of the client or between the client and a representative of the client; or
>
> (E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b).[1]

Rule 503(b) protects not only confidential communications between the lawyer and client, but also the discourse among their representatives. It is an exception to the general principle that the privilege is waived if the lawyer or client voluntarily discloses privileged communications to a third party. *See* TEX. R. EVID. 511(1).

XL[2] relies primarily on the privilege defined in Rule 503(b)(1)(C)—which has been variously described as the "joint client" privilege, the "joint defense" privilege, and the "common interest" privilege. Courts sometimes use these terms interchangeably, but they involve distinct doctrines that serve different purposes. As we explain below, however, none of them accurately describes the privilege at issue in this case.

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[1] Although many of our evidentiary rules mirror their federal counterparts, *see, e.g.*, FED. R. EVID. 801; TEX. R. EVID. 801, there is no federal analogue to our Rule 503. In 1972, the Chief Justice of the United States proposed to Congress the Rules of Evidence for United States Courts and Magistrates. 56 F.R.D. 183 (1972). The Proposed Rules were drafted by the Judicial Conference Advisory Committee on the Rules of Evidence and approved by the Judicial Conference of the United States and the Supreme Court. *Jaffee v. Redmond*, 518 U.S. 1, 8 n.7 (1996). The Proposed Rules defined nine specific testimonial privileges, including the lawyer–client privilege, which was contained in Proposed Rule 503. *See* PROPOSED FED. R. EVID. 503, *reprinted in* 56 F.R.D. 183, 235-40 (1972). Congress rejected Proposed Rule 503 in favor of Federal Rule of Evidence 501's general mandate that "the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience," although "in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness . . . shall be determined in accordance with State law." FED. R. EVID. 501 (1975) (amended 2011). "Although Congress did not adopt this rule, courts have relied upon [Proposed Rule 503] as an accurate definition of the federal common law of attorney–client privilege . . . ." *United States v. Spector*, 793 F.2d 932, 938 (8th Cir. 1986).

[2] For ease of reference, we refer to relators XL and Cambridge as "XL." Their legal arguments are identical, and our conclusion that the privilege does not apply here disposes of both of their claims.

A. Joint Client Privilege

The joint client or co-client doctrine applies "[w]hen the same attorney simultaneously represents two or more clients on the same matter." PAUL R. RICE, ATTORNEY–CLIENT PRIVILEGE IN THE UNITED STATES § 4:30 (2011). Joint representation is permitted when all clients consent and there is no substantial risk that the lawyer's representation of one client would be materially and adversely affected by the lawyer's duties to the other. 2 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 128 (2000). "Where [an] attorney acts as counsel for two parties, communications made to the attorney for the purpose of facilitating the rendition of legal services to the clients are privileged, except in a controversy between the clients." *In re JDN Real Estate–McKinney L.P.*, 211 S.W.3d 907, 922 (Tex. App.—Dallas 2006, pet. denied); *see also* TEX. R. EVID. 503(d)(5) (noting that communications made by two or more clients to a lawyer retained in common are not privileged "when offered in an action between or among any of the clients").

B. Joint Defense and Common Interest Doctrines

Representations involving multiple clients with separate counsel call for the application of what have been called the joint defense and common interest doctrines. Courts and parties often confuse the relevant nomenclature. *See In re Teleglobe Commc'n Corp.*, 493 F.3d 345, 363 n.18 (3d Cir. 2007) ("[M]uch of the caselaw confuses the community-of-interest privilege (which is the same as the 'common-interest privilege' . . .) with the co-client privilege.") (citation omitted).[3] Unlike

[3] *See also* 24 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5493 (1986) ("Federal courts continue to confuse the allied lawyer doctrine, which applies when parties with separate lawyers consult together, and the joint-client doctrine, which applies when two clients share the same lawyer, by using the phrase 'joint defense privilege' to mangle the two concepts.").

the joint client rule, the joint defense and common interest rules apply when there has been sharing of information between or among *separately represented* parties. *See* 1 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 75 cmt. c ("Co-client representations must also be distinguished from situations in which a lawyer represents a single client, but another person with allied interests cooperates with the client and the client's lawyer . . . .").

The joint defense rule applies when multiple parties to a lawsuit, each represented by different attorneys, communicate among themselves for the purpose of forming a common defense strategy. *In re JDN*, 211 S.W.3d at 923. Unlike the common interest doctrine, the joint defense doctrine applies only in the context of litigation. VINCENT S. WALKOWIAK, THE ATTORNEY–CLIENT PRIVILEGE IN CIVIL LITIGATION 18 (4th ed. 2008).

The common interest rule (also known as the "community of interest," "pooled interests," or "allied lawyer" doctrine) is more expansive than the joint defense doctrine.[4] The parties must share a mutual interest, but unlike the joint defense doctrine, the common interest rule applies to "two or more separately represented persons whatever their denomination in pleadings and whether or not involved in litigation." 1 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 76 reporter's note cmt. b; *see also* RICE § 4:35, 474–75 ("The 'community of interest' rule is distinguished from the 'joint defense' rule by the fact that the collaboration between the parties need

[4] Thus, the common interest doctrine is different from the joint client doctrine for the very same reason as the joint defense doctrine: unlike the joint client situation, in the common interest arrangement, each client has her own lawyer—they are not jointly represented by one lawyer. 2 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 5:20 (3d ed. 2007); *see also* 1 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 76 cmt. a (2000) (noting that the common interest rule "differs from the co-client rule of [privilege] in that the clients are represented by separate lawyers").

not be related to a pending legal action."). Thus, plaintiffs and nonlitigating persons with common interests can assert this exception to the waiver rule. 1 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 76 reporter's note cmt. b (noting that common interest is the preferable term because it includes "both claiming as well as defending parties and nonlitigating as well as litigating persons").[5]

III. Texas Rule of Evidence 503(b)(1)(C)—The Allied Litigant Doctrine

Courts of appeals have generally applied Rule 503(b)(1)(C) to joint defense situations where multiple defendants, represented by separate counsel, work together in a common defense.[6] Notably, and in contrast to the proposed federal rule,[7] Texas requires that the communications be made in the

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[5] *See also, e.g.*, *In re Grand Jury Subpoena*, 274 F.3d 563, 572 (1st Cir. 2001) ("Because the privilege sometimes may apply outside the context of actual litigation, what the parties call a 'joint defense' privilege is more aptly termed the 'common interest' rule.").

[6] *See, e.g., In re JDN Real Estate—McKinney L.P.*, 211 S.W.3d 907, 922 (Tex. App.—Dallas 2006, orig. proceeding [mand. denied]) ("[R]ule 503(b)(1)(C) . . . address[es] the joint-defense privilege, which applies when multiple parties to a lawsuit represented by different attorneys communicate among themselves."); *In re Dalco*, 186 S.W.3d 660, 666 (Tex. App.—Beaumont 2006, orig. proceeding [mand. denied]) (" . . . [T]he 'joint defense privilege,' found in TEX. R. EVID. 503(b)(1)(C)[,] . . . [w]hen applicable . . . 'cloaks communications with confidentiality where "a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel."'" (quoting *United States v. Gotti*, 771 F. Supp. 535, 545 (E.D.N.Y. 1991)).

[7] *See* PROPOSED FED. R. EVID. 503(b)(3), *reprinted in* 56 F.R.D. 183, 236 (1972) (protecting communications between a client "to a lawyer representing another in a matter of common interest"); *see also, e.g.*, *In re Santa Fe Int'l Corp.*, 272 S.W.3d 705, 710 (5th Cir. 2001) (noting that the common interest privilege applies to both communications between co-defendants in actual litigation and their counsel as well as to "communications between *potential* co-defendants and their counsel" (emphasis in original)); *United States v. Schwimmer*, 892 F.2d 237, 243–44 (2d Cir. 1989) ("'The need to protect the free flow of information from client to attorney logically exists whenever multiple clients share a common interest about a legal matter,' . . . and it is therefore unnecessary that there be actual litigation in progress for the common interest rule of the attorney–client privilege to apply . . . ." (citations omitted)).

context of a pending action.[8] *See* TEX. R. EVID. 503(b)(1)(C) (protecting from disclosure communications between a client "to a lawyer . . . representing another party in a *pending action* and concerning a matter of common interest therein") (emphasis added).[9] Although criticized,[10] the pending action requirement limits the privilege "to situations where the benefit and the necessity are at their highest, and . . . restrict[s] the opportunity for misuse." *United States v. Duke Energy Corp.*, 214 F.R.D. 383, 388 (M.D.N.C. 2003). Thus, in jurisdictions like Texas, which have a pending action requirement, no commonality of interest exists absent actual litigation. Accordingly, our privilege is not a "common interest" privilege that extends beyond litigation. Nor is it a "joint defense" privilege, as it applies not just to defendants but to any parties to a pending action. Rule 503(b)(1)(C)'s privilege is more appropriately termed an "allied litigant" privilege.[11]

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[8] A number of other states' evidentiary rules also require communications to be made in the context of pending litigation in order for the doctrine to apply. *See, e.g.,* HAW. R. EVID. 503(b) (protecting communications made "by the client . . . to a lawyer . . . representing another party in a pending action and concerning a matter of common interest"); ME. R. EVID. 502(b)(same); MISS. R. EVID. 502(b)(same); N.H. R. EVID. 502(b) (same); OKLA. STAT. tit. 12 § 2502 (B)(3) (same); S.D. CODIFIED LAWS § 19-13-3 (same). In addition, Uniform Rule of Evidence 502(b)(3) also includes a "pending action" requirement. UNIF. R. EVID. 502(b)(3).

[9] *See also In re Dalco*, 186 S.W.3d at 666–67 ("Rule 503(b)(1)(C) appears to attach the common interest 'privilege' to confidential communications disclosed in the course of legal services rendered during some '*pending action*' and *'concerning a matter of common interest therein*.' . . . Here, . . . this contractual relinquishment of Citibank's confidential or proprietary information to Universal did not occur during any 'pending action' and therefore could not concern 'a matter of common interest therein.'" (emphasis in original) (citations omitted)).

[10] *See* Katharine Traylor Schaffzin, *An Uncertain Privilege: Why the Common Interest Doctrine Does Not Work and How Uniformity Can Fix It*, 15 B.U. PUB. INT. L.J. 49, 77–78 (2005) (noting that the pending action requirement is redundant of other safeguards and harmful because it fails to protect communications shared between those with a common legal interest unrelated to litigation).

[11] A leading federal law treatise suggests that the appropriate moniker is the "allied lawyer doctrine." 24 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5493

The allied litigant doctrine protects communications made between a client, or the client's lawyer, to another party's lawyer, not to the other party itself. *See, e.g.*, *Robert Bosch, LLC v. Pylon Mfg. Corp.*, 263 F.R.D. 142, 146 (D. Del. 2009) ("[T]o qualify for and to maintain continued protection [under the common interest privilege], the communication must be shared between counsel."); WALKOWIAK, at 18 (noting that the joint defense doctrine "does not apply to . . . communications [made directly to] other parties themselves").[12] This attorney-sharing requirement makes clear that the privilege applies only when the parties have separate counsel. *See, e.g.*, *In re Teleglobe*, 493 F.3d at 365 ("[T]he [common interest] privilege only applies when clients are represented by separate counsel."); *Griffith v. Davis*, 161 F.R.D. 687, 692 (C.D. Cal. 1995) ("The

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(1986). Other sources refer to a "joint litigant" exception. *See, e.g.*, James M. Fischer, *The Attorney–Client Privilege Meets the Common Interest Arrangement: Protecting Confidences While Exchanging Information for Mutual Gain*, 16 REV. LITIG. 631, 633–34 (1997); *see also Libbey Glass, Inc. v. Oneida, Ltd.*, 197 F.R.D. 342, 347 (N.D. Ohio 1999) ("Where several parties, though represented by separate counsel, are on the same side of a legal dispute and share information for their mutual benefit in that dispute, the '*joint litigant*' privilege protects 'attorney–client privileged matters when they are shared with co-parties, even though those parties are represented by separate counsel.'")(emphasis added) (citation omitted); *In re Sandwich Islands Distilling Corp.*, No. 07-01029, 2009 WL 3055199, at *2 (Bankr. D. Haw. Sept. 21, 2009) ("Under Hawaii law, contrary to federal common law, the joint litigant common interest privilege is limited to co-parties and their counsel in pending litigation."). Because the Texas rule has both a pending action and a common interest requirement, however, the "allied litigant" doctrine more accurately describes our law.

[12] *See also In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 364–65 (3d Cir. 2007) ("[T]o be eligible for continued protection, the communication must be shared with the *attorney* of the member of the community of interest. . . . The attorney-sharing requirement helps prevent abuse by ensuring that the common-interest privilege only supplants the disclosure rule when attorneys, not clients, decide to share information in order to coordinate legal strategies." (citation omitted)); *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989)("[The joint defense privilege] serves to protect the confidentiality of communications passing from *one party to the attorney for another party* where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel.")(emphasis added).

[joint defense] doctrine applies where parties are represented by separate counsel but engage in a common legal enterprise.").

IV. XL has failed to show that the communications between Strandwitz and Cintas are privileged.

XL argues that the communications between Strandwitz and Cintas are protected by the attorney–client privilege, and more generally, the insurer–insured relationship. We have not recognized a general insurer–insured privilege.[13] Nevertheless, we agree that, under certain circumstances, communications between an insurer and its insured may be shielded from discovery by the attorney–client privilege. That appears to be the majority rule. *See, e.g.*, 17A LEE R. RUSS ET AL., COUCH ON INSURANCE § 250:19 (3d ed. 2005) (noting that majority view is that the attorney–client privilege applies to communications between an insured and its liability insurer when they concern a potential suit and communications are predominantly intended to be transmitted to the attorney hired by insurer to defend insured). But for us to reach that conclusion here, XL must show that its lawyer's communications are among those protected by Rule 503,[14] and it has not done so.

A. Rule 503(b)(1)(C)'s allied litigant doctrine is inapplicable.

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[13] *See, e.g.*, *In re Ford Motor Co.*, 988 S.W.2d 714, 719 (Tex. 1998) (declining to extend the attorney–client privilege to communications between an insured and liability insurer where "at the time [the insured] made her statements, there was no attorney–client relationship" between her and her insurer); *see also In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 341 (Tex. App.—Texarkana 1999, pet. denied) (holding that if counsel retained by an insurer acts as an "investigator," and not as an attorney, then the communications between the insured and insurer are not privileged).

[14] Our evidentiary rules have the force and effect of statutes and should be construed accordingly. *See In re City of Georgetown*, 53 S.W.3d 328, 332 (Tex. 2001).

Here, XL is the client, and the communications were between XL's lawyer and a third party, Cintas, who was not represented by XL's lawyer (or any other lawyer) and was not a party to the litigation or any other related pending action. We recognize that Cintas, having contracted for a substantial deductible, may have shared a joint interest with XL during the administrative proceedings in the outcome of the claim. But no matter how common XL's and Cintas's interests might have been, our rule requires that the communication be made to a *lawyer or her representative* representing another party in a *pending action*. TEX. R. EVID. 503(b)(1)(C) (protecting certain communications "by . . . the client's lawyer . . . to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein"). Those requirements were not met here.

Part of XL's difficulty in proving a privilege stems from the fact that, in Texas, workers' compensation claims are brought directly against a workers' compensation carrier, with limited involvement of the employer in the adjudication of the rights to benefits. The insurer, not the employer, is directly responsible for paying benefits. *See* TEX. LAB. CODE § 406.031(a) (making the insurance carrier and not the employer directly "liable for compensation for an employee's injury without regard to fault or negligence").[15] Thus, the insurer, not the insured, is the client and party

[15] Under the insurance policy, XL is primarily responsible for the payment of benefits as well as legal fees that arise out of any claim or suit it defends, while Cintas reimburses it for such expenses:

> In consideration of a reduced premium, you have agreed to reimburse us up to the deductible amounts stated in the Schedule at the end of this endorsement for all payments legally required, including Allocated Loss Adjustment Expense(s), where you have elected to include such expense as indicated in the Schedule, which arises out of any claim or suit we defend.

to the pending action, and it retains counsel on its own behalf. In contrast, in a lawsuit involving a standard liability insurance policy, only the insured is a party to the case, and the insurer typically retains counsel on its insured's behalf.[16] Often, as outlined below, those communications fall within one of Rule 503(b)'s subsections. But in a case in which the communications were not made to the insured's lawyer, and the insured is not a party to a pending action, as required by the rule, the allied litigant privilege does not apply.

B. XL and Cintas were not joint clients.

For similar reasons, the joint client rule of privilege is inapplicable. XL, and XL alone, was Strandwitz's client. XL does not argue, nor is there any evidence, that Strandwitz also represented Cintas. We do not exclude the possibility that an insured and insurer may have a common lawyer in the workers' compensation context. "[W]e have never held that an insurance defense lawyer *cannot* represent both the insurer and the insured, only that the lawyer *must* represent the insured and protect his interests from compromise by the insurer." *Unauthorized Practice of Law Comm. v. Am.*

> We will remain responsible for the full payment of all claims under this policy without regard to your ability or intention to reimburse us for the deductible amount, provided that this does not release you from your obligation to reimburse us.

[16] *See, e.g.*, *Raymond v. N.C. Police Benevolent Ass'n, Inc.*, 721 S.E.2d 923, 926 (N.C. 2011) ("The most common scenario involving a tripartite attorney–client relationship occurs when an insurance company employs counsel to defend its insured against a claim. . . . In the insurance context, courts find that the attorney defending the insured and receiving payment from the insurance company represents both the insured and the insurer, providing joint representation to both clients. . . . Under these circumstances, notwithstanding that usually only the insured has been sued, a tripartite attorney-client relationship exists because the interests of both the insured and the insurer in prevailing against the plaintiff's claim are closely aligned." (citations omitted)); *see also Metroflight, Inc. v. Argonaut Ins. Co.*, 403 F. Supp. 1195, 1197 (N.D. Tex. 1975) ("Liability insurance policies . . . commonly obligate the insurer to defend actions against the insured within the policy coverage.").

Home Assurance Co., 261 S.W.3d 24, 42 (Tex. 2008) (emphasis in original); *see also id.* (noting that "[w]hether defense counsel also represents the insurer is a matter of contract between them"); TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.06 (allowing a lawyer to represent more than one client in a matter if not precluded by conflicts between them)*, reprinted in* TEX. GOV'T CODE, tit. 2, subtit. G, app. A. We recognize that Texas law assumes that workers' compensation insurers and employers will converse about workers' compensation claims. *See* TEX. LAB. CODE § 415.002(b) (providing that an insurance carrier does not commit an administrative violation by allowing an employer to freely discuss a claim, assist in the investigation and evaluation of a claim, or attend and participate in a division proceeding); TEX. ADMIN. CODE § 65.10 (same). But before those communications are privileged, parties must show that the communications come within the ambit of Rule 503, and XL has failed to make such a showing here.

Nor do we rule out the possibility that an insurer can be a representative of the insured under Rule 503, making some of its communications privileged. *See Unauthorized Practice of Law*, 261 S.W.3d at 43 (noting that "'an insurer's right of control generally includes the authority to make defense decisions *as if it were the client* "where no conflict of interest exists"'" (emphasis in original)(citation omitted)); *see also* TEX. R. EVID. 503(a)(2), 503(b)(1)(A),(C),(D). But XL has neither pleaded nor proved that this is the case.

Both sides argue forcefully that sound policy favors their position. Whether recognizing a privilege here is good policy is another matter; we conclude only that the communications here are not within the allied litigant or joint client privileges.

C. The communications are not privileged under subsections (A), (B), (D), or (E).

XL also argues that the communications are privileged under Rule 503(b)(1)(A), which protects communications "between the client or a representative of the client and the client's lawyer or a representative of the lawyer." TEX. R. EVID. 503(b)(1)(A). According to XL, the insurer and insured are "representatives" of each other. Texas Rule of Evidence 503(a)(2) defines "representative of the client" as:

> (A) a person having authority to obtain professional legal services, or to act on advice thereby rendered, on behalf of the client, or
>
> (B) any other person who, for the purpose of effectuating legal representation for the client, makes or receives a confidential communication while acting in the scope of employment for the client.

TEX. R. EVID. 503(a)(2).

Cintas could not have been a "representative of the client," as it did not have the authority to obtain legal services for its insurer, XL. For the same reason, Cintas could not act, on XL's behalf, on any advice "thereby rendered"—that is, rendered as a result of it having obtained counsel for XL. XL does not contend, nor is there any proof, that Strandwitz represented both XL and Cintas, so Cintas does not qualify as a "client," either. Thus, neither subsections (A) nor (D) protects the communications. *See* TEX. R. EVID. 503(b)(1)(D) (shielding communications "between representatives of the client or between the client and a representative of the client"). XL does not contend that any other provision applies. Subsection B, which involves communications between

the lawyer and the lawyer's representative, is inapposite,[17] as is subsection E, which pertains to multiple lawyers representing the same client.[18]

D. XL's affidavit does not support a privilege for communications to Cintas.

To support its privilege claim, XL submitted the claims adjuster's affidavit. Martinez stated that Cambridge retained Strandwitz on XL's behalf and that Strandwitz would:

> [P]rovide communication to *Cambridge* relating to their professional services, their opinions associated with those professional services and also provide information necessary to the proper rendition of those services. . . . [T]he records are not disclosed to anyone who is not an employee of *Cambridge*, *XL* or in furtherance of the provision of the professional legal services.

(emphasis added). This affidavit speaks only to communications between XL's law firm and its clients, not to communications between XL's law firm and the employer Cintas. Furthermore, the affidavit does not purport to establish any privilege extending to the communications between Strandwitz and Cintas. The trial court noted this and ordered production of only those documents.[19] We conclude that the trial court acted within its discretion.

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[17] *See* TEX. R. EVID. 503(a)(4) (defining "representative of the lawyer" as either a lawyer's employee or an accountant).

[18] *See id.* R. 503(b)(1)(E) (protecting communications "among lawyers and their representatives representing the same client").

[19] After reviewing the documents in camera, the trial court stated that it had determined some were not privileged "mainly because they are communications with a Kelli Green who is the representative for Cintas, which I believe was the employer." The court continued: "And they do not appear to be documents as described by Ms. Martinez in the affidavit . . . I think there is no evidence to support that communications with Ms. Green from Cintas are privileged, and so I'm going to order those produced but only those produced."

V. Conclusion

The attorney–client privilege shields otherwise relevant information from discovery. As a result, we construe it narrowly[20] to "encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). While XL asserts that the attorney–client privilege protects communications between an insurer and its insured, it has not brought the relevant communications within Rule 503's parameters. Because the documents are not protected from discovery under the allied litigant doctrine or any other part of Rule 503, we deny relief. TEX. R. APP. P. 52.8(a).

Wallace B. Jefferson
Chief Justice

OPINION DELIVERED: June 29, 2012

[20] *See Hyman v. Grant*, 112 S.W. 1042, 1044 (Tex. 1908)("As the rule of privilege has a tendency to prevent the full disclosure of the truth, it should be limited to cases which are strictly within the principle of the policy that gave it birth.").

IN THE SUPREME COURT OF TEXAS

NO. 10-0960

IN RE XL SPECIALTY INSURANCE COMPANY AND CAMBRIDGE INTEGRATED SERVICES GROUP, INC., RELATORS

ON PETITION FOR WRIT OF MANDAMUS

JUSTICE WILLETT, dissenting.

Just seven days ago, this Court held that a common-law "bad faith" claim (and certain statutory claims) are inconsistent with the Legislature's hermetic workers' compensation regime.[1] Today the Court answers a vexing question of attorney-client privilege—a question I concede is important (after all, we granted the petition)—but the question, albeit weighty, arises possibly from a claim that no longer exists.

I say "arises possibly" because it's impossible to tell really, as the *mandamus* record before the Court is not the *full* record. So we really have no idea if Jerome Wagner has any viable claim(s) remaining post-*Ruttiger*—for example, an Insurance Code claim for misrepresenting the comp policy.[2]

[1] *Tex. Mut. Ins. Co. v. Ruttiger*, __ S.W.3d __ (Tex. 2012).

[2] *See* TEX. INS. CODE § 541.061.

Today's decision is undeniably instructive and finely reasoned. But I respectfully take issue with issuing something on a non-issue. Rather than venture what may be a purely advisory opinion springing from a now-defunct lawsuit, I would instead simply have the parties advise the Court on whether Wagner has any actionable claims remaining.

Since 1793, when Chief Justice Jay declined President Washington's request for advice on twenty-nine questions regarding America's duties under various treaties, the bar on advisory opinions has become firmly embedded in American law.[3] Two hundred and nineteen years later, and lacking ample assurance that any live controversy exists here, I respectfully dissent.

_____

Don R. Willett
Justice

OPINION DELIVERED: June 29, 2012

[3] *See* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 50–52 (6th ed. 2009); *see also Valley Baptist Med. Ctr. v. Gonzalez*, 33 S.W.3d 821, 822 (Tex. 2000) (per curiam) ("Under article II, section 1 of the Texas Constitution, courts have no jurisdiction to issue advisory opinions.").

IN THE SUPREME COURT OF TEXAS

NO. 10-0969

THE MANSIONS IN THE FOREST, L.P., AND THE ESTATES–WOODLAND, L.P.,
PETITIONERS,

v.

MONTGOMERY COUNTY, TEXAS,
RESPONDENT

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

PER CURIAM

In this case, we consider whether the lack of a jurat—a clause stating that a writing was sworn to before an authorized officer—in an affidavit opposing a motion for summary judgment is a defect that must have been objected to before the trial court ruled on the motion in order to preserve error. The court of appeals held that omission of a jurat was a substantive defect under both the Texas Government Code and Texas Rule of Civil Procedure 166a, and that such a defect could be raised for the first time on appeal. ___ S.W.3d ___, ___ (Tex. App.—Beaumont 2010). We disagree. We hold that neither the Government Code nor Rule 166a requires such an affidavit to contain a jurat. When the record lacks any indication that a purported affidavit was sworn to by the affiant, however, the written statement is not an affidavit under the Government Code, but such a

defect is waived if not raised in the trial court. Accordingly, we reverse the court of appeals' judgment and remand the case to that court for further proceedings.

The Mansions in the Forest, L.P. and The Estates–Woodland, L.P. (collectively, Landowners) own property in Montgomery County, Texas. To widen Farm to Market Road 1488, Montgomery County exercised its eminent–domain power to seize portions of three properties owned by Landowners. To ensure Landowners were properly compensated, the County requested the appointment of special commissioners to assess the fair market value of the seized land and determine the diminution in value of Landowners' remaining property. *See* TEX. PROP. CODE § 21.014.

The commissioners assessed a total sum of $345,215 for the fair market value of Landowners' seized property and any damages caused by its seizure. The County deposited this amount into the court registry, and the trial court issued a writ of possession to the County. Landowners then filed objections to the amount of the award assessed by the commissioners. The County subsequently moved for summary judgment, arguing that Landowners offered no evidence of their damages and, alternatively, that the only competent evidence of their damages was a report by the County's appraiser, valuing the seized property and any damages at $326,215.

In response to the County's motion, Landowners filed a purported affidavit from Matthew Hiles, the vice president of both Mansions and Estates. Hiles asserted that the commissioners should have awarded at least $800,000 for the seized land and the diminution in value of the remaining land. The purported affidavit, however, contained no statement in which Hiles swore to the truth of his testimony. Additionally, the notary's certification stated that Hiles acknowledged, rather than swore

to, his statements. The County objected to the affidavit, claiming it was untimely and conclusory. The County did not object to the lack of a jurat in the affidavit.

The trial court sustained the County's objections and excluded Hiles's affidavit. The trial court then granted the County's motion for summary judgment and ordered that Landowners were due compensation of $326,215. Landowners appealed, challenging the exclusion of Hiles's affidavit. On appeal, the County raised two new complaints about defects in the affidavit, including that the affidavit lacked a jurat and was neither sworn to nor given under oath. The court of appeals affirmed the trial court's ruling based on the County's newly-raised-jurat argument, holding that the lack of a jurat was a defect of substance, not of form, and therefore could be raised for the first time on appeal. ___ S.W.3d at ___. Landowners petitioned this Court for review.

The Government Code defines "affidavit" as "a statement in writing of a fact or facts signed by the party making it, sworn to before an officer authorized to administer oaths, and officially certified to by the officer under his seal of office." TEX. GOV'T CODE § 312.011(1). That definition contains the "statutory requirements" for an affidavit. *Ford Motor Co. v. Leggat*, 904 S.W.2d 643, 645 (Tex. 1995). When an affidavit meets the Government Code's requirements, it may be presented as summary judgment evidence if it complies with Texas Rule of Civil Procedure 166a(f).[1] *See* TEX. R. CIV. P. 166a(f); *Life Ins. Co. of Va. v. Gar-Dal, Inc.*, 570 S.W.2d 378, 380 (Tex. 1978) (stating that Rule 166a(f) "sets forth the procedure for presenting summary judgment evidence by affidavit"). When a written statement does not meet this basic definition, however, it is "no affidavit at all."

[1] Until September 1, 1990, Rule 166a(f) was numbered as Rule 166a(e). *See* 53 TEX. B.J. 589, 596 (1990). In this opinion, we refer to both as Rule 166a(f).

Hardy v. Beaty, 19 S.W. 778, 779 (Tex. 1892) (holding that a written statement could not be "regarded as an affidavit sufficient in law for any purpose" because it was "not sworn to by any one or before any officer"); *see also Anderson v. Cochran*, 57 S.W. 29, 30 (Tex. 1900) (holding that an unsigned statement lacked an "essential part" of the mandatory affidavit requirements).

A jurat is a certification by an authorized officer, stating that the writing was sworn to before the officer. *Perkins v. Crittenden*, 462 S.W.2d 565, 568 (Tex. 1970); *see also* BLACK'S LAW DICTIONARY (9th ed. 2009) (defining a jurat as a "certification added to an affidavit . . . stating when and before what authority the affidavit . . . was made," and noting that a jurat typically indicates "that the officer administered an oath or affirmation to the signer, who swore to or affirmed the contents of the document"). While the Government Code requires that an affidavit be sworn to, it does not require a jurat or clause stating that the writing was sworn to before the officer. TEX. GOV'T CODE § 312.011(1); *see Perkins*, 462 S.W.2d at 568 (stating that, while the statutory definition of "affidavit" requires that the affidavit be sworn to, it does not require "an authorized officer [to] attest[] to the oath"). Similarly, Rule 166a(f) does not require that an affidavit used as evidence in a summary judgment proceeding contain an officer's attestation to the affiant's oath. *See* TEX. R. CIV. P. 166a(f); *Perkins*, 462 S.W.2d at 567–68 (holding that "the jurat is an integral part of [Rule 166a(f)] which particularly refers to 'sworn or certified copies . . . referred to in an affidavit'"); *see also Ryland Grp., Inc. v. Hood*, 924 S.W.2d 120, 122 (Tex. 1996) (per curiam) (explaining that Rule 166a(f) requires an affiant to "positively and unqualifiedly represent that the 'facts' disclosed [in an affidavit] are true" (citing *Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984)). Normally, an affiant includes a jurat to prove that the written statement was made under oath before an authorized

officer. When a purported affidavit lacks a jurat, other evidence must show that it was sworn to before an authorized officer and thus satisfies the Government Code's definition of "affidavit."

The purported affidavit in this case, therefore, was not required to contain a jurat to meet the requirements of the Government Code or to satisfy Rule 166a. *See* TEX. GOV'T CODE § 312.011(1); TEX. R. CIV. P. 166a(f). To meet the Government Code's requirements, however, the record must contain some evidence that the purported affidavit was sworn to by Hiles before an authorized officer. Here, the record lacks any indication that the purported affidavit was ever sworn to by Hiles. Accordingly, the written statement does not meet the requirements of the Government Code and is not an affidavit. *See Perkins*, 462 S.W.2d at 568; *Hardy*, 19 S.W. at 779; *see also* TEX. GOV'T CODE § 312.011(1). We next consider whether this defect was properly preserved for appeal.

Generally, to preserve a complaint for appellate review: (1) a party must complain to the trial court by a timely request, objection, or motion; and (2) the trial court must rule or refuse to rule on the request, objection, or motion. TEX. R. APP. P. 33.1(a). In certain limited circumstances, we have explicitly allowed parties to deviate from this rule. *See, e.g.*, *Perkins*, 462 S.W.2d at 568 (addressing an unverified copy of a promissory note offered as summary judgment evidence, which was complained about for the first time on appeal). However, we have never held that an affidavit's alleged failure under Texas Government Code section 312.011 is excepted from the general rules of error preservation. When a purported affidavit lacks a jurat and a litigant fails to provide extrinsic evidence to show that it was sworn to before an authorized officer, the opposing party must object to this error, thereby giving the litigant a chance to correct the error. The County did not complain

that Hiles's purported affidavit was unsworn until its responsive brief in the court of appeals. Accordingly, the County waived this issue at the trial court, and it cannot be considered on appeal.

There are "important prudential considerations" behind our rules on preserving error. *In re B.L.D.*, 113 S.W.3d 340, 350 (Tex. 2003). First, requiring that parties initially raise complaints in the trial court conserves judicial resources by providing trial courts the opportunity to correct errors before appeal. *Id.* Second, judicial decision-making is more accurate when trial courts have the first opportunity to consider and rule on error. *Id.* ("Not only do the parties have the opportunity to develop and refine their arguments, but we have the benefit of other judicial review to focus and further analyze the questions at issue."). Third, a party "should not be permitted to waive, consent to, or neglect to complain about an error at trial and then surprise his opponent on appeal by stating his complaint for the first time." *Id.* (quoting *Pirtle v. Gregory*, 629 S.W.2d 919, 920 (Tex. 1982) (per curiam)). For these reasons, to preserve this issue for appeal, the County needed to present its complaint to the trial court.

We recognize that other courts of appeals have similarly extended *Perkins* to contexts other than affidavits offered to verify copies of documents, holding that absence of a jurat is a defect of substance and allowing the issue of a potentially unsworn affidavit to first be raised on appeal. *See, e.g.*, *Laman v. Big Spring State Hosp.*, 970 S.W.2d 670, 672 (Tex. App.—Eastland 1998, pet. denied); *Clendennen v. Williams*, 896 S.W.2d 257, 260 (Tex. App.—Texarkana 1995, no writ); *Tucker v. Atl. Richfield Co.*, 787 S.W.2d 555, 557 (Tex. App.—Corpus Christi 1990, writ denied); *Elam v. Yale Clinic*, 783 S.W.2d 638, 643 (Tex. App.—Houston [14th Dist.] 1989, no writ); *Trimble v. Gulf Paint & Battery, Inc.*, 728 S.W.2d 887, 889 (Tex. App.—Houston [1st Dist.] 1987, no writ);

Sturm Jewelry, Inc. v. First Nat'l Bank, 593 S.W.2d 813, 814 (Tex. Civ. App.—Waco 1980, no writ). Additionally, some courts have held that a written statement is not an affidavit solely because it lacks the formality of a jurat. *See, e.g.*, *Gonzalez v. Grimm*, 353 S.W.3d 270, 274 (Tex. App.—El Paso 2011, no pet.); *Medford v. Medford*, 68 S.W.3d 242, 247 (Tex. App.—Ft. Worth 2002, no pet.). To the extent any such opinions are inconsistent with our holding today, they are disapproved.

In sum, we hold that neither the Government Code nor Rule 166a(f) requires an affidavit to contain a jurat. Because the record lacks any indication that the purported Hiles affidavit was sworn to by the affiant, however, it does not meet the definition of "affidavit" under Texas Government Code section 312.011. We further hold that the general rules of error preservation apply in this situation, and because the County did not complain in the trial court about the purported affidavit's failure to satisfy the requirements of the Texas Government Code, the issue was not preserved for appeal. Accordingly, 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: April 20, 2012

IN THE SUPREME COURT OF TEXAS

NO. 10-0983

TEXAS DEPARTMENT OF PUBLIC SAFETY, PETITIONER,

v.

LUKE THOMAS KASPAR, RESPONDENT

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

PER CURIAM

Luke Thomas Kaspar was arrested for driving while intoxicated and provided a breath specimen with an alcohol concentration of 0.188 to 0.199, more than twice the legal limit of 0.08. An administrative law judge sustained the Texas Department of Public Safety's suspension of Kaspar's driver's license, based on the arresting officer's report and the Breath Test Technical Supervisor Affidavit. Kaspar objected to the admission of the report because it was unsworn and to the admission of the test because neither the breath test technical supervisor nor breath test operator was present as requested. Kaspar did not subpoena the officer. *See* 1 TEX. ADMIN. CODE § 159.211(c)(2) (2012), adopted 34 Tex. Reg. 334, 335 (2009) (replacing § 159.23(c)(7)). The county court affirmed the suspension, but the court of appeals reversed and rendered. Following its decision in *Texas Department of Public Safety v. Caruana*, ___ S.W.3d ___ (Tex. App.–Austin

2010), the court held that the unsworn report was inadmissible. ___ S.W.3d ___ (Tex. App.–Austin 2010). The court did not address Kaspar's other complaints.

We have reversed the court of appeals' decision in *Caruana*, ___ S.W.3d ___ (Tex. 2012), and for the reasons explained there, we reverse the court's decision in this case. We remand the case to the court of appeals for consideration of Kaspar's other arguments.

OPINION DELIVERED: June 8, 2012

IN THE SUPREME COURT OF TEXAS

NO. 10-0995

DR. ERWIN CRUZ, PETITIONER,

v.

ANDREWS RESTORATION, INC. D/B/A PROTECH SERVICES AND RUDY MARTINEZ, RESPONDENTS AND CROSS-PETITIONERS

v.

CHUBB LLOYDS INSURANCE COMPANY OF TEXAS, CROSS-RESPONDENT

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

Argued December 7, 2011

CHIEF JUSTICE JEFFERSON delivered the opinion of the Court.

A series of storms caused extensive damage to a Dallas home. This led to meetings, inspections, evaluations, negotiations, and, ultimately, litigation between the homeowner, its insurer, and the company hired to restore the home. A jury found in the restoration company's favor, and the trial court rendered judgment against the homeowner and its insurer, jointly and severally. The court of appeals affirmed in part and reversed in part. Because we disagree with part of the court of

appeals' analysis, we affirm in part and reverse and remand in part the court of appeals' judgment.

I. Background

This case has a lengthy factual and procedural history, much of which is irrelevant to the three questions before us today. One question presents a challenge to the legal sufficiency of the evidence supporting a jury finding in Andrews Restoration, Inc. d/b/a Protech Services' favor.[1] We review the evidence in the light most favorable to the verdict, crediting favorable evidence if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not. *City of Keller v. Wilson*, 168 S.W.3d 802, 807 (Tex. 2005). We summarize the facts in that light.

A. The facts

Dr. Erwin Cruz insured his Dallas home through Chubb Lloyd's Insurance Company of Texas. There were several structures on the property: the home, a cabana, and two garages, one of which had been converted to a wine cellar. After a March 2001 storm, Cruz discovered that multiple roof leaks caused significant water damage throughout the house. Cruz contacted Rudy Martinez, Protech's president, who inspected the home. Cruz signed Protech's work authorization and assignment of insurance benefits, and Protech arranged for mold testing through Afram International. Afram's tests revealed dangerously high levels of mold. Cruz's wife and infant daughter became ill, and, in April, their physician advised that if they did not move out of the house immediately, they could suffer severe medical consequences. The family moved into an apartment the next month.

[1] The other two are issues on which the evidentiary record has no bearing.

Protech extracted standing water and removed, cleaned, and stored most of the home's contents. Chubb authorized Protech to perform these services and verbally agreed to pay for them. William Marx, Chubb's adjuster, visited the Cruz home in May and met with Cruz, Adam Hardison (Cruz's attorney), and Martinez. Marx advised that Chubb would conclude its investigation and make a decision on Cruz's claim within thirty days.

When no decision had been reached by July, Hardison wrote Marx, urging Chubb to decide how to proceed with the claim. The letter noted that Hardison had called Marx several times asking when Chubb might complete its investigation, and that "[e]ach time, [Marx] advised that [he was] waiting to hear back from [his] engineers." The letter mentioned the "extreme financial burden" Cruz faced while awaiting Chubb's decision and asked for a prompt resolution. In August, Chubb agreed that Cruz's claims were covered under the policy, but left the damage claim unsettled.

Later that year, with no decision from Chubb, Cruz's representatives (including Protech) advised Chubb that remediating the mold and restoring the home would likely be more expensive than demolishing and rebuilding. Hardison told Chubb that Cruz would prefer demolition to restoration. His letter noted that the claim had been ongoing since March, and that "[t]he time has come to reach a decision on how to proceed." But the claim remained open. Cruz formally demanded policy limits in January 2002.

At the end of January, Chubb responded:

> Please be advised that the [policy limits] demand is neither accepted nor rejected at this time. Although the investigation of the claim as of this date has identified water and ensuing mold damage in some areas, there is no evidence the building, other structure(s), and or contents are a "total loss" and thus require consideration of payment of the respective policy limits. Further investigation,

> evaluation, and adjustment activities are required to support a claim under the terms and conditions of the policy of insurance.
>
> In order to move forward with the adjustment of the claim, I propose that we hire a contractor to evaluate and estimate the reconstruction cost of the projected damages resulting from remediation activities to the residence and other structure(s). These estimates could then be used to support the building claim in the adjustment process.

Around the same time, Marx and Hardison met to discuss the claim.[2] Chubb wanted to perform further testing, and it hired David Gregg, a construction expert, to estimate remediation and restoration costs. Chubb agreed it would complete its evaluation by the end of February 2002, but it failed to do so. Hardison testified that even though Chubb decided in January to do additional testing, it took eleven months to complete those tests.

Meanwhile, in April, Gregg recommended first controlling the home's humidity levels—the same recommendation Afram made based on tests it conducted earlier that year. Protech provided a dehumidification cost estimate, which Marx believed was high, but Chubb did not obtain any other estimates. Protech's expert testified that Protech's charges were in line with industry standards. Hardison urged Marx to make a decision and emphasized that any additional testing would merely "reconfirm what had been confirmed almost six months earlier."

In early June, Cruz authorized Protech to begin dehumidification. Later that month, Martinez, Hardison, and Marx met, and Marx promised Protech that Chubb would pay for Protech's services. According to Hardison, Chubb decided to have Protech dehumidify the home so that Chubb would have two options available: either remediate or declare the residence a total loss.

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[2] Cruz and Martinez may have attended the meeting as well, although the testimony conflicts on that point.

Cruz and Hardison were disappointed with Chubb's decision to control the humidity, because the cost of remediation could exceed Cruz's policy limits.

Dehumidification worked, at least initially. By December, the mold levels had been substantially reduced. Because the roof was never repaired, however, water still entered the house when it rained, requiring additional dehumidification. Chubb paid only a portion of Protech's invoices. Martinez retained a lawyer, who sent a March 3, 2003 letter to Marx demanding payment. In response, Chubb paid Protech $250,000. This was the last payment Chubb made to Protech. In June 2003, with Cruz's claim still unresolved, Hardison instructed Protech to stop dehumidifying the home and to remove its equipment. Protech's outstanding invoices totalled $705,548.02.

The reason for the delay in resolving the claim is unclear. There was evidence that Marx was preoccupied with other claims. There was also evidence that Chubb continually sought additional testing and then postponed its performance. Although Marx testified that he authorized a roof repair, Cruz's attorney testified that the offer was never communicated to him, and the roof was never repaired. Chubb ultimately tendered policy limits in November 2003. The home was demolished two years later.

B. The lawsuit

Protech sued Chubb and Cruz, seeking (as relevant here) breach of contract damages and attorney's fees. Chubb counterclaimed for fraud. Cruz counterclaimed for fraud, fraudulent inducement, negligent misrepresentation, and violations of the Texas Deceptive Trade Practice-Consumer Protection Act.

Cruz moved for partial summary judgment on one of his DTPA claims against Protech. He alleged that Protech's work authorizations omitted language mandated by the Property Code. The trial court granted the motion in part, holding that Cruz was a consumer and that Protech committed a false, misleading, and/or deceptive act under the DTPA, but the court declined to grant summary judgment as to any remedy sought by Cruz. In a subsequent order, the trial court found that $1,059,940.52 would be necessary to restore to Cruz all sums that had been paid to Protech by Cruz or on his behalf under the agreements.

The case was tried to a jury, which found that Chubb breached its oral agreement with Protech, that the agreement satisfied the "main purpose" doctrine exception to the statute of frauds, and that Protech's damages were $705,548.02—the amount of its unpaid invoices. Although the jury awarded $25,000 in contingent attorney's fees for an appeal to the court of appeals and $15,000 for an appeal to this Court, the attorney's fee questions did not ask about fees for preparation and trial. The jury also found that Cruz breached his agreement with Protech and awarded the same amounts in damages and attorney's fees as it had against Chubb.

The jury did not find that Protech committed fraud against Chubb or Cruz, or that Protech fraudulently induced Cruz to enter into an agreement, engaged in negligent misrepresentation, or violated the DTPA. Question 29 instructed the jury that the trial court had previously found Protech's failure to include the requisite Property Code language to be a false, misleading, or deceptive act that was a producing cause of injury or harm to Cruz. It then asked what sum of money would reasonably compensate Cruz for his resulting DTPA damages. The jury answered "$0."

The trial court rendered judgment on the verdict, awarding Protech $705,548.02 against Chubb and Cruz, jointly and severally, as well as appellate attorney's fees. The trial court ordered that Cruz recover no relief for his Property Code-related DTPA claim, and the court denied Protech's motion for partial new trial on attorney's fees.

All parties appealed, raising numerous issues. In pertinent part, the court of appeals held that despite the trial court's finding that Protech engaged in a deceptive act, Cruz was not entitled to restoration of consideration because Cruz had failed to prove that he was entitled to rescission. The court concluded that Chubb's oral promise to pay Protech was unsupported by consideration and thus barred by the statute of frauds. 323 S.W.3d 564, 574. Finally, the court held that Protech was not entitled to a new trial on attorney's fees, having waived its objection to the trial court's failure to submit a question on attorney's fees for preparation and trial. The court of appeals affirmed in part and reversed and rendered in part the trial court's judgment.[3]

We granted Protech's and Cruz's petitions for review. 54 Tex. Sup. Ct. J. 1548 (Aug. 19, 2011).

II. Cruz's DTPA claim fails because he is not a prevailing party, and he is not entitled to an order restoring all amounts paid under the contracts without deducting the value received under those agreements.

The Property Code requires that certain contracts for work and materials used to improve a homestead contain a statutory warning, printed in at least 10-point bold type:

> IMPORTANT NOTICE: You and your contractor are responsible for meeting the terms and conditions of this contract. If you sign this contract and you fail to meet

[3] The court of appeals also modified the judgment interest rate from 6% to 5%. 323 S.W.3d 564, 583.

> the terms and conditions of this contract, you may lose your legal ownership rights in your home. KNOW YOUR RIGHTS AND DUTIES UNDER THE LAW.

Act of April 15, 1993, 73d Leg., R.S., ch. 48, § 4, 1993 Tex. Gen. Laws 97, 98 (amended 2007) (current version at TEX. PROP. CODE § 41.007(a)). Protech's work authorizations and assignment of insurance benefits, which Cruz signed in March 2001 and June 2002, omitted this language.

The Property Code provision is among the "tie-in" statutes actionable under DTPA section 17.46,[4] and a consumer may sue for a violation. Specifically, the DTPA provides:

> (a) A consumer may maintain an action where any of the following constitute a producing cause of *[actual damages]*[5] or *damages for mental anguish:*
>
> (1) the use or employment by any person of a false, misleading, or deceptive act or practice that is:
>
> (A) specifically enumerated in a subdivision of Subsection (b) of Section 17.46 of this subchapter; and
>
> (B) *relied on by a consumer to the consumer's detriment*.

TEX. BUS. & COM. CODE § 17.50(a)(1) (emphasis added).

The next subsection lays out the available remedies, one of which is restoration:

> (b) In a suit filed under this section, *each consumer who prevails* may obtain:
>
> (1) the amount of [actual damages] found by the trier of fact. . . .;
>
> (2) an order enjoining such acts or failure to act;

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[4] *See* TEX. PROP. CODE § 41.007 (b) ("A violation of Subsection (a) of this section is a false, misleading, or deceptive act or practice within the meaning of Section 17.46, Business & Commerce Code, and is actionable in a public or private suit brought under the provisions of the [DTPA].").

[5] Because Cruz's claim is predicated on a violation of a tie-in statute, he would be entitled to recover any proven actual damages, rather than just economic ones. *See* TEX. BUS. & COM. CODE § 17.50(h).

(3) *orders necessary to restore to any party to the suit any money or property, real or personal, which may have been acquired in violation of this subchapter*; and

(4) any other relief which the court deems proper . . . .

Id. § 17.50(b)(emphasis added).

Cruz argues that, despite the jury's finding that he sustained no damages and the trial court's judgment awarding him no recovery on the claim, he is entitled to the $1,059,940.52 the trial court found had been paid under his agreements with Protech. For several reasons, we disagree.

A. Cruz did not prevail on his DTPA claims.

The DTPA authorizes consumer suits when deceptive acts are the producing cause of "[actual damages] or damages for mental anguish." TEX. BUS. & COM. CODE § 17.50(a)(1). The statute permits trial courts to award relief only to a prevailing consumer. *Id.* § 17.50(b). Among those remedies is an order to restore illegally acquired money or property, *see id.* § 17.50(b)(3), and that is the remedy Cruz seeks. But those remedies are unavailable unless a consumer has prevailed.

The jury awarded Cruz no damages on his DTPA claim. He cannot, therefore, satisfy section 17.50(a)(1). The trial court found that Cruz had suffered "injury or harm" but left it to the jury to quantify that amount. We have held that a party who failed to recover actual damages or damages for mental anguish was not entitled to attorney's fees under the DTPA. *See Gulf States Utils. Co. v. Low*, 79 S.W.3d 561, 567 (Tex. 2002). We see no reason to treat Cruz's restoration claim differently. Even a rescission award requires a showing of actual damages. *See Russell v. Indus. Transp. Co.*, 258 S.W. 462, 465 (Tex. 1924) (holding that "some pecuniary injury is essential to an action to rescind a contract for fraud"). This is not a case in which Cruz's injury was undisputed but

"the jury was not asked to place a monetary value on this injury." *Bonanza Rests. v. Uncle Pete's, Inc.*, 757 S.W.2d 445, 448 (Tex. App.—Dallas 1988, writ denied) (holding that where consumer clearly sustained injury, jury's failure to award damages was not fatal to rescission claim, because jury had not been asked about the particular injury sustained). The statute's clear language provides a cause of action only to consumers who have sustained damages, and the jury awarded Cruz none.

Moreover, under 17.50(a)(1), a consumer loses without proof that he relied to his detriment on the deceptive act. Here, neither the trial court nor the jury found reliance. Cruz's motion for summary judgment was silent on reliance, and the trial court's order states only that Protech and Martinez "committed a false, misleading, and/or deceptive act or practice under the DTPA by not including the required statutory language of Section 41.007(a) of the Texas Property Code in the contracts attached to the Motion . . . which was the producing cause of injury or harm to Cruz."

Similarly, the DTPA question submitted to the jury did not include a reliance element:

> You are instructed that the Court has previously found that the failure of Protech and Rudy Martinez to include the language required by the Texas Property Code conspicuously printed, stamped, or typed in size at least equal to 10 point bold type next to the owner's signature was a false, misleading, or deceptive act, that was a producing cause of an injury or harm to Dr. Cruz. What sum of money, if now paid in cash, would fairly and reasonably compensate Dr. Cruz for his damages, if any, that resulted from such conduct?
>
> Answer in dollars and cents for damages:
> Answer: $0

The relevant Pattern Jury Charge question includes the reliance element,[6] and Cruz included reliance in the jury questions he submitted as to the other section 17.50(a)(1) violation he alleged. Reliance is a necessary element of Cruz's DTPA claim, and he failed to secure a finding on that contested issue. The trial court's order addressed only the elements of section 17.50(a)(1)(A)—that Protech had engaged in a false, misleading, or deceptive act that was the producing cause of harm to Cruz. But the violation is not complete without a finding of reliance under section 17.50(a)(1)(B).

Because the statute authorizes recovery only to a consumer who has sustained "actual damages" or "damages for mental anguish" and who relied to his detriment on the deceptive act, Cruz has not shown that he is a prevailing consumer entitled to section 17.50(b)'s remedies.

B. Even if Cruz had prevailed, he is not entitled to an order restoring all amounts paid under the contracts without deducting the value received under those agreements.

The DTPA authorizes trial courts to restore to any party to the suit the money or property illegally acquired. TEX. BUS. & COM. CODE § 17.50(b)(3). Several courts of appeals (including the

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[6] PJC 102.1 Question and Instruction on False, Misleading, or Deceptive Act or Practice (DTPA § 17.46(b))

QUESTION ____

Did *Don Davis* engage in any false, misleading, or deceptive act or practice that *Paul Payne* relied on to his detriment and that was a producing cause of damages to *Paul Payne*?

STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES: BUSINESS, CONSUMER, INSURANCE, & EMPLOYMENT PJC 102.1 (2010).

court of appeals in this case) have held that this remedy incorporates the common law of rescission.[7] If that is so, the consumer must surrender any benefits received. *See Tex. Emp'rs Ins. Ass'n v. Kennedy*, 143 S.W.2d 583, 585 (Tex. 1940); *Smith v. Kinslow*, 598 S.W.2d 910, 915 (Tex. Civ. App.—Dallas 1980, no writ). At common law, rescission also generally requires notice and tender; that is, a plaintiff seeking to rescind a contract must give timely notice to the defendant that the contract is being rescinded and either return or offer to return the property he has received and the value of any benefit he may have derived from its possession. *See, e.g.*, *Kennedy*, 143 S.W.2d at 585; *David McDavid Pontiac, Inc. v. Nix*, 681 S.W.2d 831, 836 (Tex. App.—Dallas 1984, writ ref'd n.r.e.).

Cruz disagrees, noting that the statute uses the term "restore," which is broader than "rescind." He argues that he need not disgorge any benefit received, and that the trial court's finding entitles him to $1,059,940.52 as a matter of law.

Cruz correctly notes that the DTPA did not codify the common law, and that one of its primary purposes is "to provide consumers a cause of action for deceptive trade practices without the burden of proof and numerous defenses encountered in a common law fraud or breach of warranty suit." *Smith v. Baldwin*, 611 S.W.2d 611, 616 (Tex. 1980). He also points to one case

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[7] *See* 323 S.W.3d 564, 580-81; *Schenck v. Ebby Halliday Real Estate, Inc.*, 803 S.W.2d 361, 366 (Tex. App.—Fort Worth 1990, no writ); *Green Tree Acceptance, Inc. v. Pierce*, 768 S.W.2d 416, 424 (Tex. App.—Tyler 1989, no writ) ("Where rescission is allowed under the DTPA for breach of warranty, appropriate allowances must be made to prevent unjust enrichment.") (citing D. BRAGG, P. MAXWELL, AND J. LONGLEY, TEXAS CONSUMER LITIGATION § 8.11 (2d ed. 1983)); *Smith v. Kinslow*, 598 S.W.2d 910, 915 (Tex. Civ. App.—Dallas 1980, no writ); *see also Thomas v. State*, 226 S.W.3d 697, 710 (Tex. App.—Corpus Christi 2007, pet. dism'd) (observing that DTPA "authorizes the equitable remedy of rescission and restitution, pursuant to which a consumer may recover all consideration paid for the defective product").

suggesting that the Legislature may not have intended to import common law rescission into the DTPA:

> The legislature obviously was well acquainted with the common law concept of rescission, and yet it avoided using that term in favor of the word "restore," which is not a term of art in either the common law or the [UCC]. Therefore, it is reasonable to conclude the legislature intended to create a separate remedy for consumers unburdened by the common law requirement that the rescinding party return the value obtained in the transaction. While providing restoration of the consumer's property without requiring the consumer to return any benefit obtained would provide a windfall to the consumer, such an outcome is consistent with the punitive provisions of the DTPA designed to punish and deter deceptive trade practices.

Park Forest Baptist Church v. Park Forest Ctr., No. 05-96-00188-CV, 1998 WL 107951, at *4 (Tex. App.—Dallas Feb. 27, 1998, pet. denied) (not designated for publication). But that court acknowledged that "while there can be little dispute the DTPA as a whole is not simply a codification of the common law, it does not necessarily follow that the specific remedy provided for in section 17.50(b)(3) is anything more than mere statutory recognition of a common law remedy." *Id*. Ultimately, the court followed its own precedent and applied the common law of rescission. *Id.* at *3.

Our analysis begins with the statute's text, which authorizes a trial court to sign "orders necessary to restore to any party to the suit any money or property, real or personal, which may have been acquired in violation of this subchapter." TEX. BUS. & COM. CODE § 17.50(b)(3). "Restore" means "to give back (as in something lost or taken away)." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1936 (1961). It shares the same root as "restitution," which means the act of restoring or a condition of being restored. *Id.* Rescission is merely the "common, shorthand name" for the composite remedy of rescission and restitution. RESTATEMENT (THIRD) OF RESTITUTION AND

UNJUST ENRICHMENT § 54 cmt. a (2011). Rescission is a form of restitution that applies if the transaction may still be unwound; if it cannot, a plaintiff may sue for damages. *See id.* § 37 cmt. a. Thus, "[r]escission is one of the principal asset-based remedies in restitution," and it "restore[s] the parties to the status quo ante by unwinding the contractual exchange instead of pressing it forward." *Id*.

Cruz seeks to rescind the agreements[8]—he asks for all the money paid by him or on his behalf under the agreements—without surrendering the benefits he received. But rescission is not a one-way street. It requires a mutual restoration and accounting, in which each party restores property received from the other. *Id.* § 37 cmt. d ("Rescission is mutual: a plaintiff seeking to be restored to the status quo ante must likewise restore to the defendant whatever the plaintiff has received in the transaction."); *see also Kennedy*, 143 S.W.2d at 585. Thus, it is generally limited to cases in which counter-restitution by the claimant will restore the defendant to the status quo ante. RESTATEMENT § 54(3).

Generally, rescission is an equitable remedy,[9] and Cruz correctly asserts that fault is relevant. A defendant's wrongdoing may factor into whether he should bear an uncompensated loss in those cases in which it is impossible for a claimant to restore the defendant to the status quo ante. *Id.* § 54(3)(b). But it does not excuse the claimant in such cases from counter-restitution when feasible—as it would be here. *Id.* § 54 cmt. c ("A claimant (such as a fraud victim) who has been

[8] His post-trial motion seeking this remedy was titled "Motion for Court to Award Remedy of Restoration and Rescission."

[9] *Tex. Emp'rs Ins. Ass'n v. Kennedy*, 143 S.W.2d 583, 585 (Tex. 1940).

an innocent party to a legally defective exchange will ordinarily be able to rescind on making restitution (in specie or in value) of any benefits conferred by the other party.").

Cruz concedes that adopting his approach would give him a windfall, but he argues that this is consistent with the DTPA's punitive nature. "DTPA claims generally are . . . punitive rather than remedial." *PPG Indus. v. JMB/Houston Ctrs. Ltd. P'ship*, 146 S.W.3d 79, 89 (Tex. 2004). But that "punishment" is accomplished through the statute's liability and damage provisions—prohibiting deceptive practices and allowing recovery of actual damages, mental anguish damages, treble damages for knowing violations, and attorney's fees. *See, e.g.*, TEX. BUS. & COM. CODE §§ 17.49, 17.50. Restoration is different. It merely provides a prevailing consumer the option of unwinding the transaction, returning the parties to the status quo ante. Putting the parties back where they started means restoring both parties to their original positions.

Moreover, if it is true, as Cruz argues, that the DTPA authorizes restoration only to the consumer, without requiring that he disgorge any benefit received, the statute would have authorized the remedy only for consumers, not for "any party to the suit." *Id.* § 17.50(b)(3). And although the only money or property that can be restored is property that "may have been acquired in violation" of the statute, any value received by the consumer in the illegal transaction "may have been acquired" under the DTPA violation that forms the basis of the claim. *Id*. We agree with the court of appeals that section 17.50(b)(3)'s restoration remedy contemplates mutual restitution.

That conclusion does not compel wholesale adoption of all of the common law rescission requirements, however. Two of those requirements are notice and tender, which courts of appeals have used to reject DTPA restoration claims. *See, e.g.*, 323 S.W.3d at 581 (holding that "under

Smith and *David McDavid*, Cruz was obliged to prove and obtain a finding that he had surrendered or offered to surrender to Protech and Martinez the value of the services they provided at his house as a prerequisite for recovering under section 17.50(b)(3)"). But as we have noted, the DTPA was intended "to provide consumers a cause of action for deceptive trade practices without the burden of proof and numerous defenses encountered in a common law fraud or breach of warranty suit." *Baldwin*, 611 S.W.2d at 616. At least one court of appeals has suggested that DTPA restoration is an independent ground of recovery, requiring only that the consumer choose the remedy subject to the defendant's right to plead and prove an offset, but not incorporating common law predicates like notice and tender. *See Carrow v. Bayliner Marine Corp*., 781 S.W.2d 691, 696 (Tex. App.—Austin 1989, no writ). We agree that compliance with such requirements is unnecessary under the DTPA. Instead, we adopt the Restatement approach and conclude that notice and restitution or a tender of restitution are not prerequisites to a remedy under section 17.50(b)(3), as long as the affirmative relief to the consumer can be reduced by (or made subject to) the consumer's reciprocal obligation of restitution. *See* RESTATEMENT § 54(5).

But that did not happen here. The trial court's order recited the amounts Cruz or his agents paid Protech, but there was no deduction for the value Cruz received under the contracts. And it was undisputed that Cruz benefitted from the agreements. In addition to dehumidification, Protech arranged for mold testing, helped relocate the Cruz family and their belongings, extracted water from the home, "bio-cleaned" the furniture, and stored the home's contents. Not only that, but Cruz did not pay the entire amount himself—Chubb paid some portion of it. The DTPA does not authorize

an order restoring to Cruz amounts paid by him *and* his insurer under the contract, unaccompanied by a deduction for the value of services Protech provided.

The trial court correctly decided not to award Cruz any remedy on his DTPA claim. Its pretrial finding of the sum necessary to restore to Cruz the amounts paid under the agreement did not entitle Cruz to that amount as a matter of law, and Cruz was not a prevailing party entitled to a DTPA remedy. Cruz has failed to prove conclusively that he was entitled to the $1,059,940,52.

III. The evidence supported the jury finding that the "main purpose" doctrine applied.

Chubb and Protech had no written contract for services. Instead, Protech relied on an exception to the statute of frauds: the "main purpose" or "leading object" doctrine, a principle we first recognized in 1857 and which applies to unwritten promises made by sureties. *See Lemmon v. Box*, 20 Tex. 329, 333 (1857); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 116 (1981). Protech argued, and the jury found, that Chubb's promise to pay for the dehumidification fell within this exception.

Generally, a promise to pay another's debt must be in writing because "the promisor has received no direct benefit from the transaction." *Cooper Petroleum Co. v. LaGloria Oil & Gas. Co.*, 436 S.W.2d 889, 895 (Tex. 1969). But

> wherever the main purpose and object of the promisor is, not to answer to another, but to subserve some purpose of his own, his promise is not within the statute [of frauds], although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing the liability of another.

Lemmon, 20 Tex. at 333.

In *Gulf Liquid Fertilizer Co. v. Titus*, 354 S.W.2d 378 (Tex. 1962), we considered whether a partner's oral promise to pay a former partner's debt, so that the partnership could obtain credit, was enforceable. We held that the promise was binding because "the consideration necessarily benefited [the partner] as a member of the partnership because he shared in the partnership's ultimate profits, if any, and the benefit he received as a member of the partnership is considered sufficient to satisfy the 'main purpose' rule." *Titus*, 354 S.W.2d at 387. Similarly, in *Haas Drilling Co. v. First Nat'l Bank*, 456 S.W.2d 886, 891 (Tex. 1970), we held that where a bank foreclosed on a debtor's oil lease, the bank's promise to pay the lease was enforceable because "[w]hen the promisor assumes primary responsibility and his leading object is to serve some interest or purpose of his own, notwithstanding the effect is to pay or discharge the debt of another, the oral promise is not within the Statute of Frauds."

The main purpose doctrine requires that: (1) the promisor intended to create primary responsibility in itself to pay the debt; (2) there was consideration for the promise; and (3) the consideration given for the promise was primarily for the promisor's own use and benefit—that is, the benefit it received was the promisor's main purpose for making the promise. *See Haas*, 456 S.W.2d at 890.

The jury found the requisite elements of the main purpose doctrine had been satisfied, and the trial court rendered judgment on the verdict. The court of appeals reversed, holding that there was no evidence supporting the jury's answer to subpart b, which asked whether Chubb received direct consideration for its promise to be primarily liable for Cruz's debt. 323 S.W.3d at 573-74. The court concluded that Cruz was the primary beneficiary of Chubb's promise to pay, and any

benefit to Chubb was "purely speculative." *Id.* But the question is not who was the primary *beneficiary*, but whether Chubb's primary *purpose* in promising to pay was to benefit itself.

Even so, we disagree that Cruz, rather than Chubb, was the primary beneficiary of the dehumidification. The court of appeals held that Cruz benefitted, because "it was his property that was being improved and because the service tended to satisfy his contractual obligation" to mitigate damages. 323 S.W.3d at 573. But Cruz and his family moved out of the house in May 2001, and Chubb did not tender policy limits until December 2003. During that two-and-a-half year period, Cruz repeatedly demanded a resolution, and Chubb continued to seek extra time. The dehumidification payments were deducted from the total payout to Cruz, so it is difficult to understand how he benefitted from those payments rather than from a prompt resolution of the claim, as he repeatedly sought.

We also disagree that Chubb received no consideration for its promise to pay Protech for dehumidifying the house. Protech's services bought Chubb time to adjust the claim and evaluate the damage. Cruz's expert testified that the dehumidification maintained the status quo, giving Chubb more time to decide which course of action to pursue. Cruz's attorney testified that Chubb's decision to engage Protech to dehumidify the home allowed Chubb to "keep a finger in the dike" so that Chubb could conduct additional analysis. Not only did Cruz not benefit from the delay, but because the dehumidification payments were deducted from the amount paid to him, he may have recovered less than he would have had Chubb promptly paid the claim. We conclude that Chubb received direct consideration for its promise to pay for the dehumidification, and the court of appeals erred in concluding otherwise.

The court of appeals did not reach Chubb's legal sufficiency challenges to the remaining two findings: that Chubb intended to accept primary liability for Cruz's debt to Protech and that the direct consideration Chubb received was Chubb's main purpose for agreeing to accept primary liability for Cruz's debt. As to the first, evidence supports the jury's answer. The record reflects that, when the parties met in June 2002, Marx promised to pay for Protech to dehumidify the home, and Chubb in fact did pay Protech directly on a number of occasions. Based on this promise and the facts and circumstances of the case, the jury could have found that Chubb agreed to be primarily responsible for Cruz's debt. *See Haas Drilling Co.*, 456 S.W.2d at 889 (noting that the question of intent to be primarily responsible is for the finder of fact, taking into account all the facts and circumstances of the case).

As to the final factor, there was also evidence that Chubb's main purpose in agreeing to accept primary liability for Cruz's debt was to buy time to decide how to proceed with the claim. In January, Chubb told Cruz it could neither accept nor reject his policy limits demand without further investigation. Chubb's contractor, David Gregg, told Chubb that the humidity in the home should be controlled before further damage occurred. Chubb decided to do so, rather than pay the claim, so that it could conduct further testing and try to reach a decision on how to proceed. If Chubb had not wanted extra time, it would not have agreed to control the humidity. We conclude some evidence supports the jury finding that Chubb's main purpose in promising to pay for dehumidification was to gain extra time for its own benefit. Because evidence supports the jury's findings that the three elements of the main purpose doctrine were satisfied, we reverse that portion of the court of appeals' judgment.

IV. Protech did not make the trial court aware of its charge complaint, timely and plainly, or obtain a ruling.

Finally, Protech complains that the trial court erred by submitting questions on attorney's fees that did not ask about fees for preparation and trial, although they included questions about appellate attorney's fees. The court of appeals held that Protech waived the issue because it never objected or called the trial court's attention to the omission, and the record did not establish that the trial court refused a request to submit them. 323 S.W.3d at 584-85. Protech admits that the trial court never explicitly refused to include subparts dealing with fees for preparation and trial, but Protech contends that its proposed charge, combined with its objection to one of the attorney's fee questions, preserved error.

Parties and courts have long struggled with requirements for preserving charge error. Our procedural rules state that a complaint to a jury charge is waived unless specifically included in an objection. TEX. R. CIV. P. 274; TEX. R. APP. P. 33.1(a)(1). In *State Department of Highways & Public Transportation v. Payne*, recognizing that charge practice had become a "labyrinth daunting to the most experienced trial lawyers," we simplified the test for determining whether error was preserved. *Payne*, 838 S.W.2d 235, 240 (Tex. 1992). Like most error preservation requirements,[10] the inquiry focuses on the trial court's awareness of, and opportunity to remedy, the problem: "There should be but one test for determining if a party has preserved error in the jury charge, and that is whether the party made the trial court aware of the complaint, timely and plainly, and obtained a ruling." *Id*. at 241. We articulated this requirement to simplify a process that had been beset with

[10] *See, e.g.*, TEX. R. APP. P. 33.1(a).

"complex, intricate, sometimes contradictory, unpredictable rules" that "hardly subserve[d] the fair and just presentation of the case." *Id*.

Payne's cure must not worsen the disease. Trial courts lack the time and the means to scour every word, phrase, and omission in a charge that is created in the heat of trial in a compressed period of time. A proposed charge, whether drafted by a party or by the court, may misalign the parties; misstate the burden of proof; leave out essential elements; or omit a defense, cause of action, or (as here) a line for attorney's fees. Our procedural rules require the lawyers to tell the court about such errors before the charge is formally submitted to a jury. TEX. R. CIV. P. 272. Failing to do so squanders judicial resources, decreases the accuracy of trial court judgments and wastes time the judge, jurors, lawyers, and parties have devoted to the case. *In the Interest of B.L.D.*, 113 S.W.3d 340, 350 (Tex. 2003) (discussing the "[i]mportant prudential considerations [that] underscore our rules on preservation").

Here, Protech filed a proposed charge four days before the July 31 trial began. That charge included questions about Protech's reasonable and necessary attorney's fees, and each question included three subparts and answer blanks: one for preparation and trial, one for an appeal to the court of appeals, and one for an appeal to this court. Trial continued for two weeks, and the trial court gave the parties its proposed charge on August 8. That charge omitted the subpart dealing with fees for preparation and trial, although it included the other two subparts for appellate fees. Two days later, after an informal charge conference, the trial court conducted a formal charge conference. At that conference, Protech had only one objection: that Question No. 5, which inquired about the reasonableness and necessity of Protech's attorney's fees against Chubb, should include a ninth

factor for jurors to consider when determining the reasonableness of such an award. Specifically, Protech argued that the jury should be asked to consider "whether the services rendered related to the prosecution of plaintiff's claims, which are recoverable, or the defense of defendant's counterclaims, which are not recoverable." The trial court overruled the objection. Protech made no other charge objections or requests.

Protech nonetheless argues that the trial court's failure to include the relevant subparts in Questions 5, relating to attorney's fees against Chubb, and 14, which inquired about attorney's fees against Cruz, was a "clear refusal" to submit Protech's questions. The trial court did not endorse the requests "refused," nor did it ever indicate that it was refusing to submit the questions. While a written refusal is not always necessary to preserve error, the aggrieved party must show that the trial court was aware of the party's request and denied it. *See Dall. Mkt. Ctr. Dev. Co. v. Liedeker*, 958 S.W.2d 382, 386 (Tex. 1997) (per curiam), *overruled on other grounds by Torrington Co. v. Stutzman*, 46 S.W.3d 829, 840 n.9 (Tex. 2000). In *Liedeker*, we held that error was preserved when the record showed that "the trial court admitted that he had considered the requested question, had refused it, and had meant to endorse it but simply failed to do so, for which he was sorry." *Id.* at 387. In *Payne*, although the objection to the charge was not particularly precise, we held that a party's request preserved error because of the trial court's "clear refusal" to submit the theory to the jury. *Payne*, 838 S.W.2d at 239 (noting that "[t]he trial court's failure to submit [the requested question] could hardly have been an oversight"). Similarly, in *Alaniz v. Jones & Neuse, Inc.*, 907 S.W.2d 450, 452 (Tex. 1995) (per curiam), we held that a plaintiff preserved error regarding the trial court's failure to include a subpart for lost profits within the trial court's broad form damage question, where

the plaintiff had both filed a proposed charge before trial and objected during the charge conference to the failure to include the requested element.

Here, the parties had ample time to review the draft charge and point out discrepancies to the trial court. The charge that was ultimately submitted to the jury was forty pages long and contained thirty-two questions, most of which had multiple subparts. Protech can complain on appeal only if it made the trial court aware, timely and plainly, of the purported problem and obtained a ruling. *Payne*, 838 S.W.2d at 241. Filing a pretrial charge that includes a question containing that subpart, when no other part of the record reflects a discussion of the issue or objection to the question ultimately submitted, does not sufficiently alert the trial court to the issue.

A charge filed before trial begins rarely accounts fully for the inevitable developments during trial. For these reasons, our procedural rules require that requests be prepared and presented to the court "within a reasonable time *after* the charge is given to the parties or their attorneys for examination." TEX. R. CIV. P. 273 (emphasis added). Notwithstanding our rules, we have held that a party may rely on a pretrial charge as long as the record shows that the trial court knew of the written request and refused to submit it. *Alaniz*, 907 S.W.2d at 451-52. Thus, error was preserved where a party filed a pretrial charge, and the trial court used the very page from that charge that contained the requested question but redacted one of the subparts and answer blanks, and the party objected to the omission. *Id.* Again, trial court awareness is the key.

Although trial courts must prepare and deliver the charge, we cannot expect them to comb through the parties' pretrial filings to ensure that the resulting document comports precisely with their requests—that is the parties' responsibility. It is impossible to determine, on this record,

whether the trial court refused to submit the question, or whether the omission was merely an oversight. *Cf. Payne*, 838 S.W.2d at 239. As the court of appeals concluded, "[t]he trial court's overruling of [Protech's] objection does not show that it was refusing to submit a jury question or blank regarding attorney's fees incurred for preparation and trial," 323 S.W.3d at 585, and the record does not otherwise reflect a refusal to submit the question. We conclude the issue was not preserved for appellate review.

V. Conclusion

We affirm the court of appeals' judgment with respect to Cruz's DTPA claim and Protech's charge error complaint. We reverse the court of appeals' judgment as to Chubb and remand for that court to consider Chubb's remaining arguments, which include challenges to the factual sufficiency of the evidence supporting the jury findings. TEX. R. APP. P. 60.2(a), (d).

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Wallace B. Jefferson
Chief Justice

OPINION DELIVERED: April 20, 2012

IN THE SUPREME COURT OF TEXAS

NO. 10-0997

PARADIGM OIL, INC., PACIFIC OPERATORS, INC., PACIFIC OPERATORS OF TEXAS, INC. AND FINLEY OIL WELL SERVICE, INC., PETITIONERS,

v.

RETAMCO OPERATING, INC., RESPONDENT

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

Argued February 9, 2012

JUSTICE MEDINA delivered the opinion of the Court.

JUSTICE GREEN did not participate in the decision.

Texas Rule of Civil Procedure 215.2(b)(5) authorizes a trial court to render a default judgment against a defendant for discovery abuse, justice and due process permitting. Commonly known as the death-penalty sanction, it is the remedy of last resort.

Discovery abuse in this case caused the trial court to strike the defendants' answer and render a default judgment. In addition to striking the defendants' answer, the discovery sanction also barred the defendants from contesting the plaintiff's damages. Because these damages were unliquidated, however, the plaintiff was required to prove them at an uncontested hearing.

The defendants do not deny their discovery abuse, nor do they question the trial court's decision to strike their pleadings and render judgment by default. Rather, they complain that the trial court abused its discretion by barring them from the damages trial. The defendants maintain that this extension of the death-penalty sanction was excessive, unjust, and therefore an abuse of discretion.

The court of appeals did not agree, holding that the discovery sanction was neither excessive nor an abuse of the trial court's discretion. The court of appeals, however, remanded the case twice on legal insufficiency grounds before affirming the uncontested damages award in this, the third appeal. *See Paradigm Oil, Inc. v. Retamco Operating, Inc.*, 161 S.W.3d 531 (Tex. App.—San Antonio 2004, pet. denied) (*Paradigm I*), *on remand*, 242 S.W.3d 67 (Tex. App.—San Antonio 2007, pet. denied) (*Paradigm II*), *on remand*, 330 S.W.3d 342 (Tex. App.—San Antonio 2010) (*Paradigm III*). Because we conclude that the defaulted defendants should have been permitted to participate in the hearing on unliquidated damages, we reverse the court of appeals' judgment and remand the case to the trial court for further proceedings.

I

The case arises out of the conveyance of oil and gas properties by Retamco Operating, Inc. almost thirty years ago. Following an economic downturn in 1984, Retamco conveyed 572 oil and gas leases to PNB Securities Corporation under a debt workout agreement (the 1984 Agreement). The agreement was complex. Under it, Retamco retained certain rights, including overriding royalty

interests[1] and after-payout working interests[2] in certain wells PNB financed. The 1984 Agreement further allowed Retamco to continue operating certain leases in production, entitled Retamco to notice of lease terminations, sales, or assignments, and granted Retamco the option to retain certain leases that might otherwise terminate. Retamco was also to be notified when certain wells reached payout so it could elect to share in the working interest. The agreement obligated PNB to prepare a document describing Retamco's rights and record it in all applicable counties. PNB was further to notify those acquiring an interest in any of the leases of Retamco's rights and interests under the 1984 Agreement.

In 1999, Retamco sued multiple parties for damages under the 1984 Agreement. By the time of the suit, PNB had divested itself of all the leases covered under the agreement, with the last sixty-two leases having been sold to Paradigm Oil, Inc. in 1993. Before this sale, Paradigm operated one of the leases for PNB for a number of years.

Retamco's suit named both PNB and Paradigm as defendants. Retamco also joined other defendants, including PNB's successor, Bank of America,[3] and three Paradigm affiliates, Pacific

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[1] "An overriding royalty is an interest in the oil and gas produced at the surface, free of the expense of production." *Stable Energy, L.P. v. Newberry*, 999 S.W.2d 538, 542 (Tex. App.—Austin 1999, pet. denied).

[2] "A working interest is the right to share in well production, subject to the costs of exploration and development. Payout is reached when the costs of drilling and equipping the well are recovered from production." *Id*. at 543.

[3] Retamco ultimately settled with Bank of America, PNB's successor, for $1.25 million. Around the same time, Retamco also became involved in lawsuits with other entities which had acquired some of the 572 leases included under the 1984 Agreement. These suits settled with Retamco giving up its rights in the leases acquired by Andarko Petroleum and Crimson Oil for a total of $1.3 million.

Operators, Inc., Pacific Operators of Texas, Inc., and Finley Oilwell Service, Inc.[4] Alleging breach of contract and fraud, Retamco complained that it had not been notified of well proposals as required under the 1984 Agreement and had thereby lost the opportunity to participate in several wells. Retamco also accused Paradigm of overcharging for operating expenses and otherwise diverting proceeds, which allegedly caused Retamco to lose royalty and working-interest revenues. Retamco further alleged that Paradigm had succeeded to PNB's obligations under the 1984 Agreement by its purchase of the sixty-two leases in 1993 and was therefore jointly and severally liable for its damages.

Paradigm denied Retamco's allegations but after answering the lawsuit generally refused to participate in discovery. Retamco sought sanctions. The trial court conducted hearings on the matter, and Paradigm was ordered to pay discovery-related expenses and to provide discovery. When Paradigm failed to meet the trial court's discovery deadline, Retamco again moved for sanctions. Another hearing was conducted after which the court granted Retamco's motion, striking Paradigm's answer and rendering a $1.6 million default judgment.[5] In sanctioning Paradigm for discovery abuse, the trial court's order not only precluded Paradigm from contesting its liability but also Retamco's damages, stating:

> Paradigm Oil, Inc., Pacific Operators, Inc. and Pacific Operators of Texas, Inc., may not, and are disallowed to, oppose Plaintiff's . . . claims to overriding royalty

[4] Unless the context requires otherwise, Paradigm and affiliates Pacific Operators and Pacific Operators of Texas are hereafter collectively referred to as Paradigm. Paradigm's other affiliate, Finley, took a different track in the early years of the litigation and is generally referred to by name.

[5] The $1.6 million judgment included $750,000 in exemplary damages.

> interests, damages, exemplary damages, pre-judgment interest, or attorney's fees, whether by cross examination, objection to evidence offered, or offer of evidence[.]

Paradigm moved for a new trial, produced everything it believed Retamco requested, and offered to reimburse Retamco's legal expenses. The trial court denied the motion and thereafter severed the default judgment into a separate cause, making it a final judgment. Paradigm appealed.

The court of appeals affirmed the discovery sanction in the first appeal but did not affirm the default judgment itself. *See Paradigm I*, 161 S.W.3d at 534. Concluding that the record contained no evidence to support the $1.6 million award, the court reversed the judgment and remanded the case for a new damages hearing. *Id.* at 540. Meanwhile in the trial court, Retamco obtained a similar death-penalty sanction against Finley, the Paradigm affiliate that had not been included in the previous default judgment.

After the remand in *Paradigm I*, Retamco endeavored to prove its damages in two separate trials—one against Paradigm and affiliates Pacific Operators and Pacific Operators of Texas and the other against Finley. The two trials together resulted in approximately $5.6 million in actual damages and $40 million in punitive damages ($10 million for each of the four defendants). Paradigm and Finley separately appealed their respective judgments, and the court of appeals again reversed, holding the evidence to be legally insufficient to support the damages awarded in either trial. *See Paradigm II*, 242 S.W.3d at 69; *Finley Oilwell Serv., Inc. v. Retamco Operating, Inc.*, 248 S.W.3d 314 (Tex. App.—San Antonio 2007, pet. denied).

After these reversals, the severed actions against Paradigm and Finley were consolidated for a fourth damages trial. Once again the defendants were not permitted to participate. At the

conclusion of this uncontested trial, Retamco was awarded more than $35 million, which included $20 million in exemplary damages. On the third appeal, the court of appeals reduced the judgment by $1.25 million[6] but otherwise affirmed the trial court's judgment. *See Paradigm III*, 330 S.W.3d at 347. As it had done in the previous two appeals, Paradigm petitioned this Court for review.

II

Paradigm's petition does not contest the trial court's decision to strike its answer as a discovery sanction or the default judgment rendered against it on liability. Paradigm's appeal focuses instead on its exclusion from the trial on damages. As a general rule, a defaulted defendant has the right to participate in such a trial when, as here, the plaintiff's damages are unliquidated. *Rainwater v. Haddox*, 544 S.W.2d 729, 733 (Tex. Civ. App.—Amarillo 1976, no writ) (citing, *inter alia*, *Maywald Trailer Co. v. Perry*, 238 S.W.2d 826, 827–28 (Tex. Civ. App.—Galveston 1951, writ ref'd n.r.e.)). Paradigm contends that the trial court therefore abused its discretion by extending the discovery sanction to bar its participation at this trial.

Retamco responds that Paradigm waived this complaint by not raising the issue in the court of appeals. It points out that Paradigm's most recent brief in the court of appeals complained about several things but not about the discovery sanction itself. Even though the court of appeals previously upheld the sanction in the first appeal, Retamco maintains that Paradigm needed to brief and argue the issue in the court of appeals once again to preserve it for our review.

[6] The reduction represented a settlement credit for the amount previously paid by Bank of America to Retamco in the underlying litigation.

Retamco's argument, however, ignores the law-of-the-case doctrine. Under this doctrine, a decision rendered in a former appeal of a case is generally binding in a later appeal of the same case. *Briscoe v. Goodmark Corp.*, 102 S.W.3d 714, 716 (Tex. 2003). Having decided the issue in *Paradigm I*, the court of appeals was not obligated to reconsider the matter in subsequent appeals. *Id.* Neither was Paradigm required to reargue the issue in a court that already decided the matter.

Such a requirement would undermine the doctrine's purpose, which is to bring an end to litigation by winnowing the issues in each successive appeal. *Hudson v. Wakefield*, 711 S.W.2d 628, 630 (Tex. 1986). By narrowing the issues in successive appeals, the law-of-the-case doctrine further seeks to promote efficiency and uniformity in the decision-making process. *Id.* Requiring a party to reargue issues previously lost in the court of appeals as a predicate to this Court's review would obviously work at cross-purposes to the doctrine.

The court of appeals determined in the first appeal that the trial court did not abuse its discretion in denying Paradigm the right to participate in the post-default damages hearing. *See Paradigm I*, 161 S.W.3d at 537–38. That decision on Paradigm's participation became the law of the case for future proceedings in those courts. It did not, however, become the law of the case in this Court. Although we declined to review the matter in *Paradigm I*, our decision to deny Paradigm's petition for review in that appeal did not invoke the doctrine. *See Loram Maint. of Way, Inc. v. Ianni*, 210 S.W.3d 593, 596 (Tex. 2006) (holding that law-of-the-case doctrine is inapplicable when this Court simply denies a petition because the denial is not a decision on the merits). It was appropriate then for Paradigm to raise the issue again in this Court, even though it did not reargue

it in the court of appeals. Paradigm's previous complaint about the death-penalty sanction in *Paradigm I* preserved the issue for our review, and we turn now to the merits of that complaint.

III

As to the merits, the parties disagree about the underlying nature of the default judgment in this case. Paradigm argues that the discovery sanction should be treated like a no-answer default judgment. It submits that, by striking its answer, the discovery sanction put it in the same position as though it had never answered the suit. Because a defendant who defaults by failing to answer a lawsuit ordinarily retains the right to participate in any subsequent trial to determine unliquidated damages, Paradigm contends that it should similarly have that right in this case. It concludes that the trial court therefore abused its discretion in denying it the right to participate.

Retamco, on the other hand, maintains that a default judgment from a discovery sanction is different from a no-answer default judgment. A defendant who simply fails to answer a lawsuit, according to Retamco, is less culpable than a defendant that answers and abuses the discovery process. Retamco contends that different rules apply because of the discovery abuse and that such rules include trial court discretion to bar the defendant's participation at the damages hearing, as was done here.

The parties' arguments recognize that default judgments are not all alike and that different rules apply in different circumstances. For example, a default judgment caused by a defendant's failure to answer after service is treated differently from a default judgment caused by a defendant's failure to appear for trial after answering a suit. *Jatoi v. Decker, Jones, McMackin, Hall & Bates*, 955 S.W.2d 430, 432 (Tex. App.—Fort Worth 1997, pet. denied); TEX. R. CIV. P. 239. In the latter

instance, a post-answer default "constitutes neither an abandonment of the defendant's answer nor an implied confession of any issues thus joined by the defendant's answer." *Stoner v. Thompson*, 578 S.W.2d 679, 682 (Tex. 1979). Because the merits of the plaintiff's claim remain at issue, judgment cannot be rendered on the pleadings, and the plaintiff must prove its claim. *Id.* By contrast, the non-answering party in a no-answer default judgment is said to have admitted both the truth of facts set out in the petition and the defendant's liability on any cause of action properly alleged by those facts. *Morgan v. Compugraphic Corp.*, 675 S.W.2d 729, 731 (Tex. 1984). The defendant's default thus establishes liability, but a trial may still be necessary if the plaintiff's damages are unliquidated. *Holt Atherton Indus., Inc. v. Heine*, 835 S.W.2d 80, 83 (Tex. 1992); TEX. R. CIV. P. 243. And as a general rule, a defendant who has not answered but nevertheless appears at the post-default hearing on damages is entitled to participate.[7]

Although default judgments may generally be categorized as pre- or post-answer, other variations exist.[8] A default judgment as a discovery sanction is one variation that does not fit neatly into either general category. When a trial court strikes a defendant's answer as a discovery sanction, the resulting default is technically post-answer, but it is also, as Paradigm contends, similar to a no-

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[7] *Kerulis v. Granbury Lake Props., Inc.*, 2006 Tex. App. LEXIS 5720, at *9, 2006 WL 1791617, at *3 (Tex. App.—Fort Worth 2006) (mem. op.); *Kirkpatrick v. Mem'l Hosp. of Garland*, 862 S.W.2d 762, 773 (Tex. App.—Dallas 1993, writ denied); *Ne. Wholesale Lumber, Inc. v. Leader Lumber, Inc.*,785 S.W.2d 402, 407 (Tex. App.—Dallas 1989, no writ); *Maywald Trailer Co. v. Perry*, 238 S.W.2d 826, 827 (Tex. Civ. App.—Waco 1951, writ ref'd n.r.e.).

[8] A third type of default judgment, the judgment nihil dicit, is similar to, and treated much the same as, a no-answer default judgment. *Stoner v. Thompson*, 578 S.W.2d 679, 683 (Tex. 1979). This type of default is usually "limited to situations in which either (1) the defendant has made a plea, usually dilatory in nature, but the pleading has not placed the merits of the plaintiff's case in issue before it is overruled, or (2) the defendant has placed the merits of the case in issue by filing an answer, but has withdrawn that answer." 7 WILLIAM V. DORSANEO III, TEXAS LITIGATION GUIDE § 100.01[3] at 100-11 (2011) (citing *Frymire Eng'g Co. v. Grantham*, 524 S.W.2d 680, 681 (Tex. 1975)).

answer default judgment. Indeed, some courts have analogized the death-penalty discovery sanction to a no-answer default judgment, finding "no distinction in the treatment of cases between those where the defendant failed to answer in a lawsuit and where the defendant's answer has been stricken from the record as a result of the imposition of sanctions." *Fiduciary Mortg. Co. v. Nat'l Bank of Irving*, 762 S.W.2d 196, 200 (Tex. App.—Dallas 1988, writ denied); *see also In the Matter of Gober*, 100 F.3d 1195, 1205 (5th Cir. 1996)*; Assicurazioni Generali, S.p.A. v. Milsap*, 760 S.W.2d 314, 317 (Tex. App.—Texarkana 1988, writ denied); *City of Dallas v. Cox*, 793 S.W.2d 701, 728 (Tex. App.—Dallas 1990, no writ).

Even though a death-penalty discovery sanction may be similar to a no-answer default judgment, it is not the same for all purposes. This type of default judgment implicates not only the broader principles that apply to default judgments generally but also the rules that apply to discovery abuse, specifically those principles that control the use of a case-ending discovery sanction. *See TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913 (Tex. 1991) (explaining the limitations on death-penalty sanctions). Our review must thus take into consideration both general default judgment principles and our discovery rules.

Our discovery rules provide a variety of sanctions for discovery abuse. *See generally* TEX. R. CIV. P. 215. The law requires, however, that any sanction imposed by the trial court must be "just," *id.* 215.2(b), and we have said that two factors mark the bounds of a "just" sanction. First, a direct relationship between the offensive conduct and the sanction imposed must exist. *TransAmerican*, 811 S.W.2d at 917. Second, the sanction imposed must not be excessive. *Id.* The most extreme sanctions are also limited by due process considerations. Thus, a death-penalty

sanction cannot be used to adjudicate the merits of claims or defenses unless the offending party's conduct during discovery justifies a presumption that its claims or defenses lack merit. *Id*. at 918.

Here, the death-penalty sanction not only adjudicated the merits of Paradigm's defense but also denied it the right to participate in the trial to determine actual damages, punitive damages, and attorneys' fees, all of which were unliquidated. Because the plaintiff's damages were unliquidated, the court of appeals observed that the trial court had to hear evidence. *Paradigm I*, 161 S.W.3d at 537 (citing TEX. R. CIV. P. 243). But the court of appeals also concluded that the required hearing could be one-sided; it held that the trial court could in its discretion both "render a default judgment as sanctions and [] deny the offending party the right to oppose the damages evidence." *Paradigm I*, 161 S.W.3d at 538 (citing TEX. R. CIV. P. 215.2(b)(4)). The court reasoned that this discovery sanction was not excessive because the trial court had tried lesser sanctions to no avail and because Paradigm's repeated misconduct demonstrated "bad faith in the litigation process as a whole." *Id*. at 539. The court of appeals cited one other Texas case that approved the use of a similar discovery sanction. *Id*. at 538 (citing *In re Dynamic Health, Inc.*, 32 S.W.3d 876, 880 (Tex. App.—Texarkana 2000)).

Paradigm argues that *Dynamic Health* is either distinguishable on its facts (because there was evidence that the defendant had intentionally destroyed evidence bearing on the plaintiff's claim for damages, 32 S.W.3d at 884) or is in conflict with the weight of Texas authority, exemplified by *Rainwater v. Haddox*, 544 S.W.2d 729, 733 (Tex. Civ. App.—Amarillo 1976, no writ).[9] *Rainwater*

[9] *See also*, following *Rainwater*, *Sims v. Fitzpatrick*, 288 S.W.3d 93, 103 (Tex. App.—Houston [1st Dist.] 2009, no pet.); *Marr v. Marr*, 905 S.W.2d 331, 333 (Tex. App.—Waco 1995, no writ); *Mackey v. Bradley Motors, Inc.*, 871 S.W.2d 243, 247 (Tex. App.—Amarillo), *rev'd on other grounds*, 878 S.W.2d 140 (Tex. 1994); *Kirkpatrick v. Mem'l*

held that at the hearing to determine damages after a default judgment, "the defendant has the right to be present, to interpose objections to testimony offered by plaintiff's witnesses and to cross-examine them in order that by the exclusion of improper evidence, a proper judgment may be rendered on competent and sufficient evidence." *Id.* Paradigm complains that the court of appeals here neither cited nor distinguished *Rainwater* and its progeny, nor addressed or expressly overruled its own prior precedent in this line of cases. *See Welex, Div. of Halliburton Co. v. Broom*, 806 S.W.2d 855, 864 (Tex. App.—San Antonio 1991), *vacated on other grounds*, 816 S.W.2d at 340 (Tex. 1991); *Brantley v. Etter*, 662 S.W.2d 752, 756 (Tex. App.—San Antonio 1983) (citing *Rainwater*).[10]

We agree with Paradigm that the general rule in this state and elsewhere is that a defaulted party may participate in the post-default damages hearing. *See, e.g., Payne v. Dewitt*, 995 P.2d 1088, 1095 (Okla. 1999) (stripping the defaulted defendant "of basic due process truth-testing devices is contrary to the orderly process of assessing damages"); *Bashforth v. Zampini*, 576 A.2d 1197, 1200–01 (R.I. 1990) (holding that in a hearing on the question of damages, the defendant, even

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Hosp. of Garland, 862 S.W.2d 762, 773 (Tex. App.—Dallas 1993, writ denied); *Brantley v. Etter*, 662 S.W.2d 752, 756 (Tex. App.—San Antonio 1983), *writ ref'd n.r.e.*, 677 S.W.2d 503 (Tex. 1984) (per curiam); *Helfman Motors, Inc. v. Stockman*, 616 S.W.2d 394, 397 (Tex. Civ. App.—Fort Worth 1981, writ ref'd n.r.e.); *Bass v. Duffey*, 620 S.W.2d 847, 849–50 (Tex. App.—Houston [14th Dist.]1981, no writ); *Ill. Emp'rs Ins. Co. of Wausau v. Lewis*, 582 S.W.2d 242 (Tex. Civ. App.—Beaumont), *writ ref'd n.r.e.*, 590 S.W.2d 119 (Tex. 1979) (per curiam).

[10] Since the court of appeals decision in this case, another court of appeals has upheld death-penalty sanctions that precluded the defaulted defendant from contesting both the plaintiff's liability and damages claims. *See In re Estate of Preston*, 346 S.W.3d 137 (Tex. App.—Fort Worth 2011, no pet.). The court's opinion, however, does not discuss the damages-phase preclusion aspect of the sanctions order nor does the opinion address or overrule its own prior authority holding that a defaulted defendant has the right to challenge the plaintiff's damages. *See Helfman Motors*, *infra* note 9 (citing *Rainwater*).

though in default, is entitled to full participation); *see also Bonilla v. Trebol Motors Corp.*, 150 F.3d 77, 82 (1st Cir. 1998) (noting general rule that a defaulting party "is entitled to contest damages and to participate in a hearing on damages, should one be held") (citing 10A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2688 (3d. ed. 1998)); B. Finberg, Annotation: *Defaulting Defendant's Right to Notice and Hearing as to Determination of Amount of Damages*, 15 A.L.R.3d 586 (1967) (collecting cases).

Retamco points out, however, that much of this authority concerns no-answer default judgments rather than defaults caused by discovery abuse. It emphasizes again that discovery abuse can include conduct that goes far beyond a mere failure to answer and submits that a trial court must have discretion in an appropriate case to prohibit the sanctioned party's further participation.

We agree that a trial court should have discretion to bar a defendant's participation, such as at the damages hearing in this case, if such a sanction is necessary to remedy the abuse. Even so, such an extreme sanction must be carefully tailored to comport with the requirements of *TransAmerican* and due process. Sanctions that preclude the admission of evidence intrude upon the fact-finding process of a trial just as much as a default judgment on liability. In the latter instance, sanctions that adjudicate the merits of a party's claim or defense cannot be imposed as mere punishment but rather are appropriate only when the sanctioned party's conduct justifies a presumption that an asserted claim or defense lacks merit. *TransAmerican*, 811 S.W.2d at 918. The justification for also barring the defaulted party from the ensuing evidentiary trial on damages must go beyond that presumption because the damages issue is materially different.

The existence, or not, of facts establishing liability lends itself to the first presumption. For instance: Did the defendant's negligence proximately cause the occurrence? *Morgan*, 675 S.W.2d at 732–33. Was the defendant indebted to the plaintiff? *Paramount Pipe & Supply Co. v. Muhr*, 749 S.W.2d 491, 496 (Tex. 1988). Striking the defendant's answer establishes the answer to these questions. The either/or character of liability facts, however, does not translate to a claim for unliquidated damages, which cannot be determined by answering "yes" or "no." By their very nature, unliquidated damages are not susceptible to exact calculation and involve a range of possible answers. For this reason, a defaulting defendant admits facts establishing liability but not any claimed amount of unliquidated damages. *See Holt Atherton*, 835 S.W.2d at 83; *see also Thomson v. Wooster*, 114 U.S. 104, 111 (1885) (allegations that are distinct and positive are confessed by default; matters not alleged with certainty or, which by their nature require examination of details, require the complainant to present proof). So what kind of abuse would justify barring a defaulted defendant's participation at the hearing on unliquidated damages? *Dynamic Health*, the case cited by the court of appeals in this case, suggests spoliation as one example. *Dynamic Health*, 32 S.W.3d at 884.

The destruction of evidence that directly and significantly impairs a party's ability to prove damages might reasonably justify a sanction like the one in this case. But the destruction of this type of evidence is not at issue in this case. The evidence needed to prove Retamco's damages is available. According to Retamco, the information on the various wells has been collected, but at great expense. Retamco asserts that Paradigm's discovery abuse forced it to spend hundreds of

thousands of dollars to assemble the data needed to determine its damages—information that Retamco asserts Paradigm possessed and owed it under the 1984 Agreement.

Although punishment may be a legitimate consequence of a discovery sanction, it cannot be excessive. *See Chrysler Corp. v. Blackmon*, 841 S.W.2d 844, 849 (Tex. 1992) (listing securing compliance, deterrence, and punishment as legitimate purposes of discovery sanctions). Sanctions for discovery abuse should not be dispensed as arbitrary monetary penalties unrelated to any harm. *Ford Motor Co. v. Tyson*, 943 S.W.2d 527, 534–35 (Tex. App.—Dallas 1997, orig. proceeding). When discussing excessiveness, we have said that "the punishment should fit the crime" and that the sanction "should be no more severe than necessary to satisfy its legitimate purposes." *TransAmerican*, 811 S.W.2d at 917; *see also PR Invs. and Specialty Retailers, Inc. v. State*, 251 S.W.3d 472, 480 (Tex. 2008); *In re SCI Tex. Funeral Servs., Inc.*, 236 S.W.3d 759, 761 (Tex. 2007) (per curiam). Moreover, discovery sanctions are primarily intended to remedy discovery abuse and should be tailored to serve their remedial purpose. It is not apparent that barring Paradigm's participation in the post-default damages phase of the case served any purpose other than punishment.

Compensatory damages awarded post-default should compensate the injured party for its loss, not penalize the wrongdoer or allow the plaintiff a windfall. *See Torrington Co. v. Stutzman*, 46 S.W.3d 829, 848-49 (Tex. 2000) (noting that the role of compensatory damages is to fairly compensate the plaintiff, not punish the defendant). And although punitive damages are intended to punish the wrongdoer, they nevertheless must bear some relationship to the liability-producing conduct. *See* TEX. CIV. PRAC. & REM. CODE § 41.011(a) (requiring factfinder to consider nature of

the wrong, character of conduct involved, degree of culpability, and extent to which conduct offends public sense of justice in determining exemplary damages); *see also In the Matter of Gober*, 100 F.3d at 1205 (noting that conduct sufficient to warrant punitive damages is not regarded as admitted by default). Given this authority and the death-penalty sanction that ended the liability litigation, the additional sanction of precluding Paradigm from the damages trial was excessive. Retamco might have been entitled to a lesser sanction, such as the additional costs and expenses caused by Paradigm's discovery abuse, but barring its participation in the damages trial was "more severe than necessary to satisfy its legitimate purposes." *TransAmerican*, 811 S.W.2d at 917.

* * *

The judgment of the court of appeals is reversed and the case is remanded to the trial court for further proceedings consistent with our opinion.

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David M. Medina
Justice

Opinion delivered: June 22, 2012

IN THE SUPREME COURT OF TEXAS

NO. 10-1028

PNS STORES, INC., D/B/A MACFRUGAL'S BARGAIN CLOSEOUTS D/B/A/ MACFRUGALS, INC., PETITIONER,

v.

ANNA E. RIVERA AS NEXT FRIEND FOR RACHAEL RIVERA, RESPONDENT.

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

Argued January 11, 2012

JUSTICE GUZMAN delivered the opinion of the Court.

In this appeal from a summary judgment dismissal of a direct and collateral attack, the petitioner, PNS Stores, Inc., contends the underlying judgment is void and subject to collateral attack at any time. In this regard, PNS argues that the trial court rendering the default judgment never acquired personal jurisdiction over it because the service of process was defective. Alternatively, PNS argues that its adversary's extrinsic fraud prevented it from learning about the underlying

default judgment and that limitations was thereby tolled, making its direct attack through a bill of review timely.[1]

The court of appeals affirmed the summary judgment, concluding that the underlying default judgment was not void and that there was no evidence of extrinsic fraud that would toll limitations. 335 S.W.3d 265, 277. We agree with the court below that the alleged defects in service of process were not sufficient to render the default judgment void, but we hold that summary judgment was improperly granted because there is some evidence of extrinsic fraud. Accordingly, we reverse the court of appeals' judgment and remand the case to the trial court for further proceedings.

I. Factual and Procedural Background

On December 29, 1998, Rachael Rivera filed suit against PNS Stores, Inc. in state court for injuries she allegedly sustained when she slipped and fell at a MacFrugal's Bargain Closeouts Store, owned by PNS. PNS removed the case to federal court, and after discovery, the federal district court granted PNS's motion for summary judgment and dismissed the case "without prejudice on January 7, 2000."[2] No appeal was taken.

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[1] A bill of review is an independent equitable proceeding brought by a party to a former action who seeks to set aside a judgment that is no longer subject to challenge by appeal. *Caldwell v. Barnes*, 975 S.W.2d 535, 537 (Tex. 1998). The residual four-year statute of limitations applies to bills of review. *Id*. at 538 (citing TEX. CIV. PRAC. & REM. CODE § 16.051).

[2] The federal district court granted summary judgment on the ground that Rivera had not raised a genuine issue of material fact to show PNS had actual or constructive knowledge of the dangerous condition in its store, an essential element of her premises-liability claim.

Three months later, Rivera, through her attorney Oscar Tamez, sued again in state court for the same slip and fall claims,[3] serving PNS through its registered agent for service of process, Prentice Hall Corporation. PNS failed to answer, and Rivera obtained a no-answer default judgment for $1,480,677.74 plus post-judgment interest. Rivera then waited six years to abstract the judgment and about nine years to attempt execution.[4] By then, the judgment had more than doubled to $3,513,070.55. The writ of execution was served at the PNS corporate headquarters in Columbus, Ohio and at its place of business in San Antonio on February 10, 2009.

Thirteen days later, PNS filed a bill of review seeking to set aside the default judgment and quash the writ. After limited discovery, both Rivera and PNS moved for summary judgment. Rivera moved for summary judgment based on the four-year statute of limitations applicable to a bill of review. In its summary judgment motion, PNS argued that the default judgment was barred by res judicata[5] and void due to errors in service of process. Alternatively, PNS argued that if the judgment was merely voidable, its bill of review was nonetheless timely filed because its adversary's extrinsic fraud tolled limitations.

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[3] Other than a modified date, Rivera's re-filed state court pleadings were identical to her initial state court pleadings that PNS had prevailed against in federal court.

[4] Between the time the judgment was taken and executed, Tamez was disbarred and filed for bankruptcy, listing Rivera as a creditor. Rachael Rivera signed a general power of attorney in favor of her daughter, Anna Rivera, in 2005 and was found *non compos mentis* early in this bill of review action.

[5] PNS had obtained a *nunc pro tunc* order from the federal district court stating that "the Court's ruling was clearly an adjudication of Plaintiff's claims on the merits and the words 'without prejudice' were obviously a clerical mistake." Rivera appealed, the Fifth Circuit affirmed, *Rivera v. PNS Stores, Inc.*, 647 F.3d 188, 202 (5th Cir. 2011), and the United States Supreme Court denied certiorari, *Rivera v. PNS Stores, Inc.*, 132 S.Ct. 1741 (2012).

The trial court granted Rivera's motion for summary judgment and denied PNS's. PNS appealed. The court of appeals affirmed the summary judgment, concluding that: (1) PNS's attack was a direct attack; (2) PNS's only possible means of direct attack was by bill of review that would be barred by limitations unless there was evidence of extrinsic fraud sufficient to toll the bill's four-year limitations period; and (3) there was no evidence of extrinsic fraud.[6] 335 S.W.3d 265, 275–77.

II. Analysis

PNS argues the court of appeals erred in affirming Rivera's summary judgment because (1) defects in service rendered the default judgment void, and therefore assailable at any time, and (2) even if the judgment was merely voidable, the summary judgment was nevertheless erroneous because fact issues remained regarding the existence of extrinsic fraud sufficient to toll the bill of review's limitations period. Although we disagree that the alleged defects in service render the default judgment void, we agree there is some evidence of extrinsic fraud sufficient to raise a fact issue about whether PNS's bill of review is barred by limitations.

A. Void and Voidable Judgments

Because there is some inconsistency in our state's jurisprudence concerning important distinctions between void and voidable judgments and direct and collateral attacks, we begin our analysis with a discussion of clarifying principles. It is well settled that a litigant may attack a void judgment directly or collaterally, but a voidable judgment may only be attacked directly. *Hagen v. Hagen*, 282 S.W.3d 899, 902 (Tex. 2009) (holding that a divorce decree must be "void, not voidable,

[6] The court of appeals held that the federal court's corrected judgment *nunc pro tunc*, *see supra* n.6, did not render the default judgment void because res judicata and collateral estoppel are affirmative defenses that constitute pleas in bar, not pleas to the jurisdiction. 335 S.W.3d 265, 274.

for a collateral attack to be permitted"); *Ramsey v. Ramsey*, 19 S.W.3d 548, 552 (Tex. App.—Austin 2000, no pet.). A direct attack—such as an appeal, a motion for new trial, or a bill of review—attempts to correct, amend, modify or vacate a judgment and must be brought within a definite time period after the judgment's rendition.[7] A void judgment, on the other hand, can be collaterally attacked at any time. *In re E.R.*, __ S.W.3d __, __ (Tex. 2012). A collateral attack seeks to avoid the binding effect of a judgment in order to obtain specific relief that the judgment currently impedes. *Browning v. Prostok*, 165 S.W.3d 336, 346 (Tex. 2005). After the time to bring a direct attack has expired, a litigant may only attack a judgment collaterally.

The distinction between void and voidable judgments is critical when the time for a direct attack has expired. Before then, the distinction is less significant because—whether the judgment is void or voidable—the result is the same: the judgment is vacated.[8] We have described a judgment as void when "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." *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 863 (Tex. 2010) (quoting *Browning*, 165 S.W.3d at 346). Some confusion persists, however, over collateral attacks premised on the absence

[7] Our Rules of Civil and Appellate Procedure and the Texas Civil Practice and Remedies Code define the limitations periods for direct attacks. *See* TEX. R. CIV. P. 329b(a) (stating that "[a] motion for new trial, if filed, shall be filed prior to or within thirty days after the judgment or other order complained of is signed"); TEX. R. APP. P. 26.1(a) (stating that generally, a notice of appeal must be filed within thirty days after the judgment is signed); TEX. R. APP. P. 26.1(c) (explaining that "in a restricted appeal, the notice of appeal must be filed within six months after the judgment or order is signed"); TEX. CIV. PRAC. & REM. CODE § 16.051 (a bill of review is governed by the residual four-year limitations period).

[8] However, a court's precision in discussing the judgment as void or voidable is important in order to avoid engendering confusion when the distinction is material. Thus, regardless of when the challenge is asserted, if a party challenges a judgment as void, the first inquiry should necessarily be whether the alleged defect renders the judgment void or merely voidable.

of personal jurisdiction over a party. *See, e.g.*, *Skadden v. Alfonso*, 217 S.W.3d 611, 619–20 (Tex. App.—Houston [14th Dist.] 2006) (noting "dicta" from this Court that courts may allow collateral attack if defendant is not served with process, but concluding that because *McEwen v. Harrison*, 345 S.W.2d 706 (Tex. 1961), had not been overruled or disapproved, the court was bound to follow it), *rev'd on other grounds*, 251 S.W.3d 52 (Tex. 2008) (per curiam).

This confusion can be traced to our decision in *McEwen*. *McEwen* purported to distinguish the absence of personal jurisdiction from a lack of subject matter jurisdiction, observing that a default judgment rendered by a court without subject matter jurisdiction would be void whereas a judgment rendered by a court lacking personal jurisdiction over the parties might only be voidable. 345 S.W.3d at 710 (suggesting that the bill of review was the exclusive method to vacate a default judgment allegedly void for "want of service, or of valid service, of process"); *see also Deen v. Kirk*, 508 S.W.2d 70, 72 (Tex. 1974) (noting that *McEwen* was concerned about "jurisdiction over the subject matter . . . not . . . jurisdiction over the parties"). To the extent that *McEwen* may be read to foreclose a collateral attack on a judgment based on the failure to serve a party with notice, it has been overruled by *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80 (1988). *E.R.*, __ S.W.3d at ___.

In *Peralta*, the United States Supreme Court held that "a judgment entered without notice or service is constitutionally infirm," and some form of attack must be available when defects in personal jurisdiction violate due process. 485 U.S. at 84. The Court stated, "'[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action . . . .'" *Id*. (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)).

Thus, the "[f]ailure to give notice violates 'the most rudimentary demands of due process of law.'" *Id*. (quoting *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965)). In light of *Peralta*, we hold that a judgment may also be challenged through a collateral attack when a failure to establish personal jurisdiction violates due process.

Turning to the case at hand, PNS argues that defects in service prevented the trial court from acquiring personal jurisdiction over it and asserts that the citation: (1) fails to list the exact time service was performed; (2) fails to state that PNS was served through its registered agent; (3) states that Prentice Hall was served "VIA USPS" as well as "in person;" (4) does not state that service was by certified mail; (5) does not recite that Prentice Hall was served by registered or certified mail; and (6) lacks any proof that it was on file for ten days preceding the default judgment. *See generally* TEX. R. CIV. P. 106, 107. PNS concludes that the default judgment is void and therefore must be set aside because of these defects. Rivera counters that the alleged defects do not create a jurisdictional problem but that, in any event, the Court may not look beyond the jurisdictional recitals on the face of the judgment to determine whether the trial court lacked jurisdiction.

Although we do not agree that we must confine our review to the face of the judgment, we nevertheless conclude that these asserted defects in service do not render the default judgment void. When attacked collaterally, a judgment is presumed valid. *Stewart v. USA Custom Paint & Body Shop, Inc.*, 870 S.W.2d 18, 20 (Tex. 1994). But that presumption disappears when the record establishes a jurisdictional defect. *Alfonso*, 251 S.W.3d at 55 (holding that "[t]he presumption supporting judgments does not apply when the record affirmatively reveals a jurisdictional defect").

Accordingly, although we presume Rivera's default judgment is valid, we may look beyond its face to determine whether the record affirmatively demonstrates that the trial court lacked jurisdiction.

The record affirmatively demonstrates a jurisdictional defect sufficient to void a judgment when it either: (1) establishes that the trial court lacked subject matter jurisdiction over the suit; or (2) exposes such personal jurisdictional deficiencies as to violate due process.[9] Here, PNS filed its attack outside the bill of review's four-year statute of limitations period and its complaints amount to no more than allegations of improper service. We must therefore determine whether PNS's complaints rise to the level of a due process violation that would render the default judgment void and subject to collateral attack. The defects PNS identifies are technical in nature. After *Peralta*, Texas courts of appeals have correctly distinguished between technical defects in service and a complete failure or lack of service, concluding that only the latter violates due process. *Compare Wagner v. D'Lorm*, 315 S.W.3d 188, 194 (Tex. App.—Austin 2010, no pet.) (construing an attack as collateral where a complete lack of service was alleged),[10] *with Layton v. Nationsbanc Mortg. Corp.*, 141 S.W.3d 760, 763 (Tex. App.—Corpus Christi 2004, no pet.) (holding that improper service alone does not render a judgment void).[11] This distinction strikes a reasonable balance between the need for

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[9] *Alfonso*, 251 S.W.3d at 55; *see Peralta*, 485 U.S. at 84–85; *State Mortg. Corp. v. Ludwig*, 48 S.W.2d 950, 954 (Tex. 1932) ("'The foundation of the rule that judgments of a court of competent jurisdiction are attended with a presumption of absolute verity, is the fact that the parties have been properly brought into court and given an opportunity to be heard upon the matters determined. But the foundation falls, and the rule of verity ceases, when it affirmatively appears from the record that the judgment adjudicated and determined matters upon which the parties were not heard.'" (quoting *Hurr v. Davis*, 193 N.W. 943, 944 (Minn. 1923))).

[10] *See also Mapco, Inc. v. Carter*, 817 S.W.2d 686, 687 (Tex. 1991).

[11] *See also Kendall v. Kendall*, 340 S.W.3d 483, 503–04 (Tex. App.—Houston [1st Dist.] 2011, no pet.); *In re Ocegueda*, 304 S.W.3d 576, 579–80 (Tex. App.—El Paso 2010, pet. denied); *In re D.L.S.*, No. 05-08-00173-CV, 2009 WL 1875579, at *3 n.2 (Tex. App.—Dallas July 1, 2009, no pet.).

finality of judgments[12] and the requirement that the power underlying judicial authority must be based on a litigant's fair opportunity to be heard.

PNS nevertheless argues that a default judgment must be vacated when the prevailing party fails to strictly comply with statutory notice provisions. *See, e.g.*, *Wilson v. Dunn*, 800 S.W.2d 833, 836 (Tex. 1990). But the cases on which it relies simply reiterate the strict compliance requirement in the context of a direct attack on a default judgment. *See, e.g.*, *Primate Constr. Inc. v. Silver*, 884 S.W.2d 151, 152 (Tex. 1994) (per curiam) (noting that strict compliance is necessary to withstand a direct attack). Extending these stringent standards to collateral attacks involving mere technical defects in service would pose a serious threat to the finality of judgments. *See King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003). "While no system is infallible, '[e]ndless litigation, in which nothing was ever finally determined, would be worse than the occasional miscarriages of justice.'" *Browning*, 165 S.W.3d at 348 (alteration in original) (quoting *Alexander v. Hagerdorn*, 226 S.W.2d 996, 998 (Tex. 1950)). Exercising personal jurisdiction under these circumstances does not violate due process.

Moreover, although the service is technically defective, the record shows that Rivera requested service of process on PNS's registered agent for service, and its agent's (Prentice Hall's) computer records reveal that it received the service and accompanying documents and forwarded them to PNS.[13]

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[12] *See Browning*, 165 S.W.3d at 346 ("A collateral attack runs counter to this strong policy of finality because a collateral attack attempts to bypass the appellate process in challenging the integrity of a judgment.").

[13] Rivera's summary judgment evidence shows that notice of suit sent by certified mail, return receipt requested, was served on and received by Prentice Hall on May 25, 2000. Prentice Hall then generated a Notice of Service of Process form addressed to PNS describing the documents being forwarded to PNS and requesting that PNS acknowledge receipt. The notice included the following language: "Please acknowledge receipt of this notice and the enclosures by signing and returning the acknowledgment copy." According to Prentice Hall's computer records, on June 2, 2000,

Although PNS claims it did not receive notice of the suit until February 10, 2010, some nine years after the default was taken, service effected on a registered agent within the scope of its agency is imputed to the litigant. *See Preston Farm & Ranch Supply, Inc. v. Bio-Zyme Enters.*, 625 S.W.2d 295, 300 (Tex. 1981) (holding that notice to an agent, in the scope of his agency, is notice to the principal). And further, its agent's records reflect that PNS acknowledged receipt.

In sum, a judgment is void if the defects in service are so substantial that the defendant was not afforded due process. None of the defects at issue here deprived PNS of a meaningful opportunity to appear and answer Rivera's claims. When a defective citation is served, but the citation puts the defendant on notice of asserted claims in a pending suit, and the technical defects are not of the sort that deprive a litigant of the opportunity to be heard, we reject them as grounds sufficient to support a collateral attack. Because the trial court had jurisdiction over the subject matter of Rivera's claims and the technical defects in service at best render the default judgment voidable, not void, PNS may not collaterally attack the judgment.

B. Extrinsic Fraud

Having rejected PNS's collateral attack on the judgment, PNS must rely on its bill of review to attack the default judgment directly. A direct attack can be in the form of a motion for new trial, appeal, or bill of review. *Frost Nat'l Bank v. Fernandez*, 315 S.W.3d 494, 504 (Tex. 2010). A bill of review is an equitable proceeding to set aside a prior judgment that is no longer subject to challenge by a motion for new trial or direct appeal. *Id*. It must, however, be brought within four

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Prentice Hall received PNS's acknowledgment form.

years of the rendition of the judgment. *Caldwell v. Barnes*, 975 S.W.2d 535, 537 (Tex. 1998) (citing TEX. CIV. PRAC. & REM. CODE § 16.051). Here, PNS did not file its bill of review until approximately nine years after the default was rendered. If PNS can prove extrinsic fraud, however, the bill of review's four-year limitations period may be tolled. In affirming the summary judgment, the court of appeals concluded that there was no evidence of extrinsic fraud. We disagree.

A direct attack on "a judgment on the basis of extrinsic fraud is allowed because such fraud distorts the judicial process to such an extent that confidence in the ability to discover the fraudulent conduct through the regular adversarial process is undermined." *Browning*, 165 S.W.3d at 348. Extrinsic fraud is fraud that denies a litigant the opportunity to fully litigate at trial all the rights or defenses that could have been asserted.[14] *King Ranch*, 118 S.W.3d at 752. It occurs when a litigant has been misled by his adversary by fraud or deception, or was denied knowledge of the suit. *Alexander*, 226 S.W.2d at 1001. PNS argues that Tamez's failure to comply with Texas Rule of Civil Procedure 239a, his violations of the Texas Lawyer's Creed, and his extensive history of unethical conduct, including his disbarment, are indicative of extrinsic fraud.

We first address PNS's argument that Tamez misled the trial court by providing the clerk with PNS's registered agent's address as the last known address for PNS. Texas Rule of Civil Procedure 239a requires in relevant part:

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[14] Intrinsic fraud, by contrast, "relates to the merits of the issues which were presented . . . . Within that term are included such matters as fraudulent instruments, perjured testimony, or any matter which was actually presented to and considered by the trial court in rendering the judgment assailed." *Tice v. City of Pasadena*, 767 S.W.2d 700, 702 (Tex. 1989) (orig. proceeding). Only extrinsic fraud will support a bill of review because each party must guard against an adverse finding on issues directly presented. *Id.*

> At or immediately prior to the time . . . [a] final default judgment is rendered, the party taking the same or his attorney shall certify to the clerk in writing the last known mailing address of the party against whom the judgment is taken . . . . Immediately upon the signing of the judgment, the clerk shall mail written notice thereof to the party against whom the judgment was rendered at the address shown in the certificate . . . .

TEX. R. CIV. P. 239a. PNS argues that Tamez knew: (1) PNS's contact information including the address of its corporate headquarters and its local store in San Antonio; (2) the name and address of the local attorneys who had defended PNS in the previous case involving the same claim; and (3) that PNS would certainly defend any refiled claim. This knowledge, according to PNS, is some evidence that Tamez purposefully provided the clerk with Prentice Hall's address instead of PNS's last known address to prevent PNS from discovering the default. This is especially so, PNS argues, in light of PNS's failure to appear after the previous service through Prentice Hall. Rule 239a is intended to ensure that the party in default receives personal notice.

Rivera responds that Tamez's violation of Rule 239a is not evidence of extrinsic fraud and points us to two cases. In *Layton*, Layton provided the clerk with the address she had been given by defendant Nationsbanc as the place to receive her payments. 141 S.W.3d at 764. The court of appeals stated that Nationsbanc had failed to demonstrate why that address would be fraudulent for the purpose of receiving notices of judgment. *Id.* In *Alderson v. Alderson*, the defendant failed to provide any evidence to show that the plaintiff engaged in a purposeful act of deception, because although the motion for summary judgment was mailed to the wrong address, there was no evidence that this was due to anything other than mistake or accident. 352 S.W.3d 875, 878 (Tex. App.—Dallas 2001, pet. denied).

We conclude that under the specific circumstances presented in this case, Tamez's failure to provide the clerk with PNS's last known address, which he knew, is some evidence of extrinsic fraud. In contrast to *Layton* and *Alderson*, Tamez knew PNS's mailing address, had corresponded with PNS and its counsel at this last known address only months earlier and instead chose to provide the clerk with the address of PNS's registered agent, Prentice Hall.

Next, PNS argues that Tamez's violations of the Texas Lawyer's Creed is evidence of extrinsic fraud. The Texas Lawyer's Creed, promulgated by this Court and the Court of Criminal Appeals, was intended to encourage lawyers to be mindful that abusive tactics—ranging from hostility to obstructionism—do not serve the justice we pursue. The Texas Lawyer's Creed—A Mandate for Professionalism, *reprinted in* TEXAS RULES OF COURT 865, 865 (West 2012). The Lawyer's Creed serves as an important reminder that the conduct of lawyers "should be characterized at all times by honesty, candor, and fairness." *Id.* The Lawyer's Creed states that an attorney "will not take advantage, by causing any default or dismissal to be rendered, when [he] know[s] the identity of an opposing counsel, without first inquiring about that counsel's intention to proceed." *Id*. at 867.

PNS argues that Tamez, in blatant violation of the Texas Lawyer's Creed, purposefully took a default judgment against PNS without contacting PNS's known attorneys and that he did so only three months after the federal court granted summary judgment in the first suit with full knowledge that PNS would defend the second lawsuit as vigorously as it had the first. The Lawyer's Creed, however, is aspirational. It does not create new duties and obligations enforceable by the courts beyond those existing as a result of (1) the courts' inherent powers and (2) the rules already in

existence.[15] *Id*. at 865. The failure to notify opposing counsel of an intent to take a default judgment does not trigger the courts' inherent powers. *See Cont'l Carbon Co. v. Sea-Land Serv., Inc.*, 27 S.W.3d 184, 189 (Tex. App.—Dallas 2000, pet. denied). A lawyer's failure to adhere to the Texas Lawyer's Creed may be evidence of a lack of professionalism or character, but Tamez's failure to adhere to the sprit and letter of this aspirational standard in this case is not itself evidence of extrinsic fraud.

Finally, PNS argues that Tamez's history of unethical conduct, including grievances filed against him, his subsequent disbarment, and his refusal to give deposition testimony, is evidence of extrinsic fraud. But "[e]vidence of other wrongs or acts is not admissible to prove character in order to show 'action in conformity therewith.'" *Serv. Corp. Int'l v. Guerra,* 348 S.W.3d 221, 235 (Tex. 2011) (quoting TEX. R. EVID. 404(a)). Such evidence may be admissible to show intent, however, if "the prior acts are 'so connected with the transaction at issue that they may all be parts of a system, scheme or plan.'" *Id*. (quoting *Oakwood Mobile Homes, Inc. v. Cabler*, 73 S.W.3d 363, 375 (Tex. App.—El Paso 2002, pet. denied)). Unless some connection can be drawn between PNS's failure to assert its rights in this case and Tamez's grievances and disbarment, they will not suffice as evidence of extrinsic fraud. *See King Ranch*, 118 S.W.3d at 752. Because PNS offers no connection here, these prior acts are not evidence of extrinsic fraud.

In sum, although Tamez's failure to abide by the Texas Lawyer's Creed and his unethical conduct are not evidence of extrinsic fraud, under the specific facts of this case, his failure to comply

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[15] *See also* The Texas Lawyer's Creed—A Mandate for Professionalism, *reprinted in* TEXAS RULES OF COURT 865, 865 (West 2012) ("These standards are not a set of rules that lawyers can use and abuse to incite ancillary litigation or arguments over whether or not they have been observed.").

with Texas Rule of Civil Procedure 239a is sufficient to raise a genuine issue of material fact regarding extrinsic fraud and its effect on limitations.[16]

III. Conclusion

The alleged technical defects in service render the judgment voidable, not void. Therefore, PNS cannot collaterally attack the judgment. But because there is some evidence of extrinsic fraud, a material fact issue remains regarding Rivera's limitations defense. Accordingly, we reverse the judgment of the court of appeals and remand the case to the trial court for further proceedings.

Eva M. Guzman
Justice

OPINION DELIVERED: August 31, 2012

[16] Evidence of extrinsic fraud does not toll the bill of review's limitations period indefinitely. *See Defee v. Defee*, 966 S.W.2d 719, 722 (Tex. App.—San Antonio 1998, no pet.); *Maddux v. Brownen*, 759 S.W.2d 183, 185 (Tex. App.—Waco 1988, writ denied). A bill of review's four-year limitations period begins to run when the litigant knew or should have known about the default judgment. Rivera argues that because there is some record evidence that PNS acknowledged receipt of the judgment, PNS's bill of review was untimely. PNS responds that a letter from PNS's attorneys, dated at least six months after the default was taken, informed PNS that there had been no additional litigation pertaining to Rivera's slip and fall claim after the federal court granted PNS's summary judgment. PNS additionally cites testimony from its representative that PNS had no notice of the default judgment until it was served with the writ of execution. Because there is a factual dispute over when PNS learned of the default judgment, we do not resolve this issue.

IN THE SUPREME COURT OF TEXAS

NO. 11-0008

HONORABLE HOPE ANDRADE, PETITIONER,

v.

DON VENABLE, RESPONDENT

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

PER CURIAM

Don Venable seeks to enjoin Dallas County from identifying candidates' political party affiliations and providing a "straight-party" option on general election ballots. We must decide whether Venable has standing to pursue these claims. Because Venable has no interest distinct from that of the general public and has not established taxpayer standing under *Williams v. Lara*, 52 S.W.3d 171, 179 (Tex. 2001), we reverse in part the court of appeals' judgment and render judgment dismissing Venable's claims against Secretary of State Hope Andrade.

The Texas Election Code requires that election ballots identify each candidate's party affiliation. TEX. ELEC. CODE § 52.065(c). It also mandates that ballots contain a straight-party voting option. *Id*. § 52.071(b). Venable believes that these requirements violate Article VI, Section

4 of the Texas Constitution, because they neither punish fraud nor preserve ballot box purity.[1] According to Venable, these statutory requirements merely benefit political parties, which is not a legitimate governmental function. Venable also argues that these same provisions violate Article III, Section 52(a) because public money is used to advance the interests of discrete political parties.[2]

Venable sued Dallas County Elections Administrator Bruce Sherbet to permanently enjoin him from: (1) using county funds to identify candidates' political party affiliations and (2) providing a straight-party option on any general election ballot. Venable later added Secretary of State Hope Andrade. Sherbet and Andrade filed jurisdictional pleas. Sherbet challenged the existence of facts

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[1] Article VI, Section 4 of the Texas Constitution provides:

> 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.

[2] Article III, Section 52(a) provides:

> Except as otherwise provided by this section, the Legislature shall have no power to authorize any county, city, town or other political corporation or subdivision of the State to lend its credit or to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever, or to become a stockholder in such corporation, association or company. However, this section does not prohibit the use of public funds or credit for the payment of premiums on nonassessable property and casualty, life, health, or accident insurance policies and annuity contracts issued by a mutual insurance company authorized to do business in this State.

TEX. CONST. art. III, § 52(a).

to support Venable's claim of taxpayer standing. Andrade argued that, even accepting all of his allegations as true, Venable did not allege facts sufficient to affirmatively demonstrate jurisdiction.

Venable then amended his petition, alleging the following jurisdictional facts: (1) he is a property taxpayer in Dallas County, (2) the expenses incurred in the conduct of a general election are solely Dallas County's financial responsibility, (3) Sherbet, a salaried county employee, is the Dallas County Elections Administrator, (4) preparation of the official ballots in Dallas County for general elections is one of Sherbet's ministerial responsibilities, (5) in addition to the required actions needed to prepare a ballot, Sherbet is required to satisfy the additional ballot construction rules as required by the Texas Election Code relating to the printing of political party names and straight-party tickets, and (6) the Dallas County Elections Department is fully funded by the Dallas County General Fund for fiscal year 2010. Venable incorporated by reference a purported copy of Dallas County's adopted budget for fiscal year 2010.

The trial court granted both pleas and Sherbet's accompanying motion to dismiss. Venable appealed. The court of appeals held that Venable's amended petition pleaded sufficient facts to affirmatively demonstrate taxpayer standing. ___ S.W.3d ___, ___. Although the court acknowledged that Venable did not explicitly state that Dallas County was actually expending public funds on the allegedly illegal activity, the court construed his pleadings to say that Dallas County actually expends public funds when it includes the political party identification of the candidates on the ballot and offers a straight-party voting option. The court also held that Sherbet failed to present evidence to support his challenge to the existence of jurisdictional facts. The court reversed the trial court's judgment and remanded the case to the trial court. *Id.* at ___.

Only Andrade petitioned this Court for review, arguing that Venable lacks taxpayer standing because he failed to plead facts showing that the government actually spends money on the activity he challenges.

Generally, "a citizen lacks standing to bring a lawsuit challenging the lawfulness of governmental acts." *Andrade v. NAACP of Austin*, 345 S.W.3d 1, 6 (Tex. 2011). This is because "[g]overnments cannot operate if every citizen who concludes that a public official has abused his discretion is granted the right to come into court and bring such official's public acts under judicial review." *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 555 (Tex. 2000) (alteration in original) (citing *Osborne v. Keith*, 177 S.W.2d 198, 200 (Tex. 1944)). "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.'" *Andrade*, 345 S.W.3d at 7 (quoting CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3531.10 (3d ed. 2008)).

Unless standing is conferred by statute, a plaintiff must show that he has suffered a particularized injury distinct from the general public. *Bland Indep. Sch. Dist.*, 34 S.W.3d at 555–56. This bar against generalized grievances applies to suits brought by citizens as voters. *See Brown v. Todd*, 53 S.W.3d 297, 302 (Tex. 2001) ("No Texas court has ever recognized that a plaintiff's status as a voter, without more, confers standing to challenge the lawfulness of governmental acts."). However, under Texas law, a narrow, judicially-created exception exists: a taxpayer has standing to sue to enjoin the illegal expenditure of public funds, and need not demonstrate a particularized injury. *Williams,* 52 S.W.3d at 179; *Bland Indep. Sch. Dist.*, 34 S.W.3d at 556; *Osborne*, 177 S.W.2d at 200; *Hoffman v. Davis*, 100 S.W.2d 94, 95 (Tex. 1937); *City of Austin v. McCall*, 68 S.W.

791, 794 (Tex. 1902). "Implicit in this rule are two requirements: (1) that the plaintiff is a taxpayer; and (2) that public funds are expended on the allegedly illegal activity." *Williams*, 52 S.W.3d at 179.

In *Williams*, we examined taxpayer standing in a challenge to a religious education program at a county jail. *Id.* at 177–79. The plaintiff argued that because he paid taxes, and public funds helped administer the program at the corrections center, he had standing to enjoin its allegedly illegal operation. *Id.* at 179. The money was used to feed, clothe, and house the prisoners. *Id.* Two county-paid employees spent a portion of their time supervising the program. *Id.* This was enough, the taxpayer alleged, to conclude that the county was spending public money on this allegedly illegal activity. *Id.* We considered for the first time what constitutes "expending funds" in a taxpayer standing case. *Id.* at 181. To help answer this question, we looked to federal jurisprudence regarding municipal taxpayer standing. *Id.*

We noted that to be entitled to federal municipal taxpayer standing, "a litigant must prove that the government is actually expending money on the activity that the taxpayer challenges; merely demonstrating that tax dollars are spent on something related to the allegedly illegal conduct is not enough." *Id.* We cited several cases in which taxpayers lacked standing, including cases where the funds would have been spent regardless of the challenged activity.[3] We agreed with the county that

[3] *See, e.g.*, *Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789, 794 (9th Cir. 1999) ("Doe identifies no tax dollars that defendants spent solely on the graduation prayer, which is the only activity that she challenges. In fact, Doe acknowledges affirmatively that '[t]he prayers . . . cost the state no additional expense.' Doe instead alleges that defendants spent tax dollars on renting a hall, printing graduation programs, buying decorations, and hiring security guards. But those are ordinary costs of graduation that the school would pay whether or not the ceremony included a prayer. Therefore, those expenditures cannot establish taxpayer standing.") (alterations in original); *Gonzales v. N. Twp. of Lake Cnty., Ind.*, 4 F.3d 1412, 1416 (7th Cir. 1993) ("In this case, however, the plaintiffs' claim is undercut by their inability to show that tax revenue is spent for the crucifix. . . . [A]lthough Township funds are spent maintaining the Park areas surrounding the crucifix, this cost would be incurred with or without the presence of the crucifix. Without evidence

because the money used to feed, clothe, and house the inmates would be spent regardless of the religious program's existence, those expenditures alone were insufficient to establish that the government actually expended money on the challenged activity. *Id.* at 182.

We determined that other aspects of the program's operation involved the use of public funds, however. *Id.* We held that because county-paid employees spent a "significant amount of the County's time" operating the program, including shaping and promoting its religious curriculum, county funds were expended in operating the program. *Id.* at 183. We based our conclusion not just on the fact that salaried county employees worked on the program, but also because the record established that the employees' involvement was "anything but incidental." *Id.* There, the employees "personally and directly operated and managed" the challenged program "while on the county payroll." *Id.*

Thus, under *Williams*, in order to establish taxpayer standing a plaintiff must plead facts showing that the government is *actually* spending money on the allegedly illegal activity—not on a related legal activity. *See id.* at 182–83. This must be a measurable, added expenditure—not one that would have been made in spite of the allegedly illegal activity. *See id.* at 182. The plaintiff must be able to allege that the challenged activity "is supported by any separate tax or paid for from any particular appropriation or that it adds any sum whatever to the cost of conducting the [challenged activity]." *Doremus v. Board of Educ. Of the Borough of Hawthorne*, 342 U.S. 429, 433 (1952). Moreover, the expenditure cannot be *de minimis*—it must be significant. *Cf. id.* at 434

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of expenditure of tax revenues, the plaintiffs cannot claim standing by virtue of their taxpayer status.").

(explaining the Court's finding of a justiciable controversy in a case that "showed a measurable appropriation or disbursement of school-district funds occasioned solely by the activities complained of"); *Williams*, 52 S.W.3d at 183 (noting that county-paid employees "spent a significant amount" of time operating the challenged program). Unless a plaintiff can meet these requirements, there has not been a pecuniary injury to the taxpayers generally and the taxpayer's interest is not direct enough for his suit to proceed.

The parties do not dispute that Venable is a Dallas County resident and taxpayer. We must decide whether Venable has alleged facts showing that Dallas County expends public funds when it includes candidates' party affiliations and the straight-party option on the ballot.

Venable contends his "sole burden concerning the issue of public funding was to *allege* the use of public money in the challenged conduct." But *Williams* makes clear that a taxpayer must plead facts showing that the government is actually spending money specifically on the challenged activity. *Williams*, 52 S.W.3d at 178–81. A taxpayer plaintiff, like any other plaintiff, carries the initial burden of alleging facts that affirmatively demonstrate the trial court's jurisdiction. *See Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004).

Venable's petition incorporated by reference Dallas County's adopted budget for fiscal year 2010, which reflected general election expenses. He argues that the budget shows that public funds were being spent on the challenged activities. But simply including Dallas County's budget does not show that a measurable amount of public funds are being expended solely on the allegedly illegal activity. As the court of appeals noted, Venable's pleadings did "not explicitly state that Dallas

County is actually expending public funds on the allegedly illegal activity." ___ S.W.3d at ___. But because he "attempt[ed] to link the expenditure of public funds to the allegedly illegal activity," the court of appeals generously construed the pleadings "to claim that Dallas County is actually expending public funds . . . when it includes the political party identification of the candidates on the ballot and offers a straight-party voting option." *Id*. at ___.[4]

We disagree. Venable has, at most, alleged that Dallas County spends money on elections—not that preparing and printing ballots with candidates' political affiliations and a straight-party voting option costs any more than ballots without them. As we stated in *Williams*, merely demonstrating that tax dollars are spent on something related to the allegedly illegal conduct is not enough. *Williams*, 52 S.W.3d at 181. Nor is it sufficient for the taxpayer plaintiff to point to costs that would have been incurred regardless of the allegedly illegal activity. *Id.* at 181–82. A taxpayer does not have an interest direct enough to warrant standing unless the activity challenged involves an expenditure of public funds that would not otherwise be made.

Venable argues that he has complied with *Williams* because he has alleged that county employees were involved in the preparation of the ballots, which were required by the Elections Code to identify candidates' political parties and to offer a straight-party voting option. But as one of the cases we cited in *Williams* explained, "[n]early all governmental activities are conducted or

[4] We do not agree with the court of appeals that the record does not show that the trial court gave Venable the opportunity to amend his pleadings. ___ S.W.3d at ___. Venable had an opportunity to amend his petition after Andrade and Sherbet filed their jurisdictional pleas, and in fact, he did so. Even construing his petition liberally and looking to his intent, he failed to affirmatively demonstrate that he has taxpayer standing because he has not shown that the county actually expends funds on the activity he challenges.

overseen by employees whose salaries are funded by tax dollars. To confer taxpayer standing on such a basis would allow any municipal taxpayer to challenge virtually any governmental action at any time." *Altman v. Bedford Cent. Sch. Dist*., 245 F.3d 49, 74 (2d Cir. 2001). A government employee's time spent on the allegedly illegal activity must be significant to serve as a basis for taxpayer standing. *Williams*, 52 S.W.3d at 183.

Here, Dallas County would incur labor costs for preparing the ballots or programming the computers for electronic voting, regardless of the inclusion of candidates' party affiliations and a straight-party voting option on the general election ballot, and Venable does not allege that there is any incremental increase in cost related to the statutory requirements. Even if Venable were able to identify the additional labor costs the county incurred for time county-paid employees spend on the activity he challenges, *Williams* requires that such time be "significant"—something Venable has neither pleaded nor proved. *Id*.

Venable has not pleaded facts showing that measurable and significant public funds were being spent on the activity he challenges, and thus, has failed to affirmatively demonstrate taxpayer standing. Because Venable has no interest distinct from that of the public generally, and his claims fall outside the narrow taxpayer exception to the bar against generalized grievances, he lacks the requisite and particularized stake to warrant standing. Accordingly, we grant the petition for review, and without hearing oral argument, we reverse in part the court of appeals' judgment and render judgment dismissing Venable's claims against Andrade. TEX. R. APP. P. 59.1, 60.2(c).

OPINION DELIVERED: May 18, 2012

IN THE SUPREME COURT OF TEXAS

NO. 11-0023

JUANA LORENA ARVIZU, INDIVIDUALLY AND A/N/F JONATHAN RENE ARVIZU, MONTGOMERY COUNTY AUTO AUCTION AND EDWARD CANTU, PETITIONERS,

v.

THE ESTATE OF GEORGE PUCKETT
D/B/A PUCKETT AUTO SALES, RESPONDENT

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

PER CURIAM

Juana Lorena Arvizu and her son were injured when her car was struck by a pickup truck driven by Edward Cantu. Montgomery County Auto Auction employed Cantu. Puckett Auto Sales owned the truck. Cantu's negligence was stipulated. A jury found that, although MCAA was his employer, Cantu drove the vehicle for Puckett's benefit. The jury found that MCAA, as Cantu's employer, had the right to direct the details of his work. It also found that Cantu was subject to Puckett's control "as to the details of the mission" when the accident occurred. The trial court rendered judgment for Arvizu. The court of appeals remanded for a new trial, holding that a jury could not logically find MCAA and Puckett to have simultaneously controlled Cantu's conduct, as the trial court had instructed the jury that Cantu could not have been an employee of both. But the jury also found that MCAA was subject to Puckett's control and was on a mission for Puckett's

benefit—which comprise the elements of a principal–agent relationship. MCAA is vicariously liable for its employee's negligence; Puckett as principal is responsible for its agent's conduct. Because we are able to reconcile the jury's answers on that agency theory, we reverse the court of appeals' judgment.

Puckett Auto Sales buys used cars and sells them at public auctions. Puckett had a longstanding commercial relationship with Montgomery County Auto Auction in which MCAA would not only auction Puckett's vehicles, but would also transport unsold vehicles to other auction houses or back to Puckett's car lot. When Puckett's pickup truck did not sell, Puckett instructed MCAA to deliver it to another auction house. MCAA assigned its employee Edward Cantu to accomplish that directive, and the accident with Arvizu occurred in transit.

Arvizu sued Cantu, MCAA, and Puckett[1] for her and her son's personal injuries. MCAA and Puckett both filed cross-claims—MCAA against Puckett for contribution and Puckett against MCAA for property damage. All parties stipulated that Cantu's negligence proximately caused the injuries.[2] The question was who—MCAA, Puckett, or both—was vicariously liable for Cantu's negligence.

The jury found (1) that Cantu was MCAA's employee, not Puckett's, (2) that Cantu was transporting the pickup for Puckett's benefit and was subject to Puckett's control as to the details of the mission, and (3) that MCAA was transporting the vehicle for Puckett's benefit and was

[1] Specifically, Arvizu sued George Puckett d/b/a Puckett Auto Sales. George Puckett passed away after the lawsuit was filed, and his wife, Linda, is defending the suit as the estate's representative.

[2] Puckett agreed to the stipulation only as to form but does not dispute Cantu's negligence on appeal.

subject to Puckett's control as to the details of the mission.[3] The jury awarded Arvizu $1.2 million for her and her son's injuries. Based on these findings, the trial court, over Puckett's objection, rendered judgment on the verdict against Cantu, MCAA, and Puckett, jointly and severally.[4]

Puckett's sole argument on appeal was that the jury findings fatally conflicted, and the court of appeals agreed. ___ S.W.3d ___, ___. The court determined that Questions 1 and 2 concerned the same material fact because both questions turned "upon the issue of whether MCAA or [Puckett] had the right to control Cantu's work." *Id.* at ___. Because Puckett and MCAA could not both have had the right to control Cantu's work, the court analyzed whether the conflicting findings would compel the rendition of different judgments. *Id.* at ___.

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[3] The questions submitted to the jury were as follows:

> Question No. 1: "On the occasion in question, was Edward Cantu acting as an employee of Montgomery County Auto Auction or George Puckett d/b/a Puckett Auto Sales?"
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> Question No. 2: "On the occasion in question, was Edward Cantu transporting the vehicle in the furtherance of a mission for the benefit of George Pucket[t] D/B/A Puckett Auto Sales and subject to control by George Pucket[t] D/B/A Puckett Auto Sales as to the details of the mission?"
>
> Question No. 3: "On the occasion in question, was Montgomery County Auto Auction transporting the vehicle in the furtherance of a mission for the benefit of George Pucket[t] D/B/A Puckett Auto Sales and subject to control by George Pucket[t] D/B/A Puckett Auto Sales as to the details of the mission?"

Questions 2 and 3 track the Texas Pattern Jury Charge's language for nonemployee mission liability. *See* COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES: GENERAL NEGLIGENCE & INTENTIONAL PERSONAL TORTS PJC 10.10 (2010 ed.). Nonemployee mission liability is a form of "respondeat superior liability outside the employment context." *St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513, 537 (Tex. 2002); *see also* COMM. ON PATTERN JURY CHARGES, at PJC 10.10 cmt. ("PJC 10.10 should be given if the respondeat superior doctrine is raised in a case not involving an ordinary employee."). "The key elements of such a theory are (1) benefit to the defendant and (2) right of control." *Wolff*, 94 S.W.3d at 537.

[4] The trial court also ordered that MCAA recover all damages exceeding 50% of the amount of the judgment from Puckett and that Puckett recover nothing from MCAA for its cross-claim for property damage. ___ S.W.3d at ___ n.4.

When taking the finding in Question 1 as true and disregarding the finding in Question 2, the court concluded that MCAA would be vicariously liable because it had the right to control Cantu's work. *Id.* at ___. But when taking Question 2's finding as true and disregarding Question 1's, Puckett would be vicariously liable because it had the right to control Cantu's work. *Id.* The court said both cannot be true at the same time, and therefore held that the answers fatally conflicted. *Id.* The court reversed and remanded the trial court's judgment as to Puckett. *Id.* Arvizu, Cantu, and MCAA petitioned this Court for review, each contending that Puckett cannot escape liability for its role in the Arvizus' injuries.

We think the court of appeals' analysis, so far as it goes, is correct. The threshold question in reviewing jury findings for fatal conflict is "whether the findings are about the same material fact." *Bender v. S. Pac. Transp. Co.*, 600 S.W.2d 257, 260 (Tex. 1980). In making this determination, courts have a "duty to harmonize jury findings when possible." *Producers Chem. Co. v. McKay*, 366 S.W.2d 220, 224 (Tex. 1963). Courts must uphold jury findings if "there is any reasonably possible basis upon which they may be reconciled." *Bender*, 600 S.W.2d at 260. The inquiry does not end, however, if the court determines that the findings create a conflict about the same material fact. The court must determine whether the conflict is fatal to the entry of judgment. *Bay Petroleum Corp. v. Crumpler*, 372 S.W.2d 318, 319 (Tex. 1963).

To determine whether a conflict is fatal,

> the court must consider each of the answers claimed to be in conflict, disregarding the alleged conflicting answer but taking into consideration all of the rest of the verdict, and if, so considered, one of the answers would require a judgment in favor of the plaintiff and the other would require a judgment in favor of the defendant, then the answers are fatally in conflict.

Little Rock Furniture Mfg. Co. v. Dunn, 222 S.W.2d 985, 991 (Tex. 1949).[5] Thus, to satisfy this test, the party claiming conflict must show that one of the conflicting findings "necessarily requires the entry of a judgment different from that which the court has entered." *Id.*

We need not question whether the "control" findings are inconsistent if the verdict nevertheless supports the trial court's judgment. Findings can be "inconsistent or in conflict, or even in irreconcilable conflict," and still not be fatal to the entry of judgment. *Bay Petroleum Corp.*, 372 S.W.2d at 319.

Puckett cannot show that one of the findings necessarily requires a judgment different from the trial court's. Applying the *Little Rock* test, when the finding in Question 1 is disregarded, judgment would be rendered against Puckett because Question 2's finding establishes nonemployee mission liability against it. The result does not change when Question 2's finding is disregarded. Although the court of appeals correctly noted that Question 1 establishes vicarious liability against MCAA, ___ S.W.3d at ___, that finding must be considered with "all of the rest of the verdict," *Little Rock*, 222 S.W.2d at 991, which, importantly, includes the finding for Question 3.

Question 3 establishes a principal–agent relationship between Puckett and MCAA. The jury found that MCAA, a nonemployee, was on a mission for the benefit of Puckett and subject to Puckett's control. *See Wolff*, 94 S.W.3d at 537 (noting that nonemployee mission liability is a form of "respondeat superior liability outside the employment context" under which the key elements are "(1) benefit to the defendant and (2) right of control"); COMM. ON PATTERN JURY CHARGES, at PJC

[5] In *Bradford v. Arhelger*, 340 S.W.2d 772, 773–74 (Tex. 1960), we recognized that the *Little Rock* test will not be appropriate in all conflict cases. But the facts underlying that conclusion are not present in this case, and there is no reason to depart from the *Little Rock* test here.

10.10 (explaining that the nonemployee mission liability question "should be given if the respondeat superior doctrine is raised in a case not involving an ordinary employee"). Puckett does not dispute that it had the right to control MCAA's truck-transporting mission or that the mission was for Puckett's benefit. *Cf. Duff v. Spearman*, 322 S.W.3d 869, 879–80 (Tex. App.—Beaumont 2010, pet. denied) (refusing to impose nonemployee mission liability because the evidence supported the jury's finding that the principal did not "exercise[] control over the means and details of [the agent's] mission"); *Omega Contracting, Inc. v. Torres*, 191 S.W.3d 828, 848 (Tex. App.—Fort Worth 2006, no pet.) (en banc) (noting that the threshold issue for nonemployee mission liability is control and holding that the alleged principal "conclusively negated the essential element of its alleged right to control" the agent).

MCAA worked for Puckett; Puckett controlled the details of the mission; and the accident occurred during this transaction. Combined with the finding in Question 1 that Cantu was MCAA's employee, there existed a subagency relationship between Cantu and Puckett for which Puckett is vicariously liable. *See* RESTATEMENT (THIRD) OF AGENCY § 3.15 (2006) ("A subagent is a person appointed by an agent to perform functions that the agent has consented to perform on behalf of the agent's principal and for whose conduct the appointing agent is responsible to the principal."); *id.* § 3.15 cmt. d ("As to third parties, an action taken by a subagent carries the legal consequences for the principal that would follow were the action instead taken by the appointing agent."); *see also Royal Mortg. Corp. v. Montague*, 41 S.W.3d 721, 735 (Tex. App.—Fort Worth 2001) ("[W]e note that a subagent is a person appointed by an agent to perform some duty or the whole of the business relating to his agency. He may be the agent of the agent or an agent of the principal depending upon

the agreement creating the primary agency or upon the circumstances."), *abrogated on other grounds by Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 788–89 (Tex. 2005). Based on the combined findings in Questions 1 and 3, the judgment is valid against Puckett even if Question 2 had not been submitted. Thus, Puckett would lose under both steps of the *Little Rock* analysis, rendering any conflict between the jury findings immaterial to the judgment.

Because Puckett cannot show that one of the purportedly conflicting findings necessarily requires the entry of a judgment different from that which the trial court rendered, the court of appeals erred in reversing the trial court's judgment. Accordingly, without hearing oral argument, we grant the petitions for review, reverse the court of appeals' judgment, and reinstate the trial court's judgment. TEX. R. APP. P. 59.1, 60.2(c).

OPINION DELIVERED: March 30, 2012

IN THE SUPREME COURT OF TEXAS

NO. 11-0057

ROBERT V. BUCK AND QUEEN ISABELLA DEVELOPMENT JOINT VENTURE, PETITIONERS,

v.

G. J. PALMER, JR., RESPONDENT

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

PER CURIAM

In this case, we must decide whether mere statements of intent to discontinue a joint venture cause automatic dissolution of the venture as a matter of law. We hold that statements expressing an intent to dissolve a partnership at some future time do not necessarily constitute an immediate dissolution of the partnership as a matter of law, and that the court of appeals erred in affirming summary judgment on that basis. Accordingly, without hearing oral argument pursuant to Texas Rule of Appellate Procedure 59.1, we reverse the court of appeals' judgment and remand the case to that court. We also hold that the court of appeals did not err in determining that Buck waived any right he might have had to disqualify Palmer's attorney by failing to timely move to disqualify her.

Robert Buck, G.J. Palmer, John Thobe, and 1629 Service Corporation ("1629") created the Queen Isabella Development Joint Venture to build a marina and yacht club in Port Isabel, Texas.

By the time relevant to this case, Buck and Palmer each had a twenty percent interest and 1629 had a sixty percent interest in the venture. The venture borrowed over $7 million, guaranteed by Buck and Palmer. When the venture failed after a series of major storms damaged the marina, waves of litigation ensued as creditors sought repayment. The litigation culminated in a settlement wherein the venture's outstanding debt was reduced to a $600,000 note and 1629's interest in the venture was transferred to Palmer, giving him an eighty percent interest. Since the settlement, the value of the property has risen to a recent estimated value of around $4 million.

The current dispute involves the remaining twenty percent interest in the venture. In 1997, Palmer sued Buck for breach of an oral agreement, alleging that Buck promised to transfer his remaining interest in the venture to Palmer in exchange for freedom from the venture's indebtedness following the earlier settlement. Buck denied the existence of this contract, sought a declaration that he was still the owner of an interest in the venture, and requested that the trial court determine the fair value of his interest. Palmer filed no-evidence and traditional summary judgment motions on the basis that, even absent the oral contract, Buck relinquished his interest when he allegedly expressed his will to dissolve the venture on various occasion between 1993 and 1995. The principal evidence of dissolution is a letter dated June 16, 1995, in which Buck wrote to Palmer, "I have no desire to embark into any QID land development scenario with you."[1] Thus, Palmer argued, Buck is only entitled to a distribution according to the value of the venture at that time—a value that was no greater than zero in light of the venture's indebtedness. Palmer also filed a separate summary

[1] Palmer also points to other statements by Buck expressing a desire to discontinue the joint venture at some unspecified time in the future as conclusive evidence of dissolution.

judgment motion on statute of limitations grounds. Buck responded to these motions, alleging that he at no time intended to relinquish his interest in the joint venture and is entitled to a distribution of his share of the venture according to its current value. Buck had previously moved to disqualify Palmer's lawyer and had sought to compel discovery of Palmer's financial statements.

The trial court denied Buck's motions and granted Palmer's summary judgment motions. Without reaching the limitations issue, the court of appeals affirmed, reasoning that Buck's communications to Palmer in 1995 are conclusive evidence of dissolution of the joint venture and warranted summary judgment on the basis that Buck lacks standing to assert any claims to the venture. ___ S.W.3d ___. We disagree.

We review a trial court's grant of summary judgment de novo. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). We must determine whether there is more than a scintilla of probative evidence raising genuine issues of material fact. *See* TEX. R. CIV. P. 166a(c), (I).[2] We must review the record "in the light most favorable to the nonmovant, indulging every reasonable inference and resolving any doubts against the motion." *City of Keller v. Wilson*, 168 S.W.3d 802, 824 (Tex. 2005). Undisputed evidence may be conclusive of the absence of a material fact issue, but only if reasonable people could not differ in their conclusions as to that evidence. *See id.* at 814.

[2] Both parties brought forth summary judgment evidence in the context of this hybrid no-evidence and traditional motion, so the differing burdens of the two forms of summary judgment motion are of no import here. The ultimate question is simply whether a fact issue exists.

The applicable law in this case, the Texas Uniform Partnership Act,[3] provides that dissolution is caused "by the express will" of any partner ceasing association with the continued operation of the business. TUPA § 31. Palmer contends that the June 1995 letter conclusively established the partnership's dissolution as of that date. Palmer cites a single Texas court of appeals case, *Woodruff v. Bryant*, 558 S.W.2d 535, 539–40 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.), in support of the proposition that dissolution occurs "automatically" upon a partner's expression of intent to dissolve. But in every Texas case cited by Palmer or the court of appeals, the court only held that the mere expression of will to dissolve is *legally sufficient* evidence of dissolution. *See Thomas v. Am. Nat'l Bank*, 704 S.W.2d 321, 324 (Tex. 1986) (holding a single conversation to be *sufficient* evidence of dissolution to preclude summary judgment); *Woodruff*, 558 S.W.2d at 539–40 (holding a letter expressing desire to cease involvement to be *some* evidence supporting a jury finding of dissolution). In fact, the *Woodruff* court, despite finding legally sufficient evidence of dissolution, ultimately overturned the jury finding on factual insufficiency grounds in light of the "overwhelming evidence" that the partner retained her partnership interest. *Id.* at 541–42. While the June 1995 letter might be some evidence that the partnership was dissolved, Buck presented other evidence that creates a genuine issue of material fact as to his intent. That evidence included (1) the settlement agreement signed by Palmer following the venture's litigation with its creditors, which listed Buck as a twenty percent owner, after the alleged dissolution; (2) an amended joint venture agreement, adopted after the alleged dissolution, which also continued to show Buck as an

[3] Though the applicable law in this case, the TUPA has since expired. Act of May 9,1961, 57th Leg., R.S. Ch. 158, 1961 Tex. Gen. Laws 289 (formerly TEX. REV. CIV. STAT. ANN. art 6132b), expired January 1, 1999, Act of May 31, 1993, 73rd Leg., R.S., ch. 917, 1993 Tex. Gen. Laws 3887. The Act will be cited simply as "TUPA."

owner; and (3) Buck's own affidavit testimony that he did not intend to dissolve the venture. Based on that evidence, reasonable jurors could differ as to whether Buck intended to dissolve the partnership, merely express a desire to relinquish his interest at a later time, or simply engaged in hyperbole in light of his frustrations with the venture's poor performance. Accordingly, we reverse the court of appeals' judgment.

Buck also contends that the court of appeals erred in holding that the trial court did not abuse its discretion in refusing to grant his motion to disqualify Palmer's counsel based on an alleged conflict of interest due to her association with a law firm that had previously represented Buck and Palmer. We disagree. The court of appeals held that Buck's unexplained seven-month delay in seeking the attorney's disqualification was sufficient to establish waiver. We have held that a delay of even less time waives a motion to disqualify. *Vaughan v. Walther*, 875 S.W 2d 690, 691 (Tex. 1994).

Because Buck produced evidence creating a genuine issue of material fact as to his intent to dissolve the partnership, we hold that the court of appeals erred in affirming summary judgment on that basis. We also hold that the court of appeals did not err in upholding the trial court's denial of Buck's motion to disqualify Palmer's attorney. Accordingly, we reverse the court of appeals' judgment and remand this case to the court of appeals for consideration of the unaddressed summary judgment motion on statute of limitations grounds, as well as for reconsideration of Buck's motion to compel discovery.

OPINION DELIVERED: August 31, 2012

IN THE SUPREME COURT OF TEXAS

NO. 11-0059

EL PASO MARKETING, L.P. AND ENTERPRISE TEXAS PIPELINE LLC, PETITIONER,

v.

WOLF HOLLOW I, L.P., RESPONDENT

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

Argued February 8, 2012

JUSTICE HECHT delivered the opinion of the Court.

The owner of a gas-fired electric power generating plant sued the owner of the pipeline that supplies fuel to the plant for negligence in allowing interruptions in service and in delivering gas below contractual quality standards. The pipeline owner contends that the suit sounds in contract, not in tort. We agree and thus reverse the court of appeals' judgment.[1] We also consider whether all the plant's claimed damages are consequential damages that it agreed to waive. We remand the case to the court of appeals for further proceedings.

[1] 329 S.W.3d 628 (Tex. App.–Houston [14th Dist.] 2010).

I

El Paso Marketing, L.P. manages the gas fuel supply for an electric power generating plant owned and operated by Wolf Hollow I, L.P. in Granbury, Texas. El Paso purchases the amount of gas needed by Wolf Hollow at a market hub near Pecos, Texas. The gas flows into a commercial pipeline owned by Enterprise Texas Pipeline LLC. Wolf Hollow's plant is connected to the pipeline.

Wolf Hollow and El Paso operate under a Gas Supply and Fuel Management Agreement ("the Supply Agreement"). El Paso and Enterprise, in turn, operate under a Gas Transportation Agreement ("the Transportation Agreement").[2] That agreement was originally between Enterprise and Wolf Hollow, but Wolf Hollow immediately assigned the agreement, with Enterprise's consent, to El Paso.[3] The Transportation Agreement contemplated that assignment,[4] and the Supply Agreement required it.[5]

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[2] Multiple contracts comprise the complete agreement.

[3] "Wolf Hollow", "El Paso", and "Enterprise" include their predecessors.

[4] A paragraph among the "Additional Special Provisions" of the Transportation Agreement states in upper case letters: "[Wolf Hollow] may assign its rights and obligations under this agreement to any party that provides fuel management services to [Wolf Hollow] or agrees to sell and deliver gas to [Wolf Hollow] at [Wolf Hollow's] plant, upon the consent of [Enterprise], which consent shall not be unreasonably withheld." In addition, Appendix A, Section 22 states: "[The Transportation Agreement] shall inure to and bind the permitted successors and assigns of [Wolf Hollow] and [Enterprise]; provided, neither [Wolf Hollow] nor [Enterprise] shall transfer the . . . agreement without the prior written approval of the other and which approval may not be unreasonably withheld, delayed or conditioned. . . . Provided further, either [Wolf Hollow] or [Enterprise] may transfer its interest to any parent or affiliate by assignment, merger or otherwise without the prior approval of the other, but no such transfer shall operate to relieve the transferor of its obligations hereunder."

[5] Section 4.6 of the Supply Agreement states: "[Wolf Hollow] shall assign to [El Paso] and [El Paso] shall assume the rights and obligations of [Wolf Hollow] under the Gas Transportation Agreements . . . . [El Paso] shall be responsible for the transportation of Gas sold and delivered hereunder to the relevant Point of Delivery pursuant to the Gas Transportation Agreements between [Wolf Hollow] and the relevant Transporter, as assigned to [El Paso]."

Wolf Hollow sued El Paso for breach of the Supply Agreement and Enterprise for negligence. Wolf Hollow asserts two claims. One is based on four interruptions in gas delivery. El Paso and Enterprise contend that each interruption was caused by force majeure, which, under the Supply Agreement, excuses a failure to meet delivery obligations.[6] Wolf Hollow disagrees. Wolf Hollow seeks to recover the cost of replacement power it purchased to meet its delivery obligations while its plant was down. El Paso contends that these are consequential damages waived by the Supply Agreement.[7] Wolf Hollow disputes this characterization and argues that, in any event, such damages are recoverable under Section 21.1 of the Supply Agreement. Section 21.1(a) provides that if El Paso fails to deliver gas as required, other than as excused by force majeure, it must immediately notify Wolf Hollow, which may then purchase replacement gas and recover the extra cost from El Paso.[8] Sections 21.1(b) and (c) provide that if no such gas is available, Wolf Hollow may accept El Paso's offer to provide replacement power, or purchase such power itself and recover the extra cost

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[6] Section 17.1 of the Supply Agreement states: "For purposes of this Agreement, an 'Event of Force Majeure' means any act or event that prevents the affected Party from performing its obligations (other than the payment of money) under this Agreement if such act or event is beyond the reasonable control of and not a result of the negligence or intentional act of the affected Party and such affected Party has been unable by the exercise of due diligence to overcome or mitigate the effects of such act or event." Further, Section 17.3 states: "If either Party is rendered wholly or partially unable to perform its obligations under this Agreement because of an Event of Force Majeure, that Party shall be excused from whatever performance is affected by the Event of Force Majeure to the extent so affected [subject to various provisos]."

[7] Section 24.11(a) of the Supply Agreement states in upper case letters: "Except as specifically set forth herein, neither party shall be liable to the other party for . . . consequential damages." The Transportation Agreement also waives consequential damages. Appendix A, Section 13.2 states, again in upper case letters: [Enterprise's] and [Wolf Hollow's] liability to each other shall . . . be limited to direct actual damages only. . . . In no event shall [Enterprise] or [Wolf Hollow] be liable to each other for . . . consequential . . . damages . . . ."

[8] Section 21.1(a) of the Supply Agreement states: "Unless excused by an Event of Force Majeure . . . , if at any time [El Paso] determines that it will not be able to . . . deliver . . . , or actually fails to . . . deliver . . . [gas as contractually required, El Paso] shall immediately notify [Wolf Hollow] of [El Paso's] inability to fully perform its obligations . . . and [Wolf Hollow] may seek to cover . . . by making such Gas purchases from other suppliers using the Cover Standard, and upon making such purchases shall be entitled to recover from [El Paso damages for the extra cost]."

from El Paso.[9] The Supply Agreement subjects Wolf Hollow's purchases of replacement gas or power to a "Cover Standard" requiring commercial reasonableness in the circumstances.[10] El Paso contends that Wolf Hollow cannot recover the extra cost of replacement power because it did not first seek replacement gas.

Wolf Hollow's second claim alleges that from time to time Enterprise delivered gas contaminated with heavy liquid hydrocarbons and thus below the quality specified by the Transportation Agreement.[11] Section 14.1 of the Supply Agreement requires that the gas El Paso delivers to Wolf Hollow meet those specifications, and that if it does not, El Paso must assign any claim it has against Enterprise to Wolf Hollow.[12] Enterprise contends that this assignment is Wolf

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[9] Section 21.1(b) of the Supply Agreement states: "If Buyer has used the Cover Standard . . . to purchase [replacement gas and none] is available, [El Paso] may provide replacement power . . . . [Wolf Hollow] shall accept or reject, at its sole discretion, the proposed replacement power, . . . [and El Paso] may submit other proposals . . . ." Section 21.1(c) states: "If [El Paso] is unable to provide replacement power or [Wolf Hollow] rejects [El Paso's] offer to provide replacement power, [Wolf Hollow] shall be entitled to recover from [El Paso the extra cost of Wolf Hollow's purchasing replacement power]." Section 21.1(c) prescribes in detail the method of calculating the amount due from El Paso, which we refer to simply as "extra cost".

[10] Section 1.1 of the Supply Agreement contains the following definition: "'Cover Standard' means that, if there is an unexcused failure by [El Paso] to deliver any Quantity of Gas pursuant to this Agreement, [Wolf Hollow] shall use commercially reasonable efforts to obtain a replacement Quantity of Gas, alternate power generation fuels or replacement power, at a price reasonable for the delivery area consistent with the amount of notice of the pending unexcused delivery failure provided by [El Paso], the immediacy of [Wolf Hollow's] Gas consumption needs, the Quantity of Gas involved, and the anticipated length of the unexcused delivery failure by [El Paso]."

[11] Quality specifications are set out in Section 14.1 of Appendix to the Transportation Agreement. Appendix A contains what the parties refer to as the pipeline's "Statement of Operating Conditions for Transportation Service" or "Transporter's Tariff". *See* Section 1.1 of the Supply Agreement ("'Transporter's Tariff' means the tariff or statement of operating conditions of EPGT or LSP, as the case may be, as amended or modified from time to time and as approved by the Governmental Authority having jurisdiction."). The details are not at issue here.

[12] Section 14.1 of the Supply Agreement states: "The quality . . . of Gas that [El Paso] sells, delivers or causes to be delivered to [Wolf Hollow] . . . shall meet or exceed the minimum gas quality specifications established in the [Enterprise] Tariff; provided, however, that (i) if [Enterprise] fails to deliver Gas . . . that meets such quality specifications, then [El Paso] shall assign to [Wolf Hollow], or otherwise cause [Wolf Hollow] to be subrogated to, any claim that [El Paso] may have against [Enterprise] as a result of such delivery failure under the [Transportation Agreement] to which [Enterprise] is a party, as assigned by [Wolf Hollow] to [El Paso] . . . ."

Hollow's sole remedy for its quality claim. Wolf Hollow disagrees. Wolf Hollow seeks damages for plant repairs and equipment upgrades to prevent future harm to the plant ("plant damages"), as well as replacement-power damages for shutdowns while repairs and upgrades were being made.

We need not detail all proceedings in the trial court. The trial court granted summary judgment motions brought by El Paso and denied summary judgment motions brought by Wolf Hollow. The trial court also granted, without comment, Enterprise's summary judgment motion contending that Wolf Hollow could not assert a negligence cause of action because its claims sounded in contract and its damages were precluded by the economic loss rule. The trial court rendered judgment for El Paso and Enterprise, specifically holding that:

- the four delivery interruptions were each caused by force majeure, excusing El Paso's performance under the Supply Agreement;
- all damages sought by Wolf Hollow are consequential damages waived by the Supply Agreement (and by the Transportation Agreement);
- Wolf Hollow's exclusive remedy for its quality claim is an assignment of any claim El Paso has against Enterprise; and
- El Paso is entitled to declarations regarding force majeure and the exclusive remedy for Wolf Hollow's quality claim.[13]

The court of appeals agreed that the replacement-power damages and plant damages claimed by Wolf Hollow are consequential damages waived in the Supply Agreement.[14] The court did not

[13] Specifically, the declaratory judgment stated that the four delivery interruptions were caused by events of force majeure, of which El Paso gave proper notice, and excused under the Supply Agreements; that Wolf Hollow's exclusive remedy for a gas quality claim is an assignment of any claim El Paso has against Enterprise; and that Article XXI of the Supply Agreement does not apply to gas quality claims.

[14] 329 S.W.3d 628, 639, 642 (Tex. App.–Houston [14th Dist.] 2010).

address whether the gas delivery interruptions were excused for force majeure. And having held that Wolf Hollow cannot prevail on its claims, the court concluded that declarations denying the basis for those claims were moot.[15] But the court held that because Wolf Hollow has no contract with Enterprise, it can sue for negligence, and that the action is not barred by the economic loss rule.[16] The court vacated the declaratory judgment and otherwise affirmed judgment for El Paso, reversed the judgment for Enterprise, and remanded the case to the trial court for further proceedings.[17]

El Paso and Enterprise petitioned this court for review, and Wolf Hollow conditionally petitioned for review. We granted all three petitions.[18]

We begin by considering whether Wolf Hollow's claims against Enterprise sound in tort or contract. We then turn to whether Wolf Hollow waived all the damages it asserts in the Supply Agreement. Finally, we consider whether the court of appeals erred in vacating El Paso's declaratory judgment.

II

"'Tort obligations are in general obligations that are imposed by law — apart from and independent of promises made and therefore apart from the manifested intention of the parties — to avoid injury to others.'"[19] Accordingly, in determining whether an action sounds in tort or

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[15] *Id.* at 642.

[16] *Id.* at 644-645.

[17] *Id*. at 645.

[18] 55 Tex. Sup. Ct. J. 145 (Dec. 16, 2011).

[19] *Sw. Bell Tel. Co. v. DeLanney*, 809 S.W.2d 493, 494 (Tex. 1991) (quoting W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 92 at 655 (5th ed. 1984)).

contract, we look to the source of the duty allegedly violated and the nature of the claimed loss.[20] Wolf Hollow alleges violations of gas delivery and gas quality obligations that exist only in the Supply Agreement and the Transportation Agreement. The gist of Wolf Hollow's claims is not that Enterprise failed to act as a reasonable pipeline should have, which is the liability standard for negligence, but that it violated specific obligations that might or might not be unreasonable apart from the parties' agreements. For Wolf Hollow, firm service was crucial; another buyer might elect interruptible service, which contemplates that deliveries will not be constant.[21] Wolf Hollow's plant depended on a certain quality of gas, while a gas processor would depend on a supply of raw gas. Clearly, the duties Wolf Hollow alleges Enterprise violated were imposed by contract, not by law.

Wolf Hollow argues that because it no longer has any contractual relationship with Enterprise, having assigned the Transportation Agreement to El Paso, it is entitled to sue for negligence. Enterprise counters that Wolf Hollow cannot shed by assignment the Transportation Agreement's rights, duties, and limitations. "Generally speaking, a party cannot escape its obligations under a contract merely by assigning the contract to a third party."[22] But even assuming that Wolf Hollow's assignment relieved it of its rights and obligations under the Transportation Agreement, Wolf Hollow's argument is nevertheless flawed. It incorrectly assumes that Wolf

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[20] *Id*.

[21] *See Midwest Gas Servs., Inc. v. Ind. Gas Co., Inc.*, 317 F.3d 703, 707 n.2 (7th Cir. 2003) ("Firm service is the guaranteed right to receive a certain volume of gas via a specific pipeline. Interruptible service is the right to receive a certain volume of gas from a pipeline out of the excess capacity the pipeline has available, *i.e.*, the pipeline's surplus capacity left after the pipeline has met the needs of its firm service customers. Interruptible service customers usually have alternative fuel sources for their energy needs, such as fuel oil or coal, while firm capacity customers are able to use natural gas as their exclusive fuel source.").

[22] *Seagull Energy E & P, Inc. v. Eland Energy, Inc.*, 207 S.W.3d 342, 346-347 (Tex. 2006).

Hollow must be entitled to sue Enterprise for *something* — if not breach of contract, then negligence. But Wolf Hollow, by its Supply Agreement, can look to El Paso, its gas supply manager, to answer for delivery interruptions, poor quality gas, and other gas supply problems.

Wolf Hollow can enforce Enterprise's gas quality obligations through an assignment of El Paso's claims against Enterprise, to which it is entitled by Section 14.1 of the Supply Agreement.[23] But Wolf Hollow concedes, in this Court, that the consequential damages waivers in the Supply Agreement and the Transportation Agreement[24] preclude it from recovering plant damages on a contractual claim. That explains why Wolf Hollow has refused to accept such an assignment and instead seeks to avoid the waivers by asserting an action for negligence. Wolf Hollow's position is that it augmented its rights against Enterprise by assigning away the contract that created them in the first place. We disagree. Wolf Hollow chose to limit its contractual rights against Enterprise, whether it kept those rights or assigned them away.

El Paso and Enterprise argue that a Section 14.1 assignment is Wolf Hollow's exclusive remedy for its quality claim. Though Wolf Hollow cannot sue Enterprise for negligence, for the reasons we have explained, nothing in Section 14.1 suggests that it cannot sue El Paso for breach of the Supply Agreement in allowing poor quality gas to be delivered. Indeed, the general obligation to supply quality gas under Section 14.1 is El Paso's. But the consequential damages waivers that preclude Wolf Hollow from recovering plant damages on an assigned claim against Enterprise also preclude recovery of such damages on a quality claim against El Paso. The question remains

[23] *See supra* note 12.

[24] *See supra* note 7.

whether Wolf Hollow's claim for replacement-power damages is barred by the consequential damages waiver.

III

"Direct damages are the necessary and usual result of the defendant's wrongful act; they flow naturally and necessarily from the wrong. . . . Consequential damages, on the other hand, result naturally, but not necessarily . . . ."[25] Although Wolf Hollow argues that its replacement-power damages are direct, not consequential, these damages derive entirely from the agreements Wolf Hollow has with its customers and thus do not flow necessarily from plant shutdowns due to gas supply problems. Wolf Hollow's replacement-power damages are not direct damages.

Wolf Hollow nevertheless argues that they are not consequential damages for another reason. The parties agree that the Supply Agreement's consequential damages waiver is governed by the Uniform Commercial Code.[26] The UCC definition of consequential damages excludes cover,[27] defined as "making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller."[28] Wolf Hollow contends that the extra costs it incurred to purchase replacement power to meet its own delivery obligations

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[25] *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 816 (Tex. 1997).

[26] The Supply Agreement calls for the application of New York law, but the parties have not pointed to any material difference between New York law and Texas law, so we presume they are the same. *See Coca-Cola Co. v. Harmar Bottling Co.*, 218 S.W.3d 671, 685 (Tex. 2006).

[27] TEX. BUS. & COM. CODE § 2.715(b)(2) ("Consequential damages resulting from the seller's breach include . . . "any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise . . . .").

[28] *Id.* § 2.712(a).

when its plant was shut down due to gas delivery interruptions and poor gas quality were cover and therefore not consequential damages. But the power Wolf Hollow purchased was not, strictly speaking, a substitute for the gas due; the power was a substitute for what was to be produced from that gas. Wolf Hollow argues that by purchasing replacement power, it discharged its obligations to its customers the same as if it had purchased replacement gas. But even assuming that replacement power is similar to replacement gas, it does not fit within the plain statutory language.

Parties may agree, however, to "remedies in addition to or in substitution for those provided" by the UCC.[29] In the Supply Agreement, Wolf Hollow and El Paso contemplated the possibility of interruptions in gas delivery, expressly providing that those caused by force majeure were excused.[30] They further anticipated that Wolf Hollow might not be able to obtain replacement gas to avoid a plant shutdown, that Wolf Hollow could then purchase replacement power instead, and that El Paso would be liable for the extra cost. They agreed to a "Cover Standard" that would apply to "efforts to obtain a replacement Quantity of Gas, alternate power generation fuels *or replacement power*".[31] And in Section 21.1 they set forth the following three-step procedure for covering a lack of gas supply with replacement power:

- Section 21.1(a): If El Paso determines that it will not be able to make the required delivery of gas or actually fails to do so, it must "immediately notify" Wolf Hollow, which can then attempt to cover by purchasing replacement gas.[32]

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[29] *Id*. § 2.719(a)(1).

[30] *See supra* note 6.

[31] *See supra* note 10 (emphasis added).

[32] *See supra* note 8.

- Section 21.1(b): If replacement gas is not available, El Paso can offer replacement power, but Wolf Hollow is not required to accept it.[33]

- Section 21.1(c): If replacement power is either not offered or not accepted, Wolf Hollow can purchase replacement power and recover the extra cost from El Paso.[34]

The court of appeals held that Wolf Hollow did not comply with the first two steps, which are prerequisites to the third. But there is evidence that it did. El Paso did not notify Wolf Hollow of gas delivery failures until after they occurred. At that point, replacement gas could not avoid a plant shutdown that had already occurred or remedy the power shortage to Wolf Hollow's customers. Only replacement power could remedy that shortage.

It makes sense that the parties would provide for an alternate cover-type mechanism when obtaining replacement gas would be problematic. El Paso contends that Wolf Hollow's plant was connected to a second pipeline, from which it could have taken gas, but it is not clear whether Wolf Hollow had the right to do so. It is even less clear that such a gas source, if available, could have avoided a plant shutdown and the consequent damages to Wolf Hollow.

We thus conclude that there is evidence Wolf Hollow is entitled to recover replacement-power damages under Section 21.1(c) of the Supply Agreement, precluding summary judgment against Wolf Hollow based on the consequential damages waiver.

IV

We turn briefly to El Paso's contention that the court of appeals improperly modified the trial court's judgment by deleting its declarations as moot on the ground that all of Wolf Hollow's claims

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[33] *See supra* note 9.

[34] *Id*.

were barred by the waiver of consequential damages in the Supply Agreement. Because we have held that Wolf Hollow may pursue replacement-power damages under the contract, we reverse this part of the court of appeals' judgment.

* * *

We hold: Wolf Hollow cannot assert its delivery and quality claims against Enterprise in an action for negligence, and though it could assert its quality claim against Enterprise through an assignment from El Paso, the damages it seeks would be barred by the consequential damages waivers. Those waivers also preclude Wolf Hollow's recovery of plant damages from El Paso, but El Paso has not established that they preclude recovery of replacement-power damages. Because Wolf Hollow's replacement-power claim survives, the trial court's declaratory judgment is not moot. Accordingly, the judgment of the court of appeals is reversed, and the case is remanded to the court of appeals for further proceedings in accordance with this opinion.

Nathan L. Hecht
Justice

OPINION DELIVERED: June 15, 2012

IN THE SUPREME COURT OF TEXAS

NO. 11-0079

ONCOR ELECTRIC DELIVERY COMPANY LLC, PETITIONER,

v.

DALLAS AREA RAPID TRANSIT AND FORT WORTH TRANSPORTATION AUTHORITY, RESPONDENTS

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

Argued January 11, 2012

JUSTICE HECHT delivered the opinion of the Court.

An electric utility sued two regional public transportation authorities, which are governmental entities, to condemn an easement across their land for use in constructing a transmission line approved by the Public Utility Commission ("PUC"). A divided court of appeals upheld the authorities' assertion of governmental immunity and dismissed the case.[1] While the utility's petition for review was pending in this Court, the Legislature enacted House Bill 971, which extends an electric corporation's power of eminent domain to include the acquisition of "all public land, except land owned by the state, on which the [PUC] has approved the construction of [a transmission]

[1] 331 S.W.3d 91 (Tex. App.–Dallas 2010).

line."[2] The utility asks that we vacate the court of appeals' judgment and remand the case to the trial court to consider the effect of the new statute. The authorities object that the statute is inapplicable. We agree with the utility.

I

Oncor Electric Delivery Company LLC owns and operates the largest electric distribution and transmission system in Texas, delivering power over some 117,000 miles of lines to about three million homes and businesses. Oncor applied to the PUC for approval to construct a new transmission line serving Dallas County.[3] The PUC considered several different routes, weighing the costs to consumers and the impact on local communities and property owners. After lengthy proceedings, it approved one that crossed over a public commuter rail line between Dallas and Fort Worth that is jointly owned and operated by Dallas Area Rapid Transit ("DART") and the Fort Worth Transportation Authority (collectively, "the Authorities"), both regional public transportation authorities under Texas law.[4] All interested parties were notified of Oncor's application,[5] and many landowners participated in the PUC proceedings. The Authorities did not.

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[2] Act of May 27, 2011, 82nd Leg., R.S., ch. 949, § 1, 2011 Tex. Gen. Laws 2400, 2400 [hereinafter "House Bill 971"], codified as TEX. UTIL. CODE § 37.053(d).

[3] *See* TEX. UTIL. CODE §§ 37.051-37.061 (detailing the requirements for applying for a certificate of convenience and necessity from the PUC).

[4] A regional transportation authority "is a public political entity and corporate body [that] has perpetual succession[] and . . . exercises public and essential governmental functions." TEX. TRANSP. CODE § 452.052(a).

[5] *See* TEX. UTIL. CODE § 37.054 ("(a) When an application for a certificate is filed, the commission shall: (1) give notice of the application to interested parties and to the office; and (2) if requested: (A) set a time and place for a hearing; and (B) give notice of the hearing. (b) A person or electric cooperative interested in the application may intervene at the hearing.").

Oncor attempted to negotiate with the Authorities for an aerial easement and right-of-way over approximately 0.37 acres of their rail line. Although Oncor and its predecessor had successfully negotiated similar rights-of-way with DART hundreds of times before, this time the parties could not reach an agreement,[6] and Oncor sued to condemn the easement. Oncor invoked Section 181.004 of the Utilities Code, which states:

> A gas or electric corporation has the right and power to enter on, condemn, and appropriate the land, right-of-way, easement, or other property of any person or corporation.[7]

The Authorities are governmental entities[8] and pleaded immunity from suit. The trial court denied their plea and refused to dismiss the case, and the Authorities appealed.[9] A divided court of appeals held that governmental entities are immune from suits for condemnation,[10] that Section 181.004 does

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[6] The Authorities tell us that they "do not seek to change Oncor's route . . . as established by the [PUC]" and that "DART and Oncor (or its predecessor, TXU Electric Company) have entered into over 800 agreements for Oncor's lines to cross DART property without the use of eminent domain." Respondents' Brief on the Merits 2.

[7] TEX. UTIL. CODE § 181.004; *see id.* § 181.001 (defining "corporation" and "electric corporation" for purposes of chapter 181); *id.* § 181.001(2) ("'Electric corporation' means an electric current and power corporation.").

[8] TEX. TRANSP. CODE § 452.052(c) ("An authority is a governmental unit under [the Texas Tort Claims Act], and the operations of the authority are not proprietary functions for any purpose including the application of [the Act]."); *Dallas Area Rapid Transit v. Amalgamated Transit Union Local No. 1338*, 273 S.W.3d 659, 661 (Tex. 2008) ("Dallas Area Rapid Transit is a regional public transportation authority that performs only governmental functions and is immune from suit under Texas law." (footnotes omitted)).

[9] TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8) (authorizing an interlocutory appeal from an order that "grants or denies a plea to the jurisdiction by a governmental unit as that term is defined in [the Texas Tort Claims Act]").

[10] 331 S.W.3d 91, 97-100 (Tex. App.–Dallas 2010).

not waive governmental immunity,[11] and that the PUC's authority to approve transmission lines does not preempt immunity.[12] Accordingly, the court dismissed the action.

Oncor petitioned this Court for review, and we requested briefing on the merits. But before Oncor filed its brief, the Legislature enacted House Bill 971, adding Section 37.053(d) of the Utilities Code, which provides in part:

> For transmission facilities ordered or approved by the [PUC] . . . , the rights extended to an electric corporation under Section 181.004 include all public land, except land owned by the state, on which the commission has approved the construction of the line.[13]

In its brief, Oncor argued that the court of appeals' opinion and judgment should be vacated and the case remanded to the trial court to consider the effect of the new statute. Oncor reserved its argument for reversal of the court of appeals' opinion. The Authorities responded that Section 37.053(d) cannot affect this case for three reasons: (1) the statute does not clearly and unambiguously waive immunity any more than does Section 181.004; (2) the statute should be applied prospectively only; and (3) the Authorities, as political subdivisions of the State, have the same immunity as the State and therefore fall within the statutory exception for State-owned land. We granted Oncor's petition.[14] We address each of the Authorities' arguments in turn. We assume, without deciding, that governmental entities are immune from condemnation suits.

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[11] *Id.* at 100-106.

[12] *Id.* at 106-107.

[13] TEX. UTIL. CODE § 37.053(d).

[14] 55 Tex. Sup. Ct. J. 2 (Sept. 30, 2011).

II

We have long held,[15] and the Legislature has more recently come to expressly require of itself,[16] that a waiver of governmental immunity must be clear and unambiguous. Were we to apply that standard to Section 181.004, our analysis would proceed along these lines. Section 181.004 confers on gas and electric utilities a power of eminent domain over the "property of any person or corporation." Since the adoption of the Code Construction Act in 1967, the Legislature has instructed that in construing its codes, the word "person" includes the "government or governmental subdivision or agency" "unless the statute or context . . . requires a different definition".[17] But in 2001, the Legislature added that "the use of 'person' . . . to include governmental entities[] does not indicate legislative intent to waive sovereign immunity unless the context of the statute indicates no other reasonable construction."[18] These directives do not establish whether Section 181.004 waives immunity and shed no light at all on what the Legislature intended by its use of the word "person" in general statutes — not codes — enacted in 1911, when the predecessor to Section 181.004 was

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[15] *Welch v. State*, 148 S.W.2d 876, 879 (Tex. Civ. App.–Dallas 1941, writ ref'd) ("Although the Legislature is authorized to waive the State's immunity from such liability, its intention to do so should appear by clear and unambiguous language.").

[16] TEX. GOV'T CODE § 311.034 ("In order to preserve the legislature's interest in managing state fiscal matters through the appropriations process, a statute shall not be construed as a waiver of sovereign immunity unless the waiver is effected by clear and unambiguous language.").

[17] Act of May 24, 1967, 60th Leg., R.S., ch. 455. § 1, 1967 Tex. Gen. Laws 1036, 1036, codified formerly as TEX. REV. CIV. STAT. ANN. art. 5429b-2 and now as TEX. GOV'T CODE § 311.005(2); *see also* TEX. UTIL. CODE § 1.002 (providing that the Code Construction Act "applies to the construction of each provision in [the Utilities Code] except as otherwise expressly provided by [the Utilities Code]").

[18] Act of May 26, 2001, 77th Leg., R.S., ch. 1158, § 8, 2001 Tex. Gen. Laws 2570, 2572, codified as TEX. GOV'T CODE § 311.034.

first enacted.[19] The court of appeals was not persuaded by Oncor's arguments that a utility's power to condemn public lands was recognized in early case law.[20] And while the Authorities are "corporate bod[ies]",[21] one may certainly question whether that statutory description of their capacity brings them within the entities whose property can be condemned by a gas or electric corporation. In short, whether Section 181.004 clearly and unambiguously waives a government landowner's immunity is a difficult question.[22]

And it is one we need not answer here because our focus instead is on Section 37.053(d). That statute provides that "the rights extended to an electric corporation under Section 181.004" — which by the latter's terms are the rights "to enter on, condemn, and appropriate . . . land, [a] right-of-way, [an] easement, or other property" — "include" certain "public land" in certain circumstances. Section 37.053(d) applies only to electric corporations, not gas corporations also covered by Section 181.004. The rights conferred do not extend to all public land but only to public land not owned by the State. And those rights exist only when construction of transmission facilities on the land is PUC-approved.

Had Section 37.053(d) gone on to state "immunity is waived", its effect would be perfectly clear. But as we have observed, not all statutes are so explicit, and "[t]he rule requiring a waiver of

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[19] Act approved March 25, 1911, 32d Leg., R.S., ch. 111, § 4, 1911 Tex. Gen. Laws 228, 229.

[20] 331 S.W.3d 91, 100-106 (Tex. App.–Dallas 2010).

[21] TEX. TRANSP. CODE § 452.052(a).

[22] We note that condemnation of public property generally involves a number of other considerations, such as the nature of the condemnor, the scope of its authority, and an assessment of competing public uses. *See generally* 1A JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 2.17 (3d ed. 2011).

governmental immunity to be clear and unambiguous cannot be applied so rigidly that the almost certain intent of the Legislature is disregarded."[23] We think Section 37.053(d) is clear enough. A general provision that electric utilities can condemn public land might be construed merely to recognize a power that cannot be exercised without a specific waiver of immunity, just as a statute authorizing a governmental entity to "be sued" does not waive immunity for all suits.[24] But Section 37.053(d) is very specific: only electric corporations, only some land, and only with PUC approval. A statute creating specific, restricted "rights", as Section 37.053(d) does, cannot reasonably be read to tacitly condition their exercise on a separate waiver of immunity. The obvious purpose of Section 37.053(d) — indeed, its only apparent purpose — is to provide for rights that can actually be exercised. "If a statute leaves no reasonable doubt of its purpose, we will not require perfect clarity, even in determining whether governmental immunity has been waived."[25]

In applying the clear-and-unambiguous standard, "we must look at whether a statute makes any sense if immunity is not waived."[26] We think Section 37.053(d) does not. Accordingly, we conclude that it waives governmental immunity.

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[23] *City of LaPorte v. Barfield*, 898 S.W.2d 288, 292 (Tex. 1995).

[24] *Tooke v. City of Mexia*, 197 S.W.3d 325, 342 (Tex. 2006).

[25] *Barfield*, 898 S.W.2d at 292.

[26] *Kerrville State Hosp. v. Fernandez*, 28 S.W.3d 1, 6 (Tex. 2000).

III

The Authorities argue that the Legislature did not intend for Section 37.053(d) to apply in a case filed before it took effect and that such application would violate the constitutional prohibition against retroactive laws.[27]

The Legislature has directed that in construing its codes, "[a] statute is presumed to be prospective in its operation unless expressly made retrospective."[28] House Bill 971 enacted Section 37.053(d) and two other provisions. Of the other two, the Bill expressly made one applicable only in future PUC proceedings and the other in pending and future PUC proceedings.[29] Otherwise, Section 5 provided that the Bill should take effect immediately if it received a two-thirds vote in both houses of the Legislature,[30] which it did. Thus, Section 37.053(d) was expressly made effective immediately in all proceedings.

Applying the statute in this proceeding does not violate the Constitution. "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."[31] Immunity from suit is a matter of jurisdiction. Furthermore, "changes in the law that . . . have little impact on prior rights[]

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

[28] TEX. GOV'T CODE § 311.022.

[29] House Bill 971 §§ 2(b) & 4.

[30] *Id.* § 5.

[31] *Univ. of Tex. Sw. Med. Ctr. at Dallas v. Estate of Arancibia*, 324 S.W.3d 544, 548 (Tex. 2010).

are usually not unconstitutionally retroactive."[32] "A governmental entity cannot complain of a retroactive waiver of immunity, since all governmental immunity derives from the State, and a governmental entity acquires no vested rights against the State."[33]

Accordingly, we conclude that Section 37.053(d) applies in this case.

IV

Finally, the Authorities argue that their property falls within Section 37.053(d)'s exception for "land owned by the state". They concede, as they must, that they are not the State,[34] but they argue that because their immunity is derived from the State, they should share the exception. But the exception is based on ownership, not the source of immunity, and plainly, the State does not own the Authorities' rail line. Moreover, if the exception applied to the property of every governmental entity with State-derived immunity, it would apply to all public land and would swallow the rest of the provision, denying it effect. We must presume that the Legislature intends its enactments to be effective.[35] Consequently, we cannot construe the exception to include the Authorities' property.

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[32] *Robinson v. Crown Cork & Seal Co.*, 335 S.W.3d 126, 146 (Tex. 2010).

[33] *Tooke v. City of Mexia*, 197 S.W.3d 325, 345 (Tex. 2006).

[34] *Cf. Monsanto Co. v. Cornerstones Mun. Util. Dist.*, 865 S.W.2d 937, 939-940 (Tex. 1993).

[35] TEX. GOV'T CODE § 311.021(2) (providing that, when a statute is enacted, it is presumed that "the entire statute is intended to be effective").

For these reasons, we vacate the opinion and judgment of the court of appeals and remand the case to the trial court for further proceedings.[36]

Nathan L. Hecht

OPINION DELIVERED: June 22, 2012

[36] *See* TEX. R. APP. P. 60.2(f).

IN THE SUPREME COURT OF TEXAS

NO. 11-0131

MARIA ESTER SALINAS, PETITIONER,

v.

NORBERTO SALINAS, RESPONDENT

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

PER CURIAM

Maria Salinas contends that the court of appeals affirmed a judgment against her based on an alleged defamatory statement that the jury concluded had caused no harm to the plaintiff. We agree, reverse the court of appeals' judgment, and remand to that court for further proceedings.

Norberto Salinas, the mayor of Mission, Texas, sued Maria (no relation) for slander, alleging three slanderous statements made by Maria:

- Statement One, made at a city council meeting and allegedly directed at Norberto: "[Y]ou have stolen and lied and killed."
- Statement Two, allegedly made to a third party: "Norberto Salinas is a drug dealer and corrupt politician."
- Statement Three, made during a Telemundo television program: "[T]he mayor in La Joya told me that Norberto Salinas went to talk to him to say that they were going to kill me."

We refer to these statements as the city council statement, the drug dealer statement, and the

Telemundo statement.

The trial court concluded that all three statements were defamatory per se. Maria admitted making the city council statement and the Telemundo statement, but denied making the drug dealer statement. Norberto conceded that he was a public official and that the statements involved public issues. The jury found that Maria made the drug dealer statement. The jury also found that all three statements were false and were made with actual malice. The jury was asked, as to each statement, whether it proximately caused Norberto to suffer mental anguish, and was instructed on the meaning of proximate cause and mental anguish, the latter requiring "evidence . . . establishing a substantial disruption in [Norberto's] daily routine or . . . other evidence of a high degree of mental pain and distress that is more than mere worry, anxiety, vexation, embarrassment, or anger." The jury found that the city council statement and the drug dealer statement proximately caused Norberto to suffer mental anguish. But Question No. 17 asked whether the Telemundo statement proximately caused Norberto to suffer mental anguish, and the jury answered "No."

The jury was then asked in Question No. 18, a single damages question limited to mental anguish damages, to determine what sum of money "would fairly and reasonably compensate Norberto Salinas, for the injury, if any, that resulted from the occurrence in question." The jury was instructed to answer this question only if it answered "Yes" to one or more of the three preceding proximate cause questions. Since the jury found that the city council and drug dealer statements had caused Norberto to suffer mental anguish, the jury proceeded to answer the mental anguish damages question, and found damages of $30,000. The trial court rendered a judgment in this amount, along with interest and costs.

We can only guess why the jury did not find that the Telemundo statement resulted in any damages to Norberto. Perhaps the jury concluded that Norberto and the Telemundo viewers did not take the comment seriously, since as Norberto conceded in his briefing to the court of appeals, this comment "possessed the believability of an Elvis sighting." ___ S.W.3d ___, ___. Regardless, we think the record shows that the jury did not award Norberto any damages for the Telemundo statement.

Maria appealed the judgment, raising numerous issues. Among other arguments, Maria contended that her statements were constitutionally protected political speech, that the statements were not defamatory per se and therefore required proof of special damages, that the evidence of mental anguish did not show the high level of mental pain and distress required to recover mental anguish damages, and that Norberto, as a public official, failed to prove actual malice.

The court of appeals affirmed the trial court's judgment in favor of Norberto[1] based on the Telemundo statement alone. The court concluded that the Telemundo statement was defamatory per se and that there was sufficient evidence the statement was made with actual malice. As to damages, the court upheld the trial court's judgment of $30,000 by holding that "it is not necessary to prove mental anguish where the words used are slanderous per se, because the law presumes actual damages." *Id.* at ___.

We think the court of appeals erred in affirming the judgment based on the Telemundo statement, because the jury rejected this claim. Although the jury found that the statement was false

[1] The court of appeals reversed the trial court's judgment in favor of another plaintiff, Pat Townsend. We do not disturb the court of appeals' judgment with respect to Townsend.

and was made with malice, it found that the statement did not proximately cause injury to Norberto. In Question No. 18, it was instructed to assess mental anguish damages "if any, that resulted from the occurrence in question," and was instructed not to even reach this question unless it found that one or more of the statements proximately caused Norberto to suffer mental anguish. We must assume the jury followed the court's instructions, *Turner, Collie & Braden, Inc. v. Brookhollow, Inc.,* 642 S.W.2d 160, 167 (Tex. 1982), and therefore conclude that the jury did not award any damages for the Telemundo statement.

"Our law presumes that statements that are defamatory per se injure the victim's reputation and entitle him to recover general damages, including damages for loss of reputation and mental anguish." *Bentley v. Bunton*, 94 S.W.3d 561, 604 (Tex. 2002) (plurality opinion). However, even if some mental anguish can be presumed in cases of defamation per se, and if we assume the Telemundo statement was defamatory per se, the law does not presume any particular amount of damages beyond nominal damages.[2] *See Denton Publ'g Co. v. Boyd*, 448 S.W.2d 145, 147 (Tex. Civ. App.—Fort Worth 1969) (holding that a plaintiff in a libel per se case is entitled to nominal damages and "such actual damages as might be shown to be the proximate result of the publication"), *aff'd*, 460 S.W.2d 881 (Tex. 1970); *Tex. Disposal Sys.*, 219 S.W.3d at 584 (stating that in cases of defamation per se, "the amount of actual general damages remains a question for the jury"); *Adolf Coors Co. v. Rodriguez*, 780 S.W.2d 477, 488 (Tex. App—Corpus Christi 1989, writ

[2] We need not decide whether Norberto would have been entitled to nominal damages for slander per se if he had requested them. He did not request such an award from the trial court and did not request that the jury be instructed to award at least nominal damages. We note, however, that courts have not resolved this issue in an entirely consistent manner. *See Tex. Disposal Sys. Landfill, Inc. v. Waste Mgmt. Holdings, Inc.* 219 S.W.3d 563, 584–85 n.22 (Tex. App.—Austin 2007, pet. denied) (discussing cases).

denied) (noting that under presumption of damages applicable to libel per se, damages "are within the jury's discretion, are purely personal, and cannot be measured by any fixed rule or standard"); *Bradbury v. Scott*, 788 S.W.2d 31, 39 (Tex. App.—Houston [1st Dist.] 1989), writ denied) (holding, in case of libel per se, "where the amount of the actual damages is not capable of definite ascertainment, and prima facie liability is established, the determination of the amount is necessarily lodged in the discretion of the jury"); *Freeman v. Schwenker*, 73 S.W.2d 609, 611 (Tex. Civ. App.—Austin 1934, no writ) (same).

Moreover, the jury was not instructed to presume mental anguish damages and award damages based on such a presumption, and Norberto did not request such an instruction. Instead, the jury was instructed to award mental anguish damages, if any, only upon a finding that a statement proximately caused mental anguish; it did not make this requisite finding for the Telemundo statement and therefore did not award mental anguish damages for this statement. There is, in short, no jury verdict in support of an award of damages of $30,000 or any other amount for the Telemundo statement, and the court of appeals could not sua sponte make its own award of damages. *See Freeman*, 73 S.W.2d at 611 (holding, in libel per se case, that "[i]t is a well-settled rule that, where a case is submitted to a jury . . . judgment of the court must be rendered upon the verdict returned"); *see also Osterberg v. Peca*, 12 S.W.3d 31, 55 (Tex. 2000) (holding that appellate court could not review sufficiency of evidence under a legal standard that was not submitted to the jury if no party objected to failure to charge jury under the standard). Even if mental anguish can be presumed, the determination of the amount of mental anguish damages is an inquiry left to the finder of fact. We therefore agree with Maria that the court of appeals was not authorized to award $30,000 in mental

anguish damages for the Telemundo statement, without a damages finding by the jury supporting such an award.

Whether the judgment should stand based on the other two allegedly defamatory statements depends on a resolution of issues not reached by the court of appeals. Accordingly, without oral argument, *see* TEX. R. APP. P. 59.1, we grant the petition for review, reverse the court of appeals' judgment in favor of Norberto, and remand the case to that court for further proceedings.

OPINION DELIVERED: April 20, 2012

IN THE SUPREME COURT OF TEXAS

NO. 11-0189

RYLAND ENTERPRISE, INC., PETITIONER,

v.

VICKIE WEATHERSPOON, RESPONDENT

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

PER CURIAM

In this case we must decide whether the court of appeals erred in dismissing Ryland Enterprise, Inc.'s appeal as untimely. Because an arguable interpretation of our procedural rules allowed Ryland's premature, pre-judgment motion for judgment notwithstanding the verdict (JNOV motion) to extend the appellate timetable to ninety days, the court of appeals erred in dismissing the appeal. Accordingly, pursuant to Texas Rule of Appellate Procedure 59.1 without hearing oral argument, we reverse the court of appeals' judgment and remand the case to that court.

Vickie Weatherspoon sued Ryland Enterprise, Inc. in 2007, and the case went to trial in May 2010. On May 4th, the jury returned a verdict for Weatherspoon. On May 25, 2010—after the jury verdict but before the judgment was signed—Ryland filed a JNOV motion on legal insufficiency grounds. Though not styled as a motion for new trial, the JNOV motion also requested a new trial in the alternative. Prior to holding a hearing on the JNOV motion, the trial court signed a judgment

for Weatherspoon on June 14, 2010, initiating the appellate time table. The judgment also purported to—via a handwritten notation by the judge on the face of the order—deny Ryland's JNOV motion. Despite that purported denial, Weatherspoon filed a response to the JNOV motion on July 7, 2010, and the trial court held a hearing on the motion on July 8th. Though no written order appears in the record, an electronic docket sheet indicates that the judge (presumably orally) denied the motion (again) on that day.

Over a month later, on August 18, 2010, Ryland filed a notice of appeal in the trial court, sixty-five days after the judgment was signed. Because the notice was filed beyond the thirty-day deadline that applies if none of the motions listed in Texas Rule of Appellate Procedure 26.1(a) is filed, Weatherspoon moved to dismiss the appeal as untimely. The court of appeals granted the motion and issued a per curiam opinion. ___ S.W.3d ___. The court reasoned that although a JNOV motion may extend the appellate timetable to ninety days in some circumstances, it only does so if filed after the judgment is signed, and not before. We disagree.

This Court has consistently treated minor procedural mishaps with leniency, preserving the right to appeal. *See Verburgt v. Dorner*, 959 S.W.2d 615, 616 (Tex. 1997). In *Verburgt*, a litigant mistakenly filed a cost bond four days late without filing a motion for an extension of time. *Id.* at 615–16. This Court held that a motion for extension of time is implied if a party in good faith files late, but within the fifteen-day time period for requesting an extension. *Id.* at 617. We have applied comparable leniency when a litigant failed to comply with the appellate rules for indigency filings, *Higgins v. Randall Cnty. Sheriff's Office*, 257 S.W.3d 684, 688–89 (Tex. 2008); when a litigant did not adequately explain the reason for an untimely notice of appeal, *Hone v. Hanafin*, 104 S.W.3d

884, 888 (Tex. 2003); and, most pertinent here, when a litigant sought to extend the appellate filing deadlines with a post-judgment motion not explicitly mentioned in the time-extending provisions of Rule 26.1, *Gomez v. Tex. Dep't of Criminal Justice, Inst'l Div.*, 896 S.W.2d 176, 176–77 (Tex. 1995) (per curiam). We summed up this principle of leniency in *Verburgt* with the rule that "appellate courts should not dismiss an appeal for a procedural defect whenever any arguable interpretation of the Rules of Appellate Procedure would preserve the appeal." 959 S.W.2d at 616.

In this case, a number of overlapping procedural rules apply. Under Rule 26.1, the normal filing deadline for a notice of appeal is thirty days. That deadline is extended to ninety days "if any party timely files: (1) a motion for new trial; [or] (2) a motion to modify the judgment." TEX. R. APP. P. 26.1(a)(1)–(2). Texas Rule of Civil Procedure 329b states that a motion for new trial is timely if filed "*prior to* or within thirty days after the judgment . . . complained of is signed." TEX. R. CIV. P. 329b(a) (emphasis added). This "prior to" language is supplemented and clarified by civil rule 306c, which provides that "[n]o motion for new trial . . . shall be held ineffective because prematurely filed; but every such motion shall be deemed to have been filed on the date of but subsequent to the time of signing of the judgment the motion assails." TEX. R. CIV. P. 306c. The Rules of Appellate Procedure echo this concept in Rule 27.2, under which "[t]he appellate court may treat actions taken before an appealable order is signed as relating to an appeal of that order and give them effect as if they had been taken after the order was signed." TEX. R. APP. P. 27.2. Finally, civil rule 329b(g) states that a "motion to modify . . . shall be filed and determined . . . and shall extend . . . the time for perfecting an appeal in the same manner as a motion for new trial." TEX. R. CIV. P. 329b(g). Thus, the premature filing rules in civil rule 306c and appellate rule 27.2 apply equally

to motions for new trial or to modify the judgment. Under these overlapping procedural rules, the filing of a motion for new trial or to modify the judgment, before the judgment is signed or within thirty days after, extends the deadline for filing a notice of appeal to ninety days.

The underlying nature of Ryland's JNOV motion was: (1) to assail the judgment likely to follow from the jury's verdict; and (2) to request a new trial. Either purpose warrants the application of the above-described procedural rules. A JNOV motion can constitute a "motion to modify the judgment" under Rule 26.1(a)(2) if it assails the later-entered judgment. *See Gomez*, 896 S.W.2d at 176–77 (holding that any motion which "assail[s] the trial court's judgment" extends the appellate timetable). Ryland's legal sufficiency challenge, though raised in a JNOV motion, certainly assailed the judgment that was eventually signed. Moreover, Ryland's JNOV motion specifically requested a new trial in the alternative. Since courts should acknowledge the substance of the relief sought despite the formal styling of the pleading, *State Bar of Tex. v. Heard*, 603 S.W.2d 829, 833 (Tex. 1980) (citing TEX. R. CIV. P. 71), that alternative request further bolsters the applicability of Rule 26.1. Whether a premature motion to modify the judgment or a premature motion for new trial, Ryland's motion clearly assailed the trial court's judgment and triggered Rule 26.1(a)'s extension of the appellate timetable.[1]

[1] The court of appeals focused on the fact that the JNOV motion in this case was filed pre-judgment, rather than post-judgment, perhaps implicitly referencing the "live pleading" requirement adopted by some courts of appeals. *E.g.*, *Brazos Elec. Power Coop., Inc. v. Callejo*, 734 S.W.2d 126, 129 (Tex. App.—Dallas 1987, no writ) ("[W]hen . . . a judgment is entered, the trial court disposes of the prior pending motion for judgment on the verdict [or JNOV], and the motion is no longer a 'live' pleading that can operate to extend the appellate timetable . . . [or] be considered as a *prematurely* filed motion for new trial under [Texas Rule of Appellate Procedure 27]." (emphasis in original)); *see also A.G. Solar & Co. v. Nordyke*, 744 S.W.2d 646, 647–48 (Tex. App.—Dallas 1988, no writ) (applying the same rule to a motion for new trial that had been overruled prior to the judgment being signed). But this Court has rejected the live pleading requirement in *Fredonia State Bank v. General American Life Insurance Co.*, 881 S.W.2d 279, 282 n.2 (Tex. 1994), and *Wilkins v. Methodist Health Care System*, 160 S.W.3d 559, 562–63 (Tex. 2005), and we see no reason to apply it to this case. *But cf. Wilkins*, 160 S.W.3d at 563 (holding that when a pre-judgment motion is *granted*, it does

On the facts of this case, an arguable interpretation of appellate rules 26.1(a) and 27.2 and civil rules 329b and 306c allowed Ryland's motion, though filed pre-judgment, to nevertheless extend the appellate timetable to ninety days. Ryland's sixty-fifth-day notice of appeal was therefore timely, and the court of appeals erred in dismissing the appeal. Pursuant to Texas Rule of Appellate Procedure 59.1, we reverse the court of appeals' judgment without hearing oral argument and remand to that court for consideration of Ryland's appeal.

OPINION DELIVERED: December 16, 2011

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not preserve error or extend the appellate timetable as to a later-signed contrary judgment).

IN THE SUPREME COURT OF TEXAS

NO. 11-0217

ROBB EVANS, RECEIVER FOR MEDIACOPY TEXAS, INC., AND INFODISC GLOBAL HOLDING, INC., MAYNARDS INDUSTRIES (1991) INC., AND INTERNATIONAL COMMERCIAL BANK OF CHINA, LOS ANGELES BRANCH, PETITIONERS,

v.

UNIT 82 JOINT VENTURE, FIVE STAR HOLDING COMPANY, INC., FIVE STAR HOLDING MANAGEMENT, L.L.C., AND 1320/1390 DON HASKINS, LTD., RESPONDENTS

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

PER CURIAM

Recently in *York v. State*, we reiterated that "'[a]n action taken in violation of the automatic [in bankruptcy] stay is void, not merely voidable.'" ___ S.W.3d ___, ___ (Tex. 2012) (quoting *Continental Casing Corp. v. Samedan Oil Corp.*, 751 S.W.2d 499, 501 (Tex. 1988) (per curiam)). In this case, the court of appeals, *sua sponte*, dismissed the entire proceeding as violating the automatic stay. 349 S.W.3d 42 (Tex. App.–El Paso 2010). Because the record does not support the court's decision, we reverse its judgment and remand the case to the trial court for further proceedings.

Infodisc Global Holding, Inc. ("Infodisc") and one of its subsidiaries, Mediacopy Texas, Inc. ("M-TX"), defaulted on a loan from International Commercial Bank of China ("the Bank"). A California court placed the borrowers in receivership to liquidate their assets securing the loan, and an ancillary receivership was opened in Texas, the case now before us. Meanwhile, another Infodisc subsidiary, Mediacopy, Inc., a California corporation ("M-CA"), declared bankruptcy, and that proceeding remained pending at all times material to this case.

The receiver claimed and sold property in an El Paso warehouse that the Landlord[1] alleges was not leased to Infodisc or M-TX but to M-CA. The parties dispute who the tenant was and who owned the property and fixtures in the warehouse. The Bank asserts that Infodisc, M-TX, and M-CA all leased the warehouse, and that M-TX owned all the property at the warehouse and operated its business there. The Landlord contends that only M-CA leased the warehouse, that there is no evidence that Infodisc or M-TX owned any of the warehouse property, and that it may have belonged to M-CA. The Landlord claims the warehouse property as fixtures and in satisfaction of its claims against the tenant.

After the trial court rejected almost all of the Landlord's claims, Landlord appealed. Although M-CA was not a party to the case, and no party had questioned whether the receivership proceedings impacted M-CA's bankruptcy, the court of appeals held that the proceedings violated the automatic stay, which prohibits "any act to obtain possession of property of the estate or of property from the [bankruptcy] estate or to exercise control over property of the estate," or "any act

[1] "Landlord" refers to respondents and claimants below, Unit 82 Joint Venture, Five Star Holding Company, Inc., Five Star Holding Management, L.L.C. and 1320/1390 Don Haskins, Ltd.

to create, perfect, or enforce any lien against property of the estate." 11 U.S.C. § 362(a)(3), (4). Accordingly, the court vacated the trial court's judgment and dismissed the case.

There is evidence that M-CA had an interest in the warehouse property, but there is also evidence it did not. The automatic stay may apply, or it may not, and because a violation of the automatic stay was not asserted in the trial court, the conflict in the evidence was not resolved. The court of appeals appears to have been of the view that only the bankruptcy court could resolve the issue. But any limitations the automatic stay may have imposed on these proceedings cannot simply be hypothesized by the court of appeals *sua sponte*. The parties should have had an opportunity to develop a record to support their positions and seek a ruling from the trial court, even if it should turn out that only the bankruptcy court can finally decide the issue. This is especially true, given that none of the parties raised the issue in the bankruptcy court, and the M-CA bankruptcy was dismissed before the trial court rendered judgment in this case.

Accordingly, we grant the petition for review,[2] and without hearing oral argument, reverse the judgment of the court of appeals. TEX. R. APP. P. 59.1. That court should have abated the appeal to allow the application of the automatic stay to be determined by the trial court in the first instance. Rather than remand the case to the court of appeals for that purpose, we think it more expeditious to remand the case ourselves to the trial court for further proceedings.

Opinion delivered: August 31, 2012

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[2] Petitioners are the receiver for Infodisc and M-TX, Robb Evans; the auctioneer who liquidated the warehouse property, Maynards Industries (1991) Inc.; and the Bank.

IN THE SUPREME COURT OF TEXAS

NO. 11-0245

IN RE CARL BASS, PATRICIA GRUTZMACHER AND THOMAS BAUER

ON PETITION FOR WRIT OF MANDAMUS

PER CURIAM

Order Remanding for Findings of Fact

Following disciplinary proceedings, the Texas State Board of Public Accountancy (Real Party in Interest in this Court) suspended the accounting licenses of relators Carl Bass, Patricia Grutzmacher, and Thomas Bauer. Relators then obtained a judgment in district court voiding those suspensions because of violations of the Open Meetings Act. When the Board appealed that judgment, relators moved the trial court to deny the Board the right to supersede the judgment pending appeal, pursuant to Texas Rule of Appellate Procedure 24.2(a)(3) (providing trial courts with discretion to deny or allow supersedeas of a judgment for something other than money or an interest in property). The district court denied relators' motion and allowed the Board to supersede the judgment, thus reinstating the license suspensions during appeal. Relators sought appellate review of the denial in the court of appeals, and the court of appeals affirmed.

Relators now petition this Court, pursuant to Appellate Rule 24.4(a), for a writ of mandamus instructing the trial court to exercise its discretion under Rule 24.2(a)(3) and grant their motion to deny supersedeas. The Board argues that, per Texas Rule of Appellate Procedure 25.1(g)(2), a trial court's discretion to deny supersedeas does not apply to state entities, who are entitled to supersede any judgment as a matter of right. We are unable to fully consider these contentions because the trial court did not state its reasons for denying relators' motion. Thus we do not know whether it was of the opinion that state agencies are entitled to supersedeas as a matter of right, or whether it found, per the discretion provided by Rule 24.2(a)(3), supersedeas appropriate in this case.

Under these circumstances, we abate the petition and remand the case to the trial court with instructions for it to prepare findings of fact and conclusions of law pertaining to its decision to allow supersedeas. The trial court shall submit its findings and conclusions to this Court no later than March 27, 2012. When the trial court's findings and conclusions are submitted, the petition will be reinstated by further order of the Court.

OPINION DELIVERED: January 27, 2012

IN THE SUPREME COURT OF TEXAS

NO. 11-0282

IN THE INTEREST OF E.R., J.B., E.G., AND C.L., CHILDREN

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

Argued February 28, 2012

CHIEF JUSTICE JEFFERSON delivered the opinion of the Court.

When the State seeks to sever permanently the relationship between a parent and a child, it must first observe fundamentally fair procedures.[1] The most basic of these is notice. If the State cannot deliver notice in person, it may try other means that will likely reach the parent.[2] We consider today whether serving the parent in a newspaper advertisement, "a poor and sometimes a hopeless substitute for actual service,"[3] is constitutionally acceptable when the State knew the mother's identity, was in regular contact with her, and had at least one in-person meeting with her after it sued to terminate the legal rights to her children. We conclude that the substituted service was poor, hopeless, and unjustifiable under these circumstances.

[1] *Santosky v. Kramer*, 455 U.S. 745 , 747-48 (1982).

[2] *McDonald v. Mabee*, 243 U.S. 90, 91-92 (1917).

[3] *City of New York v. N.Y., New Haven & Hartford R.R. Co.*, 344 U.S. 293, 296 (1953).

But that does not end our inquiry. A parental rights termination proceeding encumbers a value "far more precious than any property right"[4] and is consequently governed by special rules.[5] We are faced not with the ordinary dispute about how to allocate money in a contract or tort action. We must decide how to reconcile a parent's desire to raise her child with the State's responsibility to promote the child's best interest. The Legislature and our courts have labored to ensure that proceedings to terminate a parent's legal relationship to her child are handled efficiently. To promote permanency in child rearing at the earliest stage possible, the Legislature has enacted a strict six-month deadline to challenge a termination judgment following citation by publication.[6] For reasons we explain below, that strict time limit cannot foreclose a challenge when the parent has no constitutionally adequate notice of the proceeding. On the other hand, because a parent must remain vigilant with respect to her child's welfare, and because courts must always consider the child's best interest, a parent who learns about a judgment terminating the bonds to her child must act diligently to restore that right.

We reverse the court of appeals' judgment affirming the termination of parental rights. We remand the case to the trial court to determine whether the mother unreasonably failed to act after

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[4] *Santosky*, 455 U.S. at 758.

[5] *See, e.g.*, *id.* at 747-48 (requiring a higher level of proof in termination proceedings than that required to "award money damages in an ordinary civil action" and holding that only a clear-and-convincing evidence standard adequately protected parent's due process rights).

[6] *See* TEX. FAM. CODE § 161.211(b) ("Notwithstanding Rule 329, Texas Rules of Civil Procedure, the validity of an order terminating the parental rights of a person who is served by citation by publication is not subject to collateral or direct attack after the sixth month after the date the order was signed.").

knowing that a final judgment had taken away her children, and if so, whether granting relief would impair another person's substantial interest in reliance on that judgment.

I. Background

Several months after removing L.R.'s four children from her home and becoming their temporary managing conservator, the Department of Family Protective Services petitioned the trial court to terminate L.R.'s parental rights. After an unsuccessful attempt at personal service, the Department decided to serve L.R. by publication. Felicia Chidozie, the caseworker, prepared an affidavit summarizing her attempts to locate L.R.. Although she had L.R.'s phone number, Chidozie said that L.R. told her that she was in the process of moving and did not have a permanent address. Chidozie ran a background check through IMPACT, which confirmed the address Chidozie already possessed. Chidozie also checked a website, www.anywho.com, and found no listing. Chidozie's call to the Texas Vine System was fruitless, and the Salvation Army refused on confidentiality grounds to answer her query. Chidozie faxed TXU Electric, Missing Person's Clearinghouse, Voter Registration, and Adult Probation, but received no responses in the two days between sending the faxes and filing her affidavit stating that L.R. could not be located. Finally, Chidozie called the "motor vehicle Tax Roles" but was told that it could locate information only from property or motor vehicle numbers. Based on this affidavit, the trial court authorized service by publication.

The Department published the citation,[7] and the trial court conducted a final hearing. L.R. did not appear. The hearing transcript spans twelve double-spaced pages. Two witnesses testified: Chidozie and Erica Finley, the children's guardian and "aunt."[8] Chidozie testified that she searched diligently for L.R. and signed an affidavit chronicling her efforts. She stated that L.R. had visited the children at the Department's offices a month before the termination hearing.[9] Chidozie said that L.R. gave her a phone number but would not provide an address. Chidozie contacted L.R. at that phone number and gave her information about court hearings. Chidozie testified that L.R. attended the hearings, but was tardy each time. Chidozie said L.R. had knowingly placed or knowingly allowed the children to remain in conditions or surroundings that endangered their physical or emotional well-being. According to Chidozie, the children were physically abused, and L.R. tested positive for methamphetamine when she gave birth to her youngest child. Chidozie testified that the children were doing well in Finley's home and that termination would be in their best interest. She stated that the Department's plan was to be named the permanent managing conservator and for the children to be adopted.

Finley testified that the children had been living with her for approximately six months, that they were happy, and that she planned to adopt them. Joe Rosenfield, the children's guardian ad

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[7] The record does not contain a copy of the citation nor any information about where it was published. In contrast to our procedural rules, the Family Code requires only a single publication. *Compare* TEX. FAM. CODE § 102.010(b) ("Citation by publication shall be published one time."), *with* TEX. R. CIV. P. 116 ("The citation . . . shall be served . . . by having the same published once each week for four (4) consecutive weeks . . . .").

[8] In a post-judgment motion, the maternal grandmother disputed that Finley is related to the children.

[9] The petition for termination was filed May 25, 2007. Chidozie's affidavit of citation by publication was filed August 24. L.R. met with Chidozie at the Department's offices in either August or September (Chidozie's testimony conflicts on this point), and the termination hearing occurred on October 25.

litem, stated that Finley wanted the children, and they were doing well under her care. He opined that termination would be in the children's best interest.

Brenda Hull Thompson, who appeared as "publication attorney,"[10] stated that L.R. was served by publication and that publication was "ripe" on October 15, 2007. Thompson apparently never met with L.R. and learned for the first time at the hearing that L.R. had personally visited the children at the Department's offices. Thompson made no other statements about L.R., nor did she opine that termination would be in the children's best interest. The trial court terminated L.R.'s parental rights as well as those of the putative fathers, and it appointed the Department permanent managing conservator.

L.R. moved for a new trial within two years of the judgment. *See* TEX. R. CIV. P. 329(a) (authorizing trial court to grant motion for new trial filed within two years of judgment, if judgment rendered on service by publication and defendant did not appear in person or by attorney of her own selection). She complained that service by publication was obtained by fraud and was invalid because, among other things, she had been in regular, personal contact with Chidozie and visited the children at the Department offices during the time the Department was attempting to serve her. L.R. denied ever telling Chidozie that she did not have an address at which she could be served; instead, she asserted that she told Chidozie she did not have an address separate from her mother's, which Chidozie already had. L.R. also challenged Chidozie's affidavit.

[10] *See* TEX. FAM. CODE § 107.013(a)(2).

The Department argued that L.R.'s motion was untimely because it was filed beyond Rule 329's two-year deadline.[11] Chidozie disputed L.R.'s characterization of their conversation about her address, but Chidozie admitted that she met with L.R. in the Department's offices for a prescheduled meeting in August 2007. The Department did not cite the Family Code's six-month deadline for attacking termination decrees.[12] The trial court denied the motion, and L.R. appealed.

In her appellate brief, L.R. included a footnote citing Family Code section 161.211 but argued that the matter was an affirmative defense that the Department waived by failing to raise it in the trial court, citing *In re Bullock*, 146 S.W.3d 783, 790-91 (Tex. App.—Beaumont 2004, no pet.). The Department's brief cited the same case and agreed that "[t]he six-month limitation in section 161.211 is an affirmative defense, which is waived if not presented to the trial court. . . . If the State's argument regarding the timeliness of the motion was not sufficient to invoke the six-month limitation in section 161.211, appellant's November 16, 2009 motion for new trial was timely under rule 329(a) . . . ."

Three months after briefing had been completed, the Department filed an amended brief, now arguing that section 161.211 absolutely barred challenges made more than six months after the order was signed, and that the court of appeals should not reach the merits because L.R.'s motion was untimely.

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[11] The motion was filed November 16, 2009. Because the judgment's two-year anniversary date, November 14, 2009, was a Saturday, the motion was filed within Rule 329(a)'s deadline. *See* TEX. R. CIV. P. 4, 329(a).

[12] *See* TEX. FAM. CODE § 161.211(b).

A divided court of appeals agreed. 335 S.W.3d 816. The court held that section 161.211's six-month deadline was dispositive: "The mandatory language of family code section 161.211 leaves no room for a construction other than a requirement that any collateral or direct attack on the termination of parental rights, including a motion for new trial, be filed no more than six months after the termination order is signed." *Id*. at 820. Because L.R.'s challenge was not filed within that period, it was barred. The court of appeals held that L.R. had not raised a constitutional challenge and thus had not preserved or presented the issue for review. *Id*. at 823.

The dissent concluded that the six-month deadline applied only to people who were *validly* served by publication. *Id*. at 827 (Murphy, J., dissenting). Because service on L.R. was invalid, the deadline was inapplicable:

> While I agree that this State's policy is to provide stability and finality for children, *see* TEX. FAM. CODE ANN. § 153.001(a)(2), the legislature's intent could not be—especially when no clear language suggests—effectively to create a presumption under subsection 161.211(b) that it is always in the best interest of the child to terminate parental rights after the expiration of six months regardless of whether the trial court ever acquired jurisdiction over the parent. Given the plain and specific language of subsection 161.211(b), the presumption the legislature intended the statute to comply with the Texas and United States Constitutions, and our obligation to construe statutes to avoid constitutional infirmities, I would conclude it was the intent of the legislature in enacting subsection 161.211(b) to bar attacks on parental termination orders only in situations where the parent was actually "served."

Id. at 829. The dissent determined that L.R. was never validly served by publication because the Department had L.R.'s working phone number and a contact address, the caseworker met with L.R. during the time service by publication was being pursued, the Department knew the whereabouts of at least one relative, and Chidozie's affidavit was inconsistent with her live testimony. *Id*. at 832.

We granted L.R.'s petition for review.[13] 55 Tex. Sup. Ct. J. 145 (Dec. 16, 2011).

II. Citation by Publication

A. History

Citation by publication is a form of substituted service that, through a small notice published in the classified section of a local newspaper, is meant to apprise a defendant that her rights are at stake. Courts have accepted this method for more than a century. *See, e.g., Pennoyer v. Neff*, 95 U.S. 714, 727 (1877); *Harris v. Daugherty*, 11 S.W. 921, 922 (Tex. 1889). Sixty years ago, however, the Supreme Court squarely addressed the practice's due process implications. *See Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). *Mullane* remains the seminal case involving notice by publication, and it explains how to evaluate the adequacy of notice. *See* 4A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1074, at 368 (3d ed. 2002) (noting that *Mullane* "is recognized as the keystone of the modern philosophy regarding the due process aspects of a notice requirement and the importance of the case should not be underestimated"). We measure the constitutionality of notice using *Mullane*'s analytical

[13] We called for the views of the Solicitor General, who submitted a brief on behalf of the State of Texas as amicus curiae.

framework, rather than *Mathews v. Eldridge*'s balancing test.[14] *Dusenbery v. United States*, 534 U.S. 161, 167-68 (2002).

Mullane involved a common trust fund, a mechanism for pooling small trusts to simplify their administration. *Mullane*, 339 U.S. at 307-08. Under New York law, once such a fund had been established, its beneficiaries could be served by publication for four successive weeks. *Id*. at 309-10. Central Hanover established a common trust fund and petitioned the court for settlement of its first account as common trustee. *Id*. at 309. Central Hanover provided publication notice to beneficiaries. *Id*. A court-appointed attorney retained to represent the beneficiaries complained that notice by publication was constitutionally inadequate. *Id*. at 311.

The Supreme Court agreed. The Court observed that "[m]any controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Id.* at 313. The Court noted that personal service was the classic form of notice "always adequate in any type of proceeding." *Id.* at 313-14. But personal service is not always necessary, and "[a] construction of the Due Process Clause which would place impossible or impractical obstacles in the way could not be justified."

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[14] *See Mathews v. Eldridge*, 424 U.S. 319 (1976). In that case, the Supreme Court held that:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335.

Id. But "when notice is a person's due, process which is a mere gesture is not due process." *Id.* at 315. The Court then outlined some of the problems with publication notice:

> It would be idle to pretend that publication alone . . . is a reliable means of acquainting interested parties of the fact that their rights are before the courts. It is not an accident that the greater number of cases reaching this Court on the question of adequacy of notice have been concerned with actions founded on process constructively served through local newspapers. Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed . . . In weighing its sufficiency on the basis of equivalence with actual notice, we are unable to regard this as more than a feint.

Id. For missing or unknown persons, service by this "indirect and even . . . probably futile" means did not raise due process concerns. *Id*. at 317. But as to a known beneficiary with a known address, the Court concluded, notice by publication was constitutionally defective because it was not "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, 319.

The Court revisited *Mullane* thirty-three years later in *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983). There, a landowner signed a mortgage in favor of the Mennonite Board of Missions. *Mennonite*, 462 U.S. at 792. After the landowner failed to pay property taxes, the county began proceedings to sell the property. *Id*. at 794. Indiana law required that notice be posted at the county courthouse and published for three consecutive weeks. *Id*. at 793. Afterwards, the county could sell the property to the highest bidder. *Id*. After the auction, a two-year redemption period commenced during which those with an interest in the property could pay the delinquency. *Id*. Failing that, the purchaser acquired the deed. *Id*. at 794.

The county published notice and auctioned the property. *Id*. Adams, as the high bidder, sued to quiet title to the property. *Id*. at 794-95. Mennonite did not learn of the tax sale until after the redemption period had expired. *Id*. at 794. Mennonite argued that publication notice of the tax sale was constitutionally inadequate. *Id*. at 795. The Indiana courts rejected this argument, but the Supreme Court held that "unless the mortgagee is not reasonably identifiable, constructive notice [by publication] alone does not satisfy the mandate of *Mullane*." *Id.* at 798. The Court observed that Mennonite's identity was known, and it assumed that Mennonite's address could have been ascertained by reasonably diligent efforts. *Id*. at 798 n.4. The Court held that "[n]otice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable." *Id*. at 800. The Court reversed the Indiana Court of Appeals' judgment and held that publication notice failed to provide Mennonite with due process.

In a similar vein, the Supreme Court has rejected publication notice to known creditors or those whose identities are "reasonably ascertainable"[15] and to known landowners in condemnation proceedings.[16] The Court has also held that tenants were denied due process when served only by

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[15] *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 491 (1988); *see also City of New York v. N.Y., New Haven & Hartford R.R. Co.*, 344 U.S. 293, 296-97 (1953) (holding that publication notice deprived New York City, a known creditor, of due process).

[16] *See, e.g.*, *Schroeder v. New York*, 371 U.S. 208, 211 (1962) (holding that landowner whose name and address were on the deed records and tax rolls was entitled to more than service by publication; publication notice "did not measure up to the quality of notice" demanded by the Due Process Clause); *Walker v. City of Hutchinson*, 352 U.S. 112 (1956) (holding that publication notice deprived landowner of due process in condemnation proceeding, where landowner's "name was known to the city and was on the official records"; "there seem to be no compelling or even persuasive reasons why such direct notice cannot be given").

posted notice in an eviction proceeding,[17] and that class members whose names and addresses could be ascertained through reasonable effort cannot be served by publication.[18]

From these decisions, we can distill a common principle: when a defendant's identity is known, service by publication is generally inadequate. *See, e.g.*, 1 RESTATEMENT (SECOND) OF JUDGMENTS § 2, reporter's note cmt. a (1982) ("Some courts still do not seem to have appreciated the thrust of *Mullane*. . . . The critical distinction is between notice to known claimants and notice to persons unknown. Notice by publication meets the requirement of adequate notice as to the latter but not as to the former.").

Notice by publication, constitutionally suspect in 1950, is even more vulnerable today, given the precipitous decline in newspaper readership. *See* Jennifer Lee Case, Note, *Extra! Read All About It: Why Notice by Newspaper Publication Fails to Meet* Mullane*'s Desire-to-Inform Standard and How Modern Technology Provides a Viable Alternative*, 45 GA. L. REV. 1095, 1097 (2011) (observing that, when *Mullane* was decided, over 80% of American adults read a weekday newspaper; today that number is 50%). One thing is clear: service by publication should be a last

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[17] *See Greene v. Lindsey*, 456 U.S. 444, 456 (1982) (holding that tenants were denied due process when served only by posting, regardless of the fact that tenants did not file their challenge until after default judgments had been entered against them and their time for appeal had lapsed; "in failing to afford appellees adequate notice of the proceedings against them before issuing final orders of eviction, the State has deprived them of property without the due process of law required by the Fourteenth Amendment")

[18] *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176-77 (holding that federal procedural rule 23(c)(2) requires individual notice to all class members whose names and addresses can be ascertained through reasonable effort; trial court erred in authorizing notice by publication).

resort, not an expedient replacement for personal service.[19] Because "[n]otice by publication is a poor and sometimes a hopeless substitute for actual service of notice[,] . . .[i]ts justification is difficult at best." *City of New York v. N.Y., New Haven & Hartford R.R. Co.*, 344 U.S. 293, 296 (1953); *see also Walker v. City of Hutchinson*, 352 U.S. 112, 117 (1956) ("In too many instances notice by publication is no notice at all.").

B. A State law time limit is unenforceable when it violates due process.

Mullane's due process requirements displace state statutes that restrict the time for challenging a judgment. In *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478 (1988), the Supreme Court examined whether notice by publication deprived a creditor of due process. H. Everett Pope, Jr., was hospitalized at St. John Medical Center, where he later died. *Tulsa Prof'l*, 485 U.S. at 482. His wife initiated probate proceedings and, pursuant to Oklahoma law, published notice to creditors. *Id*. At that time, Oklahoma's nonclaim statute[20] required creditors to file claims against an estate within two months, otherwise their claims would be "barred forever." *Id*. at 481. The statute required only service by publication. *Id*. Tulsa Professional Collection

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[19] *See* 2 WILLIAM V. DORSANEO III, TEXAS LITIGATION GUIDE § 32.105[1][b] (2012) ("Cautious practitioners should exhaust all other possible means of service before using citation by publication," because "[d]ue process considerations may render service by publication ineffective unless all of the available methods reasonably likely to result in actual notice to the defendant have been attempted . . . ."); 4A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1074, at 364 (3d ed. 2002) ("Publication ordinarily is not a proper means of service in actions based on in personam jurisdiction. Perhaps the only general context in which service by publication will be sufficient is when it is used to serve an absent domiciliary who cannot be served in any other way.").

[20] Such nonclaim statutes are almost universally included in state probate codes, and the Uniform Probate Code contains a similar provision barring claims filed more than four months after notice. *See* UNIF. PROBATE CODE § 3-801 (requiring creditors to "present their claims within four months after the date of the first publication of the notice or be forever barred") (amended 1989), 8 U.L.A. 208 (1998); *Tulsa Prof'l*, 485 U.S. at 479; *see also* TEX. PROB. CODE § 294(d) (providing that unsecured creditors' claims will be barred if they fail to file a claim within four months of receiving notice by certified mail).

Services, the hospital's assignee, filed its claim after the two-month deadline. *Id*. at 482. The trial court denied the claim, the Oklahoma Court of Appeals affirmed, rejecting Tulsa's argument that notice by publication violated due process, and the Oklahoma Supreme Court agreed. *In re Estate of Pope*, 733 P.2d 396, 398 (Okla. 1986).

The U.S. Supreme Court reversed. *Tulsa Prof'l*, 485 U.S. at 491. The Court noted that the State had a legitimate interest in resolving probate proceedings expediently, and it observed that "the almost uniform practice is to establish such short deadlines, and to provide only publication notice." *Id*. at 489. Nonetheless, the Court held that service by publication was unconstitutional as to known creditors or those whose identities were "reasonably ascertainable," concluding that another form of service that would provide "actual notice to [such] creditors is not so cumbersome as to unduly hinder the dispatch with which probate proceedings are conducted." *Id*. at 490. The Court remanded for the trial court to determine whether Tulsa's identity as a creditor was known or reasonably ascertainable. If it was, "then termination of appellant's claim without actual notice violated due process," regardless of the statutory two-month deadline for filing claims. *Id*.; *see also Greene v. Lindsey*, 456 U.S. 444, 456 (1982) (holding that tenants were denied due process when served only by posting, regardless of the fact that tenants did not file their challenge until after default judgments had been entered against them and their time for appeal had lapsed); *Schroeder v. New York*, 371 U.S. 208, 211 (1962) (holding that publication notice "did not measure up to the quality of notice" demanded by the Due Process Clause even though challenge not filed within statutory three year limitations period); *Walker v. City of Hutchinson*, 352 U.S. 112, 116 (1956) (holding that publication

notice deprived landowner of due process even though collateral attack filed after deadline for appeal had passed).

Most state courts that have considered the issue have reached a similar conclusion: due process prevails over a state law time limit, even one imposed on challenges to termination of parental rights or adoptions.[21]

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[21] *See McKinney v. Ivey*, 698 S.W.2d 506, 507 (Ark. 1985) (holding that statutory one year deadline for challenging adoption decree did not bar father, who had no notice of adoption until 18 months after the decree, from suing to set it aside: "We do not discount the importance of the considerations that led to the creation of a short period of limitations in the applicable statute, but on the facts of this appeal the statute must give way to the requirements of due process."); *In re the Adoption of A.W.P.*, Nos. G042254, G042300, 2010 WL 1138279, at *1 (Cal. Ct. App. Mar. 25, 2010)("Although the Legislature may enact a statute of limitations for challenging an adoption order, a parent who was never given notice of the proceedings has a federal constitutional right to challenge the order even after the limitations period under state law has expired."); *In re C.L.S.*, 252 P.3d 556, 559-60 (Colo App. 2011) (because notice by publication deprived father of due process, the judgment was void, and statutory six-month deadline to challenge judgment was inapplicable); *In re J.M.A.*, 240 P.3d 547, 551 (Colo. App. 2010) ("[T]he [90 day limitations period for challenging a termination judgment] should not be interpreted so as to bar a due process challenge to the termination of a parent's rights when, as here, the parent alleges a lack of notice or insufficient notice of the proceedings resulting from the other parent's failure or refusal to identify him as a possible parent."); *In the Matter of D.C.*, 887 N.E.2d 950, 959 (Ind. Ct. App. 2008) (holding that Indiana's six-month deadline for challenging adoption proceedings "when applied to bar Biological Mother's challenge to the adoption proceedings in this case, creates an unconstitutional due process violation. . . . Although this State has a well-recognized interest in providing stability and permanence for children, we are dubious that the General Assembly, in spite of its broad language, intended to permit the termination of constitutionally-protected parental rights under circumstances providing less notice to the affected party than is required, for example, to obtain a default judgment on a credit card debt"); *In the Interest of S.P.*, 672 N.W.2d 842, 846, 848 (Iowa 2003) (holding that judgment was void because state failed to conduct diligent search before serving by publication, and a void judgment is subject to attack at any time); *Storm v. Mullins*, 199 S.W.3d 156, 162 (Ky. 2006) (holding that if mother was denied due process in adoption proceedings, judgment must be set aside even though she failed to challenge the adoption within the statutory one-year time limit); *In re Adoption of Knipper*, 507 N.E.2d 436, 438 (Ohio Ct.App. 1986): (holding that Ohio statute barring attacks on adoption decrees after one year was "unconstitutional, and therefore ineffective, as applied in this case, because the Ohio Legislature does not constitutionally have the power to deprive the biological mother of her parental rights without valid constructive notice"); *In re Adoption of Welshans*, 946 P.2d 1160, 1163 (Or. Ct. App. 1997) (noting that one-year deadline statute was unconstitutional as applied because father did not receive notice of adoption); *Hagy v. Pruitt*, 529 S.E.2d 714, 717 (S.C. 2000) (holding that one-year limitation for collateral attack on adoption decree did not bar action to set aside adoption on ground of extrinsic fraud); *Velasco v. Ayala*, 312 S.W.3d 783, 799-800 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (holding that mother deprived of notice that comported with due process could challenge termination order even though it was not filed within Family Code section 161.211's time limit); *In re Adoption of S.L.F.*, 27 P.3d 583, 590 (Utah Ct. App. 2001): (holding that due process allowed father to contest adoption even though statute provides otherwise); *F.E. v. G.F.M.*, 547 S.E.2d 531, 542 (Va. Ct. App. 2001) (holding that application of six-month statute of limitation to father was unconstitutional).

C. Citation by publication deprived L.R. of due process.

With these principles in mind, we examine whether citation by publication was proper in this case. Parental rights are "far more precious than any property right," and when the State initiates a termination proceeding, "it seeks not merely to infringe that fundamental liberty interest, but to end it." *Santosky v. Kramer*, 455 U.S. 745, 758-59 (1982). We carefully scrutinize termination proceedings, and we strictly construe involuntary termination statutes in the parent's favor. *Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985); *cf. United States v. Kiriaze*, 172 F.2d 1000, 1002 (5th Cir. 1949) ("When, then, the United States, as here, seeks not by actual notice to the citizen but by substituted service by publication to deprive him of this priceless right [of citizenship], it must strictly comply with the statute authorizing such service.").

Personal jurisdiction, a vital component of a valid judgment, is dependent "upon citation issued and served in a manner provided for by law." *Wilson v. Dunn*, 800 S.W.2d 833, 836 (Tex. 1990). If service is invalid, it is "of no effect" and cannot establish the trial court's jurisdiction over a party. *Uvalde Country Club v. Martin Linen Supply Co.*, 690 S.W.2d 884, 885 (Tex. 1985) (per curiam). When judgment is rendered on service of process by publication, a party has two years to move for a new trial, which the trial court may grant for "good cause." TEX. R. CIV. P. 329(a). But if service was invalid, a party is entitled to a new trial without showing good cause.[22]

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[22] *See Caldwell v. Barnes*, 154 S.W.3d 93, 96-97 (Tex. 2004) (per curiam)(holding that, on bill of review, "if a plaintiff was not served, constitutional due process relieves the plaintiff from the need to show a meritorious defense"; proof of non-service is all that must be shown); *Hunsinger v. Boyd*, 26 S.W.2d 905, 907 (Tex. 1930) (observing that motion for new trial after service by publication was like an equitable bill of review); *Wiebusch v. Wiebusch*, 636 S.W.2d 540, 542 (Tex. App.—San Antonio 1982, no writ) (holding that the court "need not determine 'good cause,' actual

The Family Code permits service by publication for individuals who cannot be served personally or through the mail, or if a person's name is unknown. TEX. FAM. CODE § 102.010(a). Citation by publication is served "as in other civil cases," *id.*, and the trial court must "inquire into the sufficiency of the diligence exercised in attempting to ascertain the residence or whereabouts of the defendant . . . before granting any judgment on such service." TEX. R. CIV. P. 109; *see also* TEX. FAM. CODE § 161.107(b) ("If a parent of the child has not been personally served in a suit in which the Department of Family and Protective Services seeks termination, the department must make a diligent effort to locate that parent."). A lack of diligence makes service by publication ineffective. *Anderson v. Collum*, 514 S.W.2d 230, 231 (Tex. 1974).

We have said that "[i]f personal service can be effected by the exercise of reasonable diligence, substituted service is not to be resorted to." *Sgitcovich v. Sgitcovich*, 241 S.W.2d 142, 147 (Tex. 1951) (quoting 42 AM. JUR. § 65, p. 54). Yet we have never explained what a diligent search involves. Other courts have. The Illinois Supreme Court recently held that "because service by publication is meant as a last resort of serving summons, it should be used only after a genuine diligent inquiry to locate the individual has been completed. Put simply, relying on a computerized database search of a parent's name while ignoring, or otherwise not investigating, other potentially useful information does not constitute a diligent inquiry" under Illinois law. *In re Dar C.*, 957 N.E.2d 898, 912 (Ill. 2011) (holding that service by publication was defective, thus depriving trial court of jurisdiction and rendering its judgment void); *see also id.* at 921-22 (Burke, J., concurring)

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knowledge of the suit and a meritorious defense, (Rule 329) because that test applies only after there has been a valid citation by publication").

(noting that when state's attorney is in actual contact with parent several months before default judgment terminating parental rights, previously issued publication notice is insufficient).

The Iowa Supreme Court reached a similar conclusion, where an investigator "failed to exhaust all reasonable means to discover [the father's] whereabouts to ensure that he did receive notice of the termination proceeding." *In the Interest of S.P.*, 672 N.W.2d 842, 848 (Iowa 2003). The father's identity was known, although his address was not. The court held that in determining whether a search is diligent, courts must examine the methods employed to locate the missing person to see if they were made through channels expected to supply the missing identity. *Id*. at 846. Although the court held that a party need not use "all possible or conceivable means of discovery,", a reasonable search "is an inquiry that a reasonable person would make, and it must extend to places where information is likely to be obtained and to persons who, in the ordinary course of events, would be likely to have information of the person or entity sought." *Id*. Thus, although an investigator from the county attorney's office checked with various governmental agencies, private databases, and city directories, and visited addresses where he thought the father might live, he failed to include "the obvious inquiries a reasonable person would make under the circumstances." *Id*. at 848. He did not talk to the children, their caretaker, or their mother. Nor did he mail notice to the various addresses he had to find a forwarding address. Because the efforts fell short of a reasonably diligent search, the father was denied an opportunity to be heard, and the termination judgment was vacated. *Id*.

The Nebraska Supreme Court reached the same result. *In re Interest of A.W.*, 401 N.W.2d 477, 478-80 (Neb. 1987). Thus, where a mother's identity was known, service by publication was

not justified even though the mother had said that she was going "underground for a while" because she had written a bad check and the police were looking for her. *Id*. at 479. The department of protective services did not contact her mother, who probably had an address for her. *Id*. Because the search was "less than reasonably diligent," the mother was improperly deprived of an opportunity to be heard. *Id*. at 480. The court vacated the termination order and remanded the case for further proceedings. *Id.*

Similarly, a Georgia appellate court recently concluded that service by publication was improper in a parental rights termination case. *See Taylor v. Padgett*, 684 S.E.2d 434, 438 (Ga. Ct. App. 2009). Even though the mother said she was living in a truck, the paternal grandparents had her phone number and could communicate with her. *Id*. at 435-37. Additionally, the mother had tried to see the children less than two weeks before the hearing. Finally, her relatives could have been contacted. *Id*. at 437. "Despite the existence of these reasonably available channels of information, the [grandparents] pursued none of them prior to obtaining an order for service by publication upon [the mother]. . . . Accordingly, the record fails to support the juvenile court's determination that service by publication was proper." *Id.*

We agree with the principles stated in these cases. A diligent search must include inquiries that someone who really wants to find the defendant would make,[23] and diligence is measured not by the quantity of the search but by its quality. Even disregarding the factual dispute about what L.R. told Chidozie about her address, the uncontroverted evidence here establishes a lack of diligence.

[23] *Cf. Mullane*, 339 U.S. at 315 ("The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.").

Chidozie neglected "obvious inquiries" a prudent investigator would have made. *In the Interest of S.P.*, 672 N.W.2d at 848. She did not contact L.R.'s mother, nor she did attempt service by mail in an effort to obtain a forwarding address. She did not pursue other forms of substituted service that would have been more likely to reach L.R., such as leaving a copy with L.R.'s mother. *See* TEX. R. CIV. P. 106(b)(1); *see also Mcdonald v. Mabee*, 243 U.S. 90, 92 (1917)("To dispense with personal service the substitute that is most likely to reach the defendant is the least that ought to be required if substantial justice is to be done."). Even if L.R.'s address was not "reasonably ascertainable," an address was unnecessary for personal service on L.R. because she visited the Department's offices during the relevant time period. When a known parent has not left the jurisdiction, when she has attended at least two court hearings and has come to the Department offices for a prescheduled, hour-long meeting with her children during the very period service was being attempted, and when the Department can reach her by telephone and can communicate with her family members, service by publication cannot provide the kind of process she is due. Sending a few faxes, checking websites, and making three phone calls–none of which were to L.R. or her family members–is not the type of diligent inquiry required before the Department may dispense with actual service in a case like this. *Mullane* authorized service by publication when "it is not reasonably possible or practicable to give more adequate warning." *Mullane*, 339 U.S. at 317.[24] Here, it was both possible and practicable to more adequately warn L.R. of the impending termination of her parental rights, and notice by publication was therefore constitutionally inadequate. *Jones v. Flowers*, 547 U.S. 220, 237 (2006).

[24] *Cf. Sgitcovich v. Sgitcovich*, 241 S.W.2d 142, 147 (Tex. 1951) (concluding that "[s]tatutes which assume to authorize service of process by publication on resident defendants when personal service is practicable are unconstitutional and void").

D. Because service was invalid, Family Code section 161.211 does not bar L.R.'s claim.

We must next decide the effect of the failure to provide adequate notice. Family Code section 161.211 provides that "the validity of an order terminating the parental rights of a person who is served by citation by publication is not subject to collateral or direct attack after the sixth month after the date the order was signed." TEX. FAM. CODE § 161.211(b). L.R. contends—as did the dissent below—that this bar applies only to parents for whom service by publication is valid. Failing that, L.R. argues that the statute is unconstitutional as applied to her.[25]

Whether we conclude that the statute applies only if service was valid or that the statute is unconstitutional as applied to L.R., the reasoning and result are the same in this case. A complete failure of service deprives a litigant of due process and a trial court of personal jurisdiction; the resulting judgment is void and may be challenged at any time. *See Tulsa Prof'l*, 485 U.S. at 491 (holding that due process violation made judgment vulnerable to attack even though challenge filed beyond statutory two-month deadline); *Peralta v. Heights Med. Ctr. Inc.*, 485 U.S. 80, 86 (1988) (concluding that Texas bill-of-review requirements must yield to constitutional demands of due process); *Browning v. Prostok*, 165 S.W.3d 336, 346 (Tex. 2005) (recognizing that judgment void for lack of personal jurisdiction could be collaterally attacked); *see also supra* note 21. *McEwen v. Harrison*, 345 S.W.2d 706, 711 (Tex. 1961), has conflicting language, but its pronouncement on that subject must yield to contrary precedent from the U.S. Supreme Court. Accordingly, the statute

[25] L.R. asserts claims under both the Due Process Clause of the United States Constitution and article I, section 19 of the Texas Constitution. Because "[t]he parties have not identified any difference between the state and federal guarantees material to the issues in this case," we treat them as the same. *Nat'l Collegiate Athletic Ass'n v. Yeo*, 171 S.W.3d 863, 867-68 (Tex. 2005).

cannot place a temporal limit on a challenge to a void judgment filed by a defendant who did not receive the type of notice to which she was constitutionally entitled.[26] Despite the Legislature's intent to expedite termination proceedings, it cannot do so at the expense of a parent's constitutional right to notice. *Cf. In the Interest of M.N.*, 262 S.W.3d 799, 803 (Tex. 2008) (noting that Family Code did not indicate legislative intent to unfairly or unreasonably preclude parents from appealing final orders).

We appreciate the policy concerns the Department identifies. It, the parent, and the child share an interest in a quick and final decision. *In the Interest of M.S.*, 115 S.W.3d 534, 548 (Tex. 2003). But finality cannot trump a parent's constitutional right to be heard. *Stanley v. Illinois*, 405 U.S. 645, 646 (1972) (noting that "the Constitution recognizes higher values than speed and efficiency"). We have twice held that Family Code provisions that expedite termination proceedings must yield to due process. *See In the Interest of B.G.*, 317 S.W.3d 250, 258 (Tex. 2010) (holding that failure to file requisite statement of appellate points could not, consistent with due process, form a basis for denying parent an appellate record and that Family Code section 263.405 was unconstitutional as applied to parent); *In the Interest of J.O.A.*, 283 S.W.3d 336, 339, 347 (Tex. 2009) (holding that despite parents' failure to file timely statement of appellate points, due process required that they be allowed to appeal complaining of ineffective assistance of counsel; "section 263.405(i) is unconstitutional as applied when it precludes a parent from raising a meritorious

[26] The Department argues that L.R. waived her constitutional challenge. We disagree. When the court of appeals decides the case on an issue not presented to the trial court (and one raised by an adverse party only after appellate briefing had been concluded), a complaint arising from the court of appeals' judgment may be raised for the first time in a petition for review. *See Bunton v. Bentley*, 153 S.W.3d 50, 53 (Tex. 2004) (per curiam).

complaint about the insufficiency of the evidence supporting the termination order"). We reach the same conclusion here: the statute's time limits cannot foreclose an attack by a parent who was deprived of constitutionally adequate notice.[27]

III. A parent who learns that her rights have been terminated cannot unreasonably delay in seeking to have them reinstated, if vacating the judgment would impair another party's substantial interest in reliance on that judgment.

While actual notice of ongoing proceedings cannot substitute for proper service,[28] a parent's right to challenge a termination judgment must have bounds. Under the Restatement, a party may not challenge an invalid default judgment if, (1) after receiving actual notice of the judgment, she manifested an intention to treat the judgment as valid; and (2) granting relief would impair another person's substantial interest of reliance on the judgment. 2 RESTATEMENT (SECOND) OF JUDGMENTS, § 66. As one comment explains:

> The right to avoid a judgment subject to the infirmities referred to in this Section [including inadequate notice] is not lost by reason of delay on the part of the moving party. In traditional theory this was attributed to the proposition that a "void" judgment is necessarily void *ab initio* and hence can never have the effect of securing rights. It appears more accurate to say that lapse of time alone does not create reliance interests in a judgment, for when lapse of time is accompanied by change of circumstance there may be grounds for refusing to treat the judgment as a nullity. See § 66. Related to this is the fact that when the judgment is for money, it may not

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[27] In light of this holding, we need not reach L.R.'s argument that section 161.211's deadline, though mandatory, is an affirmative defense that may not be raised for the first time on appeal, as several courts of appeals have held. *See In re Bullock*, 146 S.W.3d 783, 790-91 (Tex. App.—Beaumont 2004, no pet.) ("[S]ection 161.211's six month limitation on attacks on termination rulings is an affirmative defense, which is a proposition a defendant may interpose to defeat a plaintiff's prima facie case."); *In re S.A.B.*, No. 04-01-00795-CV, 2002 WL 31060158, at *1 (Tex. App.—San Antonio Sept. 18, 2002, pet. denied) (holding that appellant waived the affirmative defense of limitations in section 161.211); *see also In re M.Y.W.*, No. 14-06-00185-CV, 2006 WL 3360482, at *3 (Tex. App.—Houston [14th Dist.] 2006, pet. denied) (concluding that six-month limitations period was an affirmative defense). *But see* 335 S.W.3d 816, 821. Waived or not, the deadline is inapplicable because service by publication failed to comport with due process.

[28] *Wilson v. Dunn*, 800 S.W.2d 833, 836-37 (Tex. 1990).

> affect the parties' future conduct—and hence create interests of reliance on the judgment—until an attempt is made to execute on the judgment. Many of the cases asserting that delay does not affect the right to attack a void judgment involve attacks made in resistance to execution of money judgments. *In contrast, when a judgment has prominent future effects, such as a judgment determining marital or filial status, reliance interests are very likely to arise*.

Id. § 65 cmt. c (emphasis added). Few judgments have more substantial future ramifications than those affecting parentage.

And even though the Supreme Court has never addressed the precise question before us, it has consistently highlighted the defendant's prompt action upon learning of an adverse judgment, even when service by publication violated the defendant's due process rights. *See, e.g., Mennonite*, 462 U.S. at 794-95 (noting that Mennonite "did not realize that the property had been sold" and "first learned of the tax sale" just three months before suing to set it aside); *Schroeder*, 371 U.S. at 210-11 (stating that claimant alleged that "she had never been notified of the condemnation proceedings, and knew nothing about them, nor of her right to make a claim against the city for damages to her property" until a few months before she filed suit); *Walker*, 352 U.S. at 114 (observing that petition alleged that landowner "had never been notified of the condemnation proceedings and knew nothing about them until after the time for appeal had passed"); *see also Greene*, 456 U.S. at 446-47 (noting that, despite notice by posting, defendants did not learn of eviction proceedings until "after default judgments had been entered against them, and after their opportunity for appeal had lapsed"); *Armstrong v. Manzo*, 380 U.S. 545, 548 (1965) (noting that natural father "promptly filed a motion . . . asking that the adoption decree be 'set aside'" once he learned that his child had been adopted).

The Supreme Court has also suggested that reliance interests in a parental rights case may be relevant even when the defendant's due process rights were clearly breached. *See Rothstein v. Lutheran Social Servs.*, 405 U.S. 1051 (1972). After deciding in *Stanley v. Illinois*[29] that an unwed father was entitled to a hearing before his parental rights were terminated, the Court vacated a Wisconsin Supreme Court decision to the contrary. *Id*. at 1051. The Court remanded to the Wisconsin courts for reconsideration of the father's rights in light of *Stanley*, with instructions to provide "due consideration for the completion of the adoption proceedings and the fact that the child has apparently lived with the adoptive family for the intervening period of time." *Id*.

Although courts have variously referred to a parent's inaction as waiver, estoppel, or laches, the theories merge: when a child's welfare hangs in the balance, the reliance interest created by a termination order need not yield when a parent learns of the order yet unreasonably fails to act.[30]

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[29] 405 U.S. 645, 657-58 (1972).

[30] *See, e.g., In re Adoption of A.W.P.*, Nos. G042254, G042300, 2010 WL 1138279 (Cal. Ct. App. Mar. 25, 2010) (observing that "our sister states have uniformly held that the only limitation on a parent who seeks to challenge an adoption on the ground of lack of notice is reasonableness in bringing the claim once the parent has knowledge of the order); *In re Adoption of Miller*, Nos. 8-02-22, 8-02-23, at *3-4(Ohio Ct. App. Feb. 19, 2003) (holding that mother who was notified of adoption but failed to take action for sixteen months was barred by one year statute of limitations; "'A rule that an individual's right to set aside a judgment entered without jurisdiction over him cannot be cut off by lapse of time . . . does not and should not apply to the case where interests exist superior to those of the party whose rights are terminated.'") (quoting *In re Adoption of Moore*, No. 88 AP-746, 1989 Ohio App. LEXIS 3156 (Ohio Ct. App. Aug. 15, 1989)); *Hagy v. Pruitt*, 529 S.E.2d 714, 717 n.7 (S.C. 2000) (holding that one year limitation for collateral attack on adoption decree does not bar action to set aside adoption on ground of extrinsic fraud, although doctrine of laches will apply in determining whether such action is barred); *In re Adoption of S.L.F.*, 27 P.3d 583, 589 n.4 (Utah Ct. App. 2001) (holding that due process allowed father to contest adoption even though statute said he could not, but his claim would be subject to laches if he "unreasonably delayed in bringing an action" and the respondent was "prejudiced by that delay") (internal quotation marks omitted); *see also F.E. v. G.F.M.*, 547 S.E.2d 531, 541 (Va. Ct. App. 2001) (assuming that father had duty to act diligently to preserve his rights, but concluding there was no evidence that indicated that he failed to do so); 2 RESTATEMENT (SECOND) OF JUDGMENTS § 66 cmt. a (1982)(observing that courts have used various explanations, including equity or estoppel, to justify the "apparent anomaly of . . . according a 'void' judgment the dispositive effect of a valid judgment" but concluding that decisions could instead be reconciled as reflecting party's assent to judgment).

Unlike a judgment debtor who hopes to avoid collection efforts on a money judgment, a parent whose rights have been terminated has every incentive to promptly seek reinstatement upon learning of the termination. "[A] failure to protest the judgment in such a situation can be taken as an affirmation of the judgment because the circumstances invite[] an expression of a contrary position." 2 RESTATEMENT (SECOND) OF JUDGMENTS, § 66 cmt. b. Thus, while we have held that a judgment debtor's post-judgment diligence may be irrelevant in cases involving a default judgment for money damages,[31] we cannot reach the same conclusion here.[32]

If, after learning that a judgment has terminated her rights, a parent unreasonably stands mute, and granting relief from the judgment would impair another party's substantial reliance interest, the trial court has discretion to deny relief. Here, although L.R. learned that her rights were terminated, she provided no information about when she learned of the termination order or what actions she took in response. The record is notably silent on the point. On remand, the trial court should explore this issue.[33]

IV. Conclusion

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[31] *See Ross v. Nat'l Ctr. for the Emp't of the Disabled*, 197 S.W.3d 795, 798 (Tex. 2006) (per curiam); *see also Caldwell v. Barnes*, 975 S.W.2d 535, 538-39 (Tex. 1998) (noting that "[l]aches should not bar an action on which limitations has not run unless allowing the action 'would work a grave injustice'" (quoting *Culver v. Pickens*, 176 S.W.2d 167, 170 (Tex. 1943))).

[32] *Cf. Shah v. Moss*, 67 S.W.3d 836, 847 (Tex. 2001) (holding that "[a] plaintiff may not obtain relief under the open courts provision if he does not use due diligence and sue within a reasonable time after learning about the alleged wrong.").

[33] On remand, L.R. need not be served with citation, as she is presumed to have now entered an appearance. *See* TEX. R. CIV. P. 123.

The Department's allegations against L.R. are serious, and if proven, may justify terminating her parental rights. But that determination cannot be made before she is given notice and the opportunity to be heard. Service by publication deprived L.R. of due process. She is entitled to a new trial unless she unreasonably delayed in seeking relief after learning of the judgment against her, and granting relief would impair another party's substantial reliance on the judgment. We reverse the court of appeals' judgment and remand to the trial court for further proceedings consistent with this opinion. TEX. R. APP. P. 60.2(d).

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Wallace B. Jefferson
Chief Justice

OPINION DELIVERED: July 6, 2012

IN THE SUPREME COURT OF TEXAS

NO. 11-0282

IN THE INTEREST OF E.R., ET AL., CHILDREN, RELATORS

ON PETITION FOR WRIT OF MANDAMUS

JUSTICE LEHRMANN, concurring.

On rehearing, the State contends that the Court's decision that service by publication in this case failed to comport with due process is faulty because L.R. had appeared at several hearings. Normally, if a defendant appears in open court, the appearance has "the same force and effect as if the citation had been duly issued and served as provided by law." TEX. R. CIV. P. 120. In this instance, though, L.R. never appeared in court after the State's petition to terminate her parental rights had been filed. *See* TEX. FAM. CODE § 102.009(a)(7). Accordingly, I concur with the Court's order denying the State's motion for rehearing.

Debra H. Lehrmann
Justice

OPINION DELIVERED: August 31, 2012

IN THE SUPREME COURT OF TEXAS

NO. 11-0288

JERRY MCGINTY AND VILLAS BY DESIGN, INC., PETITIONERS,

v.

THOMAS J. HENNEN, RESPONDENT

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

PER CURIAM

Villas By Design built Thomas Hennen's home. Shortly after moving in, Hennen noticed water leaks and, a few months later, mold. On his lawyer's advice, the home was inspected and PE Services found significant contamination throughout the house. A Corpus Christi contractor estimated remedial costs to be in excess of $651,000.00, which included both the cost to rid the house of mold and the cost to rebuild areas of the house affected by that remediation. Hennen sued Villas for negligence, breach of express and implied warranties, breach of contract, and DTPA violations, among other claims. We must decide whether the evidence supports the jury's damage finding.

For each claim, the jury was asked to find two damage awards: (1) the difference, as of the date of closing, in the value of the home as it was received and the value it would have had if it had been as represented, and (2) the reasonable and necessary cost to repair the home. The jury found

the difference in value to be $262,885.83 and the reasonable and necessary cost of repair to be $651,230.72. The jury also awarded $750,000 in exemplary damages and $200,000 in attorney's fees. The trial court granted Villas' motion to disregard the jury finding regarding the date Hennen should have discovered the wrongful acts and found the DTPA and negligence claims barred by limitations, leaving only the breach-of-contract damages. The trial court denied Villas' motion for judgment notwithstanding the verdict in which it argued that no evidence supported that damage award.

Hennen appealed the trial court's finding regarding limitations, and Villas cross-appealed. Villas argued for reversal of Hennen's breach-of-contract award because (1) the cost of repair exceeded the value of the house, (2) Hennen failed to establish that his repair costs were reasonable and necessary, and (3) Hennen failed to submit evidence of the cost of repair at the time of the injury. A divided court of appeals affirmed. 335 S.W.3d 642, 655.

Villas petitioned this Court for review,[1] advancing two arguments: (1) Hennen presented no evidence that the estimated repair cost was reasonable and necessary, and (2) because remedial damages would result in economic waste, the only recoverable measure of damages is the difference in market value, on which Hennen failed to produce evidence. We agree that the evidence is legally insufficient to support the jury's finding that $651,230.72 was a reasonable and necessary cost to repair Hennen's house. And we agree that Hennen did not produce evidence of the difference in

[1] Hennen did not petition this Court for review and instead raises "cross points of error" regarding the court of appeals' limitations holding for the first time in his brief on the merits. Because he did not file a petition for review, Hennen has waived these arguments. *See* TEX. R. APP. P. 53.1 ("A party who seeks to alter the court of appeals' judgment must file a petition for review."); *Ctr. for Health Care Servs. v. Quintanilla*, 121 S.W.3d 733, 735 (Tex. 2003) (per curiam).

market value, as of the date of closing, between the house received and a house built according to the contract. We reverse the court of appeals' judgment and render judgment that Hennen take nothing on his breach-of-contract claim.

There are two measures of damages for the breach of a construction contract: (1) remedial damages, which is the cost to complete or repair less the unpaid balance on the contract price, and (2) difference-in-value damages, which is the difference between the value of the building as constructed and its value had it been constructed according to the contract. *Turner, Collie & Braden, Inc. v. Brookhollow, Inc.*, 642 S.W.2d 160, 164 (Tex. 1982). A party seeking to recover remedial damages must prove that the damages sought are reasonable and necessary. *Mustang Pipeline Co. v. Driver Pipeline Co.*, 134 S.W.3d 195, 200 (Tex. 2004) (per curiam). To establish that, the plaintiff must show more than simply "the nature of the injuries, the character of and need for the services rendered, and the amounts charged therefor." *Dall. Ry. & Terminal Co. v. Gossett*, 294 S.W.2d 377, 383 (Tex. 1956). Instead, some other "evidence showing that the charges are reasonable" is required. *Id.*

Mustang Pipeline illustrates this principle. There, Driver agreed to build Mustang a pipeline. *Mustang Pipeline Co.*, 134 S.W.3d at 196. Unexpected weather prevented Driver from completing the task on time, and Driver sought an extension. *Id.* Mustang then contracted with another company to finish Driver's portion of the pipeline and sued Driver for breach of contract. *Id.* at 197. The jury found that Driver had breached the agreement and awarded Mustang $2 million. *Id.* The trial court and court of appeals, however, set that award aside because Mustang did not establish that the $2 million it paid the new company was a reasonable cost for the completion of the pipeline. *Id.*

at 198. We agreed. *Id.* at 201. Mustang's expert estimated the cost for the new company to complete the contract but did not opine about "whether that contracted amount was a reasonable cost to build a pipeline." *Id.* We noted that evidence of out-of-pocket costs alone "did not establish that the damages were reasonable and necessary." *Id.* Instead, we found it "well settled that proof of the amounts charged or paid does not raise an issue of reasonableness, and recovery of such expenses will be denied in the absence of evidence showing that the charges are reasonable." *Id.* (quoting *Gossett*, 294 S.W.2d at 383). Because Mustang failed to produce evidence on the reasonableness of its damages, we held that the trial court correctly set aside the damage award. *Id.*

Here, the jury awarded both remedial and difference-in-value damages, and the trial court rendered judgment on the amount of remedial damages. Hennen's expert's testimony was the only evidence offered on reasonable remedial damages. He derived his estimated costs of repair from an "Exactimate" program "that's used widely in the insurance industry." The program had a Houston price guide, which he compared with Corpus Christi and found to be "within a percent or two difference." He further testified that because not every price issued by the program is right, "we have to cross-reference and double check all our pricing." And finally, he testified that "some of the other costs came from subcontractors or historical data or jobs."

The court of appeals found this evidence legally sufficient to support the jury's finding that the repair costs were reasonable. 335 S.W.3d at 654. But Hennen's evidence on reasonableness is quite similar to what we concluded was insufficient in *Mustang Pipeline*. Estimated out-of-pocket expenses, like paid out-of-pocket expenses, do not establish that the cost of repair was reasonable.

Some other evidence is necessary. Neither Hennen's damage expert nor any other witness testified to the reasonableness of the estimated cost.

Hennen argues, however, that his expert testified extensively about how he derived his pricing estimate, which is the same as reasonableness. That explanation may explain how the figure was derived, but it does not in itself make the figure reasonable. In some cases, the process will reveal factors that were considered to ensure the reasonableness of the ultimate price. But that did not happen here. Hennen's expert established only that some of the pricing came from a widely used software program and some from "subcontractors or historical data or jobs." We agree with the dissenting opinion below that this evidence does not support the jury's finding that the estimated cost of repair was reasonable.

We next address the remaining damage award. The jury awarded $262,885.83 as the difference in value between the house as received and a house built according to the contract. Villas argues that no evidence supports this award because Hennen did not offer any evidence on the value of his house during the relevant time period.

The jury was instructed that "[t]he difference in value, if any, shall be determined as of the date of the closing," and we measure the evidence by the charge as given. *See Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Research Corp.*, 299 S.W.3d 106, 112 (Tex. 2009). Hennen, however, testified to the value of his house at the time of trial, which was six years after the closing date. In response to a question asking if he knew what his property was worth, Hennen stated, "In my layman's ability to do so, I have an idea of what I think it's worth today." He then proceeded to

testify that his house was worth $450,000 to $475,000 and that "without all these problems" it would be worth $875,000. This testimony is no evidence of the difference in value at the time of closing.

Hennen argues that the jury could have reasonably inferred that the difference-in-value damages at the time of closing were close to the cost of repair, $651,230.72. Thus, it was within the jury's discretion to award the lesser amount. But remedial damages and difference-in-value damages are not the same. Otherwise, there would be no need to submit separate questions for the different measures. The jury was required to determine an award based on the value of the house at the time of closing, and Hennen offered no evidence of the house's value at that time.

Hennen also argues that Villas waived this argument by not raising it in its brief to the court of appeals. But at the court of appeals, Villas argued that Hennen failed to prove *any* measure of legally recoverable damages and specifically argued that no evidence supported the difference in value damages:

> There is also no evidence upon which the jury could have based its answer of $262,885.83 as the difference in value of the house as represented and as received. There was no evidence of the value of the house when Hennen received it in September 2002, when he closed into his permanent financing and began occupying it. While Hennen did testify as to his opinion of the value of his home at the time of trial, he offered no evidence of its value when he closed.

Villas also urged this argument in the trial court and objected to the difference-in-value submission on that basis. Villas preserved its challenge to the difference-in-value damages.

No evidence supports the reasonableness of the remedial damages awarded by the jury. As a result, the court of appeals erred in affirming the trial court's judgment awarding Hennen $651,230.72. Hennen cannot opt for the difference-in-value damages awarded by the jury because

he offered no evidence of the value of his house at the time of closing. Accordingly, without hearing oral argument, we grant Villas' petition for review, reverse the court of appeals' judgment, and render judgment that Hennen take nothing. TEX. R. APP. P. 59.1, 60.2(c).

OPINION DELIVERED: June 29, 2012

IN THE SUPREME COURT OF TEXAS

NO. 11-0316

THE OFFICE OF THE ATTORNEY GENERAL OF TEXAS, PETITIONER,

v.

ANTHONY BURTON, RESPONDENT

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

PER CURIAM

In this appeal of a judgment to confirm child support arrearage, the appellant complains solely that the evidence is legally insufficient to support a judgment of no arrearage. The court of appeals affirmed on procedural grounds, concluding that the appellant had waived its no-evidence complaint by not first presenting the complaint to the trial court. 337 S.W.3d 413 (Tex. App.—Fort Worth 2011). Because we conclude that this procedural step was unnecessary to preserve the complaint for appellate review, we reverse and remand.

Theresa Cortez and Anthony Burton divorced in 1994, and Burton was ordered to pay child support of $300 per month. A few years later, Burton suffered a series of strokes. He began receiving social security disability benefits in 2003. Burton's disability also qualified his son to receive $481 a month in social security benefits.

In 2007, Burton filed a petition to modify the parent-child relationship, requesting that his child support be reduced in light of the social security benefits his son was receiving. The trial court

signed a temporary order, which significantly reduced Burton's child support obligation. The Attorney General intervened at this point, asserting that Burton was in arrears on his child support obligation. The Attorney General calculated the arrearage to be in excess of $57,000.

On September 11, 2008, the trial court heard Burton's petition to modify and the Attorney General's request to confirm the child support arrearage. At this hearing, Burton admitted he owed an arrearage but disputed the Attorney General's figures. After crediting the social security benefits received by his son, Burton estimated that his arrearage was closer to $37,000. No one at the hearing, however, produced any social security documentation establishing the amount of benefits paid to the child. At Burton's attorney's request, the trial court agreed to issue an order directing the Social Security Administration to disclose the amounts paid to Burton's son. The court then took the matter under advisement, adjourning the hearing pending receipt of the information from Social Security.

The Social Security Administration responded to the order by letter to Burton's attorney and copied to the court, stating that it could not comply with the court's order because it had never received proper consent to release this confidential information. A consent form was enclosed with the letter. Burton did not sign and return the form but instead filed a motion asking the trial court to order Cortez to execute the form. The motion was never set for hearing.

After a few months of inactivity, the trial judge sent a letter to the parties, announcing her ruling on the petition to modify. Regarding support, the court announced that Burton's child support arrearage was $0 because "[Cortez] has failed to disclose the amount of monies given to her for the child by the Social Security Administration due to [Burton's] disability, making it impossible for the

Court to correctly determine the amount of child support arrears." The court asked Burton's attorney to prepare the order, and, after the court signed it, the Attorney General appealed.

The Attorney General complained on appeal that no evidence supported the trial court's determination that Burton owed no child support arrearage. The court of appeals, however, did not reach the evidentiary question, concluding instead that the Attorney General had failed to preserve the issue for review. 337 S.W.3d at 414. The court reasoned that the Attorney General had to first complain about the zero arrearage in the trial court before it could seek appellate review of the finding for abuse of discretion. *Id*. (citing TEX. R. APP. P. 33.1(a)). A dissent disagreed that it was procedurally necessary that the Attorney General first present its no-evidence complaint to the trial court to preserve the issue for review. *Id*. at 415 (Walker, J. dissenting) (citing TEX. R. APP. P. 33.1(d)). The dissent argued that the rules of procedure imposed no such predicate but rather provided that an appellant could raise such an evidentiary complaint "for the first time on appeal." *Id*. We agree with the dissent.

A motion for new trial is not a prerequisite to an appellate complaint about the legal sufficiency of the evidence. TEX. R. CIV. P. 324 (a), (b). As a general rule, an appellant must first complain to the trial court by a timely request, objection, or motion and obtain a ruling as a prerequisite for appellate review of that complaint, but the general rule does not apply to complaints about the sufficiency of the evidence in a trial to the court. Thus, Texas Rule of Appellate Procedure 33.1(d) provides that "[i]n a nonjury case, a complaint regarding the legal or factual insufficiency of the evidence . . . may be made for the first time on appeal in the complaining party's brief."

The Attorney General complained in the court of appeals that no evidence supported the trial court's finding of a zero arrearage. This legal sufficiency complaint is clearly within the ambit of the above rules, whether the standard of review is for abuse of discretion or not. The court of appeals accordingly erred in holding that a post-judgment motion or other objection was needed to preserve the complaint for appellate review.

We have further examined the record in this case and conclude that the Attorney General's no-evidence complaint has merit. At the hearing, Burton admitted that he had not fully met his child support obligation. He conceded an arrearage existed and merely disagreed about the amount. Nothing in the record remotely suggests that Burton was not in arrears. Accordingly, no evidence supports the trial court's finding of zero.

Because the court of appeals erred in concluding that a post-trial motion was required to preserve error in this case and further because no evidence supports the trial court's judgment of a zero arrearage, we grant the petition for review and, without hearing oral argument, TEX. R. APP. P. 59.1, reverse the court of appeals' judgment and remand the case to the trial court for further proceedings.

Opinion delivered: June 8, 2012

IN THE SUPREME COURT OF TEXAS

NO. 11-0348

MICHAEL B. WANSEY, INDIVIDUALLY AND D/B/A RIO GRANDE DEFENSIVE DRIVING SCHOOL, PETITIONER,

v.

CHERYL D. HOLE, RESPONDENT

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

PER CURIAM

In this case, we must decide whether a plaintiff may recover on a claim for negligent hiring and supervision despite suffering no harm at the hands of the employee who was allegedly negligently hired. We hold that a negligent hiring claim requires that some harmful or negligent conduct of an employee—one hired pursuant to the defendant's negligent hiring or supervision practices—proximately caused the injury complained of. Accordingly, pursuant to Texas Rule of Appellate Procedure 59.1, without hearing oral argument we reverse the court of appeals' judgment and render judgment for petitioner.

Cheryl and Ronald Hole, both attorneys, enrolled their minor daughter in a driving school owned and operated by Michael B. Wansey. One evening, when Ronald arrived at the business to pick up his daughter, he was unable to find her inside. He proceeded to a door that stood ajar at the

back of the building. Opening the door, Ronald found her standing outside, in the dark, backing away from one of her driving instructors. Ronald suspected that they had engaged in inappropriate behavior, but both his daughter and the instructor denied any wrongdoing.

Thereafter, the Holes removed their daughter from the course and demanded a full refund from Wansey, since she would have to start a new course from the beginning. Wansey refused to offer any explanation for the instructor's behavior, and disclaimed any responsibility for his employee's behavior after class hours. Wansey also refused to issue a full refund, but instead sent a check for only eighteen dollars—the pro-rated cost of the four hours of instruction remaining in the course.

Cheryl Hole—the lone plaintiff in this case—sued Wansey, not for harm endured by her daughter in the allegedly inappropriate incident with the driving instructor, but for the cost of the driving course, alleging breach of contract and grossly negligent or malicious hiring, training, supervision, or retention. The jury returned a verdict in favor of Hole, finding that Wansey's negligent conduct had proximately caused harm to Hole and that Wansey had breached the contract. The jury awarded Hole $225 (the cost of the course) in compensatory damages, $5,000 in attorney fees, and $15,000 in exemplary damages. The court of appeals reversed the breach of contract claim and the award of attorney fees, but affirmed the negligent hiring judgment and the compensatory and punitive damages. ___ S.W.3d ___. The court of appeals reasoned that Hole sustained harm in the form of the un-refunded cost of the driving course, and that Wansey's negligent hiring practices proximately caused those damages. We disagree.

Though we have never expressly set out what duty an employer has in hiring employees, or said that a negligent hiring claim requires more than just negligent hiring practices, there is a broad consensus among Texas courts that such a claim requires that the plaintiff suffer some damages from the foreseeable misconduct of an employee hired pursuant to the defendant's negligent practices. *See Brown v. Swett & Crawford of Tex., Inc.*, 178 S.W.3d 373, 384 (Tex. App.—Houston [1st Dist.] 2005, no pet.) ("To prevail on a claim for negligent hiring or supervision, the plaintiff is required to establish not only that the employer was negligent in hiring or supervising the employee, but also that the employee committed an actionable tort against the plaintiff."); *Gonzales v. Willis*, 995 S.W.2d 729, 739 (Tex. App.—San Antonio 1999, no pet.) *overruled in part on other grounds by Hoffmann-La Roche Inc. v. Zeltwanger*, 144 S.W.3d 438, 447–48 (Tex. 2004); *Mackey v. U.P. Enters., Inc.*, 935 S.W.2d 446, 459 (Tex. App.—Tyler 1996, no writ). We have explicitly established this requirement in negligent entrustment cases, which are factually similar to negligent hiring claims. *Schneider v. Esperanza Transmission Co.*, 744 S.W.2d 595, 596 (Tex. 1987) ("[T]here must be a showing . . . that the [employee] driver's negligence proximately caused the accident."); *see also TXI Transp. Co. v. Hughes*, 306 S.W.3d 230, 240 (Tex. 2010) (concluding that negligent hiring should have a similar requirement to negligent entrustment cases, which requires that the employee's negligent conduct harm the plaintiff).

In this case, Hole did not present legally sufficient evidence of any harm caused by an employee of Wansey's driving school. Even had Cheryl Hole sued on behalf of her daughter, she presented no evidence that the driving instructor actually engaged in inappropriate behavior—indeed, Ronald Hole conceded in his trial testimony that he does not know that anything illegal happened,

but rather just thought the situation was inappropriate. Hole also presented no evidence that proper hiring and supervision policies would have prevented the incident, or that her daughter suffered any harm. Rather, the only harm presented in this case was the purely economic harm—caused to Cheryl as an indirect result of the alleged incident—of the loss of the driving course tuition. Besides being an indirect, attenuated harm, the loss of the tuition was harm to the subject matter of the contract between the Holes and Wansey, which is not recoverable in tort.[1] *See Sw. Bell Tel. Co. v. DeLanney*, 809 S.W.2d 493, 494 (Tex. 1991); *Sterling Chem. Inc. v. Texaco Inc.*, 259 S.W.3d 793, 796 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) ("Simply stated, under the economic loss rule, a duty in tort does not lie when the only injury claimed is one for economic damages recoverable under a breach of contract claim.").

A negligence finding requires a duty, breach, and damages proximately caused by that breach. *Doe v. Boys Club of Greater Dallas, Inc.*, 907 S.W.2d 472, 477 (Tex. 1995). Because Hole presented no evidence of harm caused by an employee hired pursuant to Wansey's hiring policies, we hold she did not present legally sufficient evidence of damages proximately caused by Wansey's alleged negligence. We reverse the judgment of the court of appeals insofar as it affirmed the award of compensatory and exemplary damages for negligent hiring and supervision, and render judgment for Wansey. In all other respects the court of appeals' judgment is affirmed.

OPINION DELIVERED: June 29, 2012

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[1] The court of appeals found the evidence legally insufficient to support the jury's breach of contract finding, and Hole did not appeal that finding to this Court.

IN THE SUPREME COURT OF TEXAS

NO. 11-0367

CITY OF NORTH RICHLAND HILLS, TEXAS, PETITIONER,

v.

LAURA FRIEND, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF SARAH FRIEND, DECEASED AND LUTHER FRIEND, INDIVIDUALLY, RESPONDENTS

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

Argued February 28, 2012

JUSTICE LEHRMANN delivered the opinion of the Court.

In this interlocutory appeal of the denial of the City's plea to the jurisdiction, we are presented with three questions concerning the application of the Texas Tort Claims Act: (1) whether the election of remedies provisions in section 101.106 require dismissal of this suit; (2) whether the Friends' claim is one for which the City's governmental immunity has been waived under section 101.021(2) of the Act; and (3) whether there were sufficient allegations of "conscious indifference or reckless disregard for the safety of others" to satisfy section 101.055(2). Because we hold, in answer to the second question, that the City's immunity has not been waived for this sort of claim,

we do not reach the other two questions. We reverse the judgment of the court of appeals and render judgment for the City.

I. Facts

Sarah Friend collapsed on July 14, 2004 while standing in line for the "Green Extreme" water slide at NRH_2O, a city-owned water park in North Richland Hills. City employees responded with oxygen masks and other airway equipment, but did not retrieve an Automatic External Defibrillator device (AED) from a storage closet elsewhere on the park grounds. As a result, Sarah did not receive defibrillation until twenty-one minutes after her initial collapse, when the city fire department arrived. She was rushed to the hospital but could not be revived, and she died shortly after noon that day. The Friends allege that had the city employees used the AED on Sarah immediately, prior to using the airway equipment, the device would have saved her life.[1]

Friend's estate sued several defendants, including the City and some of its employees, claiming that their gross negligence in failing to retrieve and use the AED caused Sarah's untimely death. Pursuant to section 101.106(e) of the Texas Tort Claims Act, the trial court dismissed the employees. *See* TEX. CIV. PRAC. & REM. CODE § 101.106(e) (providing for dismissal of the employees on the government's motion when a governmental unit and its employees are both sued). Then, after obtaining the dismissal of the employees, the City also sought its own dismissal on three alternative grounds.

[1] Plaintiff's counsel explained at oral argument that the use of airway equipment alone during a cardiac episode was insufficient, since an open airway is of no use if the heart's normal rhythm has not been restored via defibrillation.

First, it invoked section 101.106(b) of the Tort Claims Act, which provides that filing suit against an employee forever bars suit against the governmental employer for the same conduct unless the government consents. *See id.* § 101.106(b). The City contends that when a plaintiff sues both a governmental unit and its employees, subsections 101.106(e) and (b) are both triggered and interact to require that both the employees and the governmental unit be dismissed.

Second, the City argued that the Friends' negligence claim does not fit within the narrow waiver of immunity provided by the Tort Claims Act. Sections 101.021 and 101.022 allow suits against governmental units only in cases involving the operation or use of motor vehicles, § 101.021(1), premises liability, § 101.022, or the "condition or use of tangible personal . . . property," § 101.021(2). The City contended that none of those categories applied to this case.

Finally, the City argued that even if this were the type of claim that might circumvent governmental immunity, the Friends did not sufficiently plead conscious indifference, as required by section 101.055 of the Tort Claims Act. That provision limits the Act's waiver of immunity, in emergency situations, to cases involving "conscious indifference or reckless disregard for the safety of others." *Id.* § 101.055(2).

The trial court denied the City's plea to the jurisdiction, and the court of appeals affirmed. 337 S.W.3d 387. The court of appeals reasoned that the bar in section 101.106(b) does not apply if the Friends have pled a waiver of the City's immunity. *Id.* at 392. Then, the court held that the Friends' claims did fall within section 101.021(2)'s waiver because it presented the lack of an "integral safety component." *Id.* at 395. Section 101.021 has been interpreted to permit a plaintiff to rely on the "condition or use of tangible personal property" waiver provision if the plaintiff alleges

that the governmental unit used property that lacked an integral safety component. *See Lowe v. Tex. Tech Univ.*, 540 S.W.2d 297, 300 (Tex. 1976). The court of appeals also found sufficient allegations of conscious indifference to overcome section 101.055. 337 S.W.3d at 397. It remanded the case to the trial court, and this petition for review followed. We hold that the City's immunity was not waived by section 101.021. Accordingly, we reverse the court of appeals' judgment and render judgment dismissing the Friends' claims against the City.

II. Waiver of Immunity

The court of appeals determined that the Friends had alleged sufficient facts to implicate the waiver of the City's immunity found in section 101.021(2) of the Tort Claims Act. That provision states:

> A governmental unit in the state is liable for:
>
> . . .
>
> (2) personal injury or death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law.

TEX. CIV. PRAC. & REM. § 101.021. This provision has led to vigorous debate over the proper parameters of the waiver, prompted numerous calls for legislative intervention and clarification, and spawned a host of cases exploring the outer bounds of this "use" exception to governmental immunity. Among the interpretive glosses on the statute is the rule, first articulated in *Lowe v. Texas Tech University*, that the provision by the state of personal property lacking an "integral safety

component"[2] constitutes a condition or use under section 101.021(2). 540 S.W.2d at 300. Despite rejecting the Friends' other arguments that their suit alleges a use or condition of property, the court of appeals was satisfied that the Friends had alleged a viable integral safety component theory. We disagree.[3]

It is well settled that mere nonuse of property does not suffice to invoke section 101.021(2)'s waiver. *Kassen v. Hatley*, 887 S.W.2d 4, 14 (Tex. 1994). If it did, governmental immunity "would be rendered a nullity," because "[i]t is difficult to imagine a tort case which does not involve the use, or nonuse, of some item of real or personal property." *Kerrville State Hosp.*, 923 S.W.2d at 586 (internal quotation marks omitted). But in some cases we have held that, when a plaintiff alleges that property used by the state lacks an integral safety component, immunity is waived under section 101.021(2). *Lowe*, 540 S.W.2d at 300; *see also Robinson v. Cent. Tex. MHMR Ctr.*, 780 S.W.2d 169, 171 (Tex. 1989).

In *Lowe*, the plaintiff complained of the failure by Texas Tech University to give him a knee brace with his football uniform. 540 S.W.2d at 298. We reasoned that because a knee brace was, in light of Lowe's previous knee injury, an integral part of his football uniform, the failure to furnish it constituted a condition or use of property sufficient to invoke section 101.021(2). *Id.* at 300. Following this precedent, we held in *Robinson* that the provision of swimming gear to an epileptic patient without a life preserver also established waiver. 780 S.W.2d at 171.

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[2] Though the rule was first described in *Lowe*, the term "integral safety component" was not coined until our opinion in *Kerrville State Hospital v. Clark*. 923 S.W.2d 582, 585 (Tex. 1996).

[3] The Friends did not file a petition for review with this Court challenging the rejection of their other theories for recovery, so the only question before us is whether they have stated an integral safety component theory.

But our recent holdings have limited the precedential value of those two cases. In *Kerrville State Hospital*, we described these cases as representing "the outer bounds of what we have defined as use of tangible personal property." 923 S.W.2d at 585. "The precedential value of these cases is therefore limited to claims in which a plaintiff alleges that a state actor has provided property that lacks an integral safety component and that the lack of this integral component led to the plaintiff's injuries." *Id.* In *Bishop*, we further limited the integral safety component doctrine to cases where a safety component is completely lacking, as opposed to merely inadequate. *Tex. A&M Univ. v. Bishop*, 156 S.W.3d 580, 584 (Tex. 2005).

Nevertheless, the Friends rely on *Lowe* and *Robinson* to contend that their claims fall within section 101.021(2)'s waiver, because they alleged that the City used emergency equipment but omitted an integral component of that equipment, the AED. Such a formulation threatens to eviscerate any limiting principle on "condition or use" entirely. It would enable plaintiffs, through artful pleading, to enlarge the scope of the waiver provided by section 101.021(2) by alleging that a governmental actor failed to use one particular type of equipment among a broadly defined class of property that may have been employed. Despite our binding precedent that forbids claims for nonuse, plaintiffs could circumvent immunity simply by alleging that property that was not used is linked, albeit indirectly, to property that was used—and used properly. More troubling, this expansion of the integral safety component theory would create a disincentive for governmental units to provide any form of health or safety equipment at their establishments. Counsel for the Friends acknowledged at oral argument that the Friends' theory would, paradoxically, fail if the City had stood by and watched Sarah die rather than attempt to use the oxygen mask and other airway

equipment. The Legislature could not have intended such a perverse disincentive when it enacted section 101.021.

The Friends have not stated an integral safety component theory sufficient to waive the City's immunity. The Legislature intended governmental units to be liable for negligently using harmful property, but not for failing to use it. *Kassen*, 887 S.W.2d at 14.

III. Conclusion

The doctrine of governmental immunity protects the public fisc by prohibiting suits against governmental units (or their employees acting within the scope of their employment) except in narrow circumstances prescribed by statute. When a suit fails to allege facts sufficient to implicate a waiver of that immunity, the suit is barred. In this case, the Friends essentially allege no more than a failure to use an AED, which does not fall within the waiver of immunity in section 101.021(2) of the Tort Claims Act. The trial court should have dismissed the case. Accordingly, we reverse the judgment of the court of appeals, and render judgment dismissing the Friends' claims.

_____
Debra H. Lehrmann
Justice

OPINION DELIVERED: June 29, 2012

IN THE SUPREME COURT OF TEXAS

NO. 11-0400

REDDY PARTNERSHIP/5900 NORTH FREEWAY LP AND
REDDY PARTNERSHIP, ETAL., PETITIONERS,

v.

HARRIS COUNTY APPRAISAL DISTRICT, RESPONDENT

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

PER CURIAM

In this ad valorem property tax case, we decide whether a plaintiff's trivial misnomer in its petition for judicial review defeats a trial court's jurisdiction. Because we conclude that it does not, we grant the petition for review, reverse the court of appeals' judgment, and remand the case to the trial court for further proceedings.

The property is located at 5900 North Freeway, in Houston. On June 21, 2002, Reddy Partnership, a Texas general partnership, sold it to Reddy Partnership/5900 North Freeway, L.P., a Texas limited partnership. On April 28, 2008, Harris County Appraisal District (HCAD) mailed a Notice of Appraised Value of the property to "Reddy Partnership, ETAL [sic]." A notice of protest was subsequently filed with HCAD under the same name, contesting the 2008 tax assessment. After a hearing, HCAD's Appraisal Review Board rejected the protest. The Board's order, addressed to

"Reddy Partnership, ETAL," was mailed to the partnership's designated agent, O'Connor & Associates.

On September 11, 2008, "Reddy Partnership ETAL, as the property owners, [sic]" timely filed a petition for judicial review challenging the Board's determination. Fifteen months later, after the 45-day statute of limitations to appeal the Board's order had passed, HCAD filed a plea to the jurisdiction, contending that the trial court lacked subject matter jurisdiction over the petition because the plaintiff, "Reddy Partnership," was not the owner of the property on January 1, 2008, and, therefore, lacked standing to seek judicial review of the Board's order.[1] In support of its plea, HCAD attached a copy of the warranty deed in which Reddy Partnership sold the property to Reddy Partnership/5900 North Freeway, L.P.

In response, Reddy Partnership, ETAL amended the petition to name Reddy Partnership/5900 North Freeway, L.P. as a plaintiff in the suit, and moved to substitute Reddy Partnership/5900 North Freeway, L.P. as Reddy Partnership, ETAL's true name.[2] Reddy Partnership, ETAL also responded to HCAD's plea, arguing that the trial court had jurisdiction because "Reddy Partnership, ETAL" is the common name for Reddy Partnership/5900 North Freeway, L.P., as reflected in HCAD's own records. Reddy Partnership/5900 North Freeway, L.P. argued that it acted under its common name,

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[1] The Texas Legislature has since amended Tax Code section 42.21(a) to extend the time to file a petition for review from forty-five days to sixty days from the board's order, effective June 19, 2009. *See* Acts of May 26, 2009, 81st Leg., R.S., ch. 905, § 1, 2009 Tex. Gen. Laws 2435 (current version at TEX. TAX CODE § 42.21(a)).

[2] Apparently, when Reddy Partnership, ETAL amended the petition, it *added* "Reddy Partnership/5900 North Freeway, L.P." as a plaintiff, rather than *substituted* Reddy Partnership/5900 North Freeway, L.P., for Reddy Partnership, ETAL, contrary to what it purported to do in its Rule 28 motion. As a result, the style of the case lists both Reddy Partnership, ETAL and Reddy Partnership/5900 North Freeway, L.P. as plaintiffs, although Reddy Partnership, ETAL's Rule 28 motion and response to HCAD's plea suggest that it intended to substitute the plaintiff's name for another, not to add an additional plaintiff.

Reddy Partnership, ETAL, when completing the administrative protest process and timely filing the petition for review. Consequently, it had standing to seek judicial review of the Board's order. It argued that it cured any procedural defect by amending the petition to correct or change its name pursuant to Tax Code section 42.21(e)(1). *See* TEX. TAX CODE § 42.21(e)(1) (providing that a timely filed petition "may be subsequently amended to . . . correct or change the name of a party"). And it argued that Rule of Civil Procedure 28 allowed amendment to substitute Reddy Partnership/5900 North Freeway, L.P. as the property owner's true name. *See* TEX. R. CIV. P. 28. (providing that any partnership "doing business under an assumed name may sue or be sued in its partnership, assumed or common name").

The trial court granted HCAD's jurisdictional plea and dismissed the suit. Reddy Partnership, ETAL and Reddy Partnership/5900 North Freeway, L.P. appealed. The court of appeals affirmed, holding that because the suit had not been filed by the property owner, the trial court lacked subject matter jurisdiction. ___ S.W.3d ___, ___. The court of appeals assumed that "Reddy Partnership, ETAL" referred to "Reddy Partnership," the general partnership that previously owned the property. *Id.* at ___. Because "Reddy Partnership" did not own the property as of January 1, 2008, and did not have rights to protest the Board's order as either a lessee or an agent, it lacked standing to contest the Board's order. *Id.* at ___. Nor did Reddy Partnership/5900 North Freeway, L.P. have standing because it did not itself protest the appraisal and the amended petition naming it as a plaintiff was not filed until after the deadline to appeal the order had passed. *Id.* at ___.

The court of appeals rejected petitioner's reliance on Tax Code section 42.21(e)(1). According to the court, section 42.21(e) presupposes that the petition was brought by a proper party

with standing to seek judicial review—which "Reddy Partnership" was not. *Id.* at ___. The court of appeals also held that Rule 28 would not permit substitution in this case because the named entity must show it is in fact doing business under that common name and "Reddy Partnership" failed to make such a showing. *Id.* at ___. The court of appeals concluded that because no proper party timely appealed to the trial court before the statute of limitations passed, the trial court did not acquire subject matter jurisdiction, and the Board's order became final.

Reddy Partnership, ETAL and Reddy Partnership/5900 North Freeway, L.P. petitioned this Court for review, arguing that the trial court erred in granting HCAD's plea because the administrative protest and petition for judicial review were filed by the property owner under its common name. The misnomer, petitioners argue, was corrected by Reddy Partnership, ETAL's amended petition naming Reddy Partnership/5900 North Freeway, L.P. as a plaintiff, which was permitted by section 42.21(e) and Rule 28.

As a general rule, a property owner is the only party, other than the chief appraiser, with standing to protest tax liability either at the review board or court. *See* TEX. TAX CODE §§ 42.01, 42.02; *Gregg Cnty. Appraisal Dist. v. Laidlaw Waste Sys., Inc.*, 907 S.W.2d 12, 16 (Tex. App.—Tyler 1995, writ denied). But a property owner may designate a lessee or agent to act on its behalf for any purpose under the Tax Code, including filing a tax protest. TEX. TAX CODE § 1.111(a) (authorizing a designated lessee or agent to act for a property owner); *id.* § 41.413(b) (authorizing a lessee to protest for the property owner in certain circumstances). Thus, to qualify as a party with standing to seek judicial review of an appraisal review board's tax determination, a party must either

be the chief appraiser, an owner of the property, a designated agent of the owner, or an authorized lessee under Tax Code section 41.413.

In addition, section 42.21(a) of the Tax Code requires "[a] party who appeals" to timely file a petition for judicial review with the trial court. TEX. TAX CODE § 42.21(a). If a party fails to timely file a petition with the district court, any appeal is barred and a board's determination becomes final. *See id.* A petition that is timely filed under section 42.21(a) "may be subsequently amended to . . . correct or change the name of a party." *Id.* § 42.21(e)(1).

The court of appeals incorrectly assumed that "Reddy Partnership" protested the Board's order and filed the original petition for review, even though the record makes clear that the administrative protest and petition were filed under the misnomer "Reddy Partnership, ETAL." Misnomer arises "when a party misnames itself or another party, but the correct parties are involved." *In re Greater Hous. Orthopaedic Specialists, Inc.*, 295 S.W.3d 323, 325 (Tex. 2009) (per curiam). When the correct party sues or is sued under the incorrect name, "the court acquires jurisdiction after service with the misnomer if it is clear that no one was misled or placed at a disadvantage by the error." *Sheldon v. Emergency Med. Consultants*, *I, P.A.*, 43 S.W.3d 701, 702 (Tex. App.—Fort Worth 2001, no pet.).

This is in contrast to a misidentification, which "arises when two separate legal entities actually exist and a plaintiff mistakenly sues the entity with a name similar to that of the correct entity." *Chilkewitz v. Hyson*, 22 S.W.3d 825, 828 (Tex. 1999). A misidentification's consequences are generally harsh, but the same is not true for misnomers. *See In re Greater Hous. Orthopaedic Specialists, Inc.*, 295 S.W.3d 323, 325 (Tex. 2009) (per curiam). Courts generally allow parties to

correct a misnomer so long as it is not misleading. *Id.* "In a case like this, in which the plaintiff misnames itself, the rationale for flexibility in the typical misnomer case—in which a plaintiff misnames the defendant—applies with even greater force." *Id.* at 326.

Here, HCAD did not question ownership at the administrative level or during the first year and a half of litigation. Nor was HCAD confused or prejudiced. On the contrary, HCAD records referred to the owner of the subject property as "Reddy Partnership, ETAL." HCAD addressed the notice of the appraised value of the property, the notice of protest, and the Board's order determining the protest to "Reddy Partnership, ETAL"—not Reddy Partnership/5900 North Freeway, L.P. Even assuming the owner's name caused confusion, Reddy Partnership, ETAL amended the petition and corrected the name. *See* TEX. TAX CODE § 42.21(e)(1). This amendment relates back to the filing of the original petition. *See In re Greater Hous. Orthopaedic Specialists*, 295 S.W.3d at 326 (noting that a petition involving a misnomer "is nonetheless effective, for limitations purposes, when filed, with any subsequent amendment relating back to the date of the original filing").

The property owner exhausted its administrative remedies and timely filed a petition for judicial review. The trial court acquired jurisdiction to entertain the appeal. We need not reach the petitioners' remaining issues, including whether newly enacted Tax Code section 42.016 provides for jurisdiction in this case. We grant the petition for review, and without hearing oral argument, reverse the court of appeals' judgment and remand the case to the trial court for further proceedings. TEX. R. APP. P. 59.1, 60.2(d).

OPINION DELIVERED: June 29, 2012

IN THE SUPREME COURT OF TEXAS

NO. 11-0429

CHARLES MANBECK, PETITIONER,

v.

AUSTIN INDEPENDENT SCHOOL DISTRICT, RESPONDENT

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

PER CURIAM

In this workers' compensation case, the Austin Independent School District (AISD) argues that it is immune from an award of attorney fees granted to its injured employee. We agree and accordingly reverse in part the judgment of the court of appeals.

Charles Manbeck, an AISD employee, injured himself on the job while tightening a door closer. AISD, a self-insured governmental entity deemed an "insurance carrier" under the Texas Workers' Compensation Act (Act), *see* TEX. LAB. CODE § 401.011(27), acknowledged that Manbeck had been injured but disputed whether the compensable injury extended to two alleged conditions pertaining to Manbeck's back and right shoulder.

The case proceeded through an administrative phase under the Act. A benefit review conference failed to resolve the dispute, *see id.* §§ 410.021–.034, and the case proceeded to a contested case hearing, *see id.* §§ 410.151–.169. The hearing officer sided with Manbeck on the

contested issues. AISD sought review before the administrative appeals panel, *see id.* §§ 410.201–.209, which also sided with Manbeck. AISD then sought judicial review of the panel's decision. *See id.* §§ 410.251–.258. In the district court, Manbeck filed a counterclaim seeking attorney fees under Section 408.221(c) of the Act, which provides: "An insurance carrier that seeks judicial review . . . of a final decision of the appeals panel . . . is liable for reasonable and necessary attorney's fees . . . incurred by the claimant as a result of the insurance carrier's appeal if the claimant prevails on an issue on which judicial review is sought by the insurance carrier . . . ."

AISD filed a nonsuit in the trial court, leaving only the counterclaim for fees. The case was tried to a jury, and Manbeck won a judgment on the verdict that included $36,000 for fees incurred in the trial court prior to the nonsuit, $17,415 for fees incurred in the trial court after the nonsuit, and contingent appellate fees. AISD appealed, arguing to the court of appeals that (1) the evidence was factually and legally insufficient to support the pre-nonsuit fee award, and (2) the post-nonsuit fee award could not stand because the attorney fee statute did not provide for an award of "fees for fees," that is, fees incurred in the pursuit of fees. The court of appeals rejected the first argument but agreed with the second argument. 338 S.W.3d 147, 149, 161. AISD brought a petition for review in the Supreme Court, arguing for the first time that governmental immunity from suit barred the award of attorney fees.

Manbeck contends that AISD has waived its defense of governmental immunity by failing to raise the defense in the trial court or the court of appeals. Raising the defense at the earliest opportunity is certainly a preferred practice. However, we recognize today in *Rusk State Hospital v. Black*, ___ S.W.3d ___, that the defense of sovereign immunity from suit sufficiently implicates

subject matter jurisdiction to conclude that the defense may be raised for the first time on appeal, regardless of whether sovereign immunity equates to subject matter jurisdiction for all purposes. Consistent with *Rusk State Hospital*, we conclude that AISD may assert its governmental immunity on appeal in this Court.

Reaching the merits of the immunity question, we must agree with AISD that it is immune from Manbeck's claim for attorney fees. The fee-shifting provision applies to governmental entities, if at all, under the Political Subdivisions Law, codified as Chapter 504 of the Labor Code, TEX. LAB. CODE §§ 504.001–.073. Section 504.002(a) makes portions of the Workers' Compensation Act applicable to certain political subdivisions, including school districts, *see id.* § 504.001(3), by providing a list of provisions of the Act that apply to political subdivisions. Section 504.002(b) provides that, as to this list of "adopted" provisions, *see Travis Cent. Appraisal Dist. v. Norman*, 342 S.W.3d 54, 56 (Tex. 2011), a political subdivision is deemed an "employer" under the Workers' Compensation Act. The Political Subdivisions Law, however, is qualified. Section 504.002(a) provides that the provisions of the Act apply to the list of adopted provisions "except to the extent that they are inconsistent with this chapter." Section 504.002(c) provides that "[n]either this chapter nor [the Workers' Compensation Act] authorizes a cause of action or damages against a political subdivision . . . beyond the actions and damages authorized by" the Texas Tort Claims Act, TEX. CIV. PRAC. & REM. CODE §§ 101.001–.109. Further, Section 504.053(e) provides that "[n]othing in this chapter waives sovereign immunity or creates a new cause of action."

The list of adopted provisions in Section 504.002 includes Chapter 408, the chapter containing the attorney fee provision at issue. TEX. LAB. CODE § 504.002(a)(6). The issue before

us is whether inclusion of the attorney fees provision in the list of adopted provisions set out in the Political Subdivisions Law amounts to a waiver of governmental immunity from such fees. The answer is no.

A similar issue arose in *City of La Porte v. Barfield*, 898 S.W.2d 288 (Tex. 1995). We addressed whether the retaliatory discharge provision of the Workers' Compensation Act applied to governmental entities. As with the attorney fee provision at issue in today's case, the retaliatory discharge provision was an adopted provision listed in the Political Subdivisions Law. We held that in light of the requirement that a waiver of governmental immunity must be clear and unambiguous, inclusion of the provision in the list of adopted provisions was not sufficient by itself to waive governmental immunity. We stated that "adoption of the Anti-Retaliation Law . . . does not express a clear intent to waive immunity," *id.* at 295, in part because adoption of the provision in the Political Subdivisions Law gave no clearer indication of legislative intent to waive immunity than adoption of an exemplary damages provision at issue in a prior decision where we had rejected a similar waiver argument. *Id.* at 296 (discussing *Duhart v. State*, 610 S.W.2d 740 (Tex. 1980)); *see also Norman*, 342 S.W.3d at 58 ("We concluded in *Barfield* that this incorporation was, without more, an insufficient expression of the government's intent to waive immunity."). But we ultimately concluded in *Barfield* that another provision found in the Political Subdivisions Law, TEX. LAB. CODE § 504.003, an election of remedies provision specific to retaliatory discharge claims, provided sufficient additional indication of legislative intent to conclude that the Legislature had waived immunity. "This election of remedies provision . . . persuades us, in the end, that the Legislature must have intended to waive political subdivisions' immunity for liability imposed by the Anti-

Retaliation Law." *Barfield*, 898 S.W.2d at 298. However, we also considered the effect of the language in the Political Subdivisions Law indicating that it did not authorize causes of action or damages against a political subdivision beyond those authorized by the Tort Claims Act. *Id.* at 297. As noted above, this limitation remains in the current version of the Political Subdivisions Law. We held that a "literal reading" of this language presented some "difficulties," but also concluded that "it cannot be ignored completely." *Id.* at 298–99. We ultimately held that this language referencing the Tort Claims Act at a minimum precluded exemplary damages and capped actual damages in the same manner that such damages are limited by the Tort Claims Act. *Id.* at 299.

Under *Barfield*, Manbeck's claim for attorney fees is barred by governmental immunity. As *Barfield* holds, the inclusion of Chapter 408—the chapter containing the attorney fee provision—in the Political Subdivisions Law's list of adopted provisions is not sufficient by itself to waive governmental immunity. Further, *Barfield* indicates that the remedies available to a claimant under the Political Subdivisions Law are limited to those available under the Tort Claims Act, which does not provide for an award of attorney fees. *See Tex. Educ. Agency v. Leeper*, 893 S.W.2d 432, 448 (Tex. 1994) (Gonzalez, J., concurring in part and dissenting in part) (noting that "the Texas Tort Claims Act does not expressly provide for the recovery of fees and costs, and no court has awarded them to a plaintiff under the Act"); *State Office of Risk Mgmt. v. Davis*, 315 S.W.3d 152, 154 (Tex. App.—El Paso 2010, pet. denied) (holding attorney fees unavailable in workers' compensation case because "the Texas Tort Claims Act does not expressly provide for the recovery of attorney's fees"). Moreover, *Barfield* held that a claim for limited relief was available under the retaliatory discharge provision only because the Political Subdivisions Law had an election of remedies provision specific

to retaliatory discharge claims which indicated legislative intent to waive immunity. No similar provision of the Political Subdivisions Law applies to Manbeck's claim for attorney fees. In short, if *Barfield* were the final word, Manbeck's claim for attorney fees would fail.

This result is all the more compelled by our later decision in *Travis Central Appraisal District v. Norman*, 342 S.W.3d 54 (Tex. 2011), where we revisited the issue of whether a retaliatory discharge claim could be lodged against a governmental entity. We held that *Barfield* was no longer good law in light of a subsequent amendment to the Political Subdivisions Law. We noted that in 2005 a new provision, TEX. LAB. CODE § 504.053(e), was added to the Political Subdivisions Law, providing that "[n]othing in this chapter waives sovereign immunity or creates a new cause of action." We first noted that this "no-waiver provision" was a "broadly-worded provision" applying to all of Chapter 504. 342 S.W.3d at 57. We held that it applied to both sovereign and governmental immunity, the latter protecting political subdivisions including school districts. *Id.* at 57–58. We then concluded this provision had so "muddled the issue" of immunity that we could no longer hold that the waiver of immunity with respect to wrongful discharge claims was clear and unambiguous. *Id.* at 59. Instead, we concluded that "the current version of the Political Subdivisions Law is too internally inconsistent to satisfy that standard." *Id.*

As compelled by *Norman*, the current Political Subdivisions Law does not clearly and unambiguously waive governmental immunity against Manbeck's claim for attorney fees. As in *Norman*, the remedies provision on which the claimant relied, and its inclusion in the Political Subdivision's list of adopted provisions, occurred prior to 2005. The fee-shifting provision of Chapter 408 on which Manbeck relies was enacted in 2001. Act of May 25, 2001, 77th Leg., R.S.,

ch. 1456, § 8.01, sec. 408.221(c), 2001 Tex. Gen. Laws 5167, 5189. Chapter 408 has been included in the list of adopted provisions under Chapter 504 of the Labor Code—the codified version of the Political Subdivisions Law—since the Labor Code was enacted in 1993. Act of May 12, 1993, 73d Leg., R.S., ch. 269, § 1, sec. 504.002(6), 1993 Tex. Gen. Laws 987, 1250. In 2005, the anti-waiver provision set out in Section 504.053(e) was enacted, leading us to conclude in *Norman* that, even with the benefit of an election of remedies provision supporting a waiver of immunity and not available in today's case, the Political Subdivisions Law had simply become too "internally inconsistent" to meet the standard of a clear and unambiguous waiver of immunity. Manbeck's claim, therefore, must fail under *Norman* even if it were cognizable under *Barfield*.

Manbeck contends that AISD, by bringing this suit, cannot avail itself of governmental immunity. AISD brought this suit as part of the review process under the workers' compensation regime, but it never sought affirmative relief. The suit was brought to challenge Manbeck's award secured in the administrative phase of the process.

We explored the manner in which a governmental entity's assertion of its own affirmative claim affects its immunity from suit in two recent cases. In *Reata Construction Corp. v. City of Dallas*, 197 S.W.3d 371 (Tex. 2006), we held that when a governmental entity asserts an affirmative claim for monetary damages against its opponent, the entity "does not have immunity from [the opponent's] claims germane to, connected to, and properly defensive to claims asserted by [the governmental entity], to the extent any recovery on those claims will offset any recovery by [the governmental entity] from [its opponent]." *Id.* at 378. We noted that we usually defer to the Legislature to waive immunity, *id.* at 375, and repeatedly made clear that the rule we were adopting

was narrow and carefully tailored, and applicable only when the governmental entity asserts an affirmative claim for monetary damages, *id.* at 375–78. In *City of Dallas v. Albert*, 354 S.W.3d 368 (Tex. 2011), we followed the rule we adopted in *Reata*, and recognized that this rule is limited to cases where the governmental entity asserts an affirmative claim for monetary relief against which the opponent's claims can be offset. *Id.* at 373–75.

Reata and *Albert*, our latest decisions on the effect of litigation conduct on governmental immunity, do not fit the facts of today's case. AISD never brought an affirmative claim for money damages against which Manbeck's claims could be offset. AISD instead merely availed itself of its statutory right to challenge Manbeck's award of monetary relief by pursuing an appeal of the administrative decision to district court. We hold that AISD's decision to challenge in court the administrative award of benefits to Manbeck did not result in a loss of AISD's governmental immunity from Manbeck's claim for attorney fees.

For these reasons, we affirm the court of appeals' judgment insofar as it reversed the trial court's award of attorney fees incurred after the nonsuit and the trial court's award of contingent appellate attorney fees. We reverse the court of appeals' judgment insofar as it affirmed the trial court's award of attorney fees incurred prior to the nonsuit.

OPINION DELIVERED: August 31, 2012

IN THE SUPREME COURT OF TEXAS

NO. 11-0434

IN RE DAVID LOPEZ, SR., INDIVIDUALLY AND AS REPRESENTATIVE FOR THE ESTATE OF SAN JUANA LOPEZ, DECEASED, CLAUDIA GRIFALDO, CLARO LOPEZ, DALIA LOPEZ, RAUL LOPEZ, EDUARDO LOPEZ, ROLANDO LOPEZ, DAVID LOPEZ, JR.

ON PETITION FOR WRIT OF MANDAMUS

PER CURIAM

In this original proceeding, we are asked to decide whether section 171.096(b) or 171.096(c) of the Texas Civil Practice and Remedies Code applies when an arbitration hearing has been held in a different county from the one agreed to in a written contract. Section 171.096(b) states that if an arbitration agreement "provides that the hearing before the arbitrators is to be held in a county in this state, a party must file the initial application [to vacate the arbitration award] with the clerk of the court of that county." TEX. CIV. PRAC. & REM. CODE § 171.096(b). Section 171.096(c) mandates that "[i]f a hearing before the arbitrators has been held, a party must file the initial application [to vacate the arbitration award] with the clerk of the court of the county in which the hearing was held." *Id.* § 171.096(c). The parties had an agreement specifying that arbitration was to take place in Victoria County, but instead had an arbitration hearing in Travis County. When Regency Nursing Center Partners of Yoakum, Ltd. ("Yoakum"), one of the parties to the agreement, filed an application in Victoria County to vacate the arbitration award, David Lopez, Sr., individually

and as a representative for the estate of San Juana Lopez, deceased, Claudia Grifaldo, Claro Lopez, Dalia Lopez, Raul Lopez, Eduardo Lopez, Rolando Lopez, and David Lopez, Jr. (collectively "the Lopezes"), the other party, filed a motion to transfer venue to Travis County based on section 171.096(c). Yoakum filed a response stating that venue was proper in Victoria County pursuant to section 171.096(b). The trial court denied the Lopezes' motion, and the court of appeals also denied relief. __ S.W.3d __. We conclude that the trial court clearly abused its discretion by applying section 171.096(b) instead of 171.096(c) since an arbitration hearing had already been held. Therefore, we conditionally grant relief without hearing oral argument, pursuant to Texas Rule of Appellate Procedure 59.1.

The Lopezes entered into a written agreement with Yoakum for admission of San Juana Lopez to Yoakum's nursing home. This agreement contained an arbitration clause providing that "[t]he arbitration hearing and all related proceedings shall be conducted in Victoria County, Texas, unless otherwise agreed." The Lopezes submitted a demand for arbitration of survival and wrongful death claims for negligent care by Yoakum to the American Arbitration Association, indicating Victoria County to be the location for the hearing. However, through email, the parties instead agreed to a specific arbitrator located in Travis County. Although the arbitration agreement was never explicitly modified, the arbitration took place in Travis County, with a ruling in the Lopezes' favor.

Yoakum filed an application in Victoria County to vacate the arbitration award, arguing that it had been denied its opportunity to be heard, as the arbitrator was sleeping during the presentation of the evidence. The Lopezes filed a motion to transfer venue to Travis County, arguing that it was

the mandatory venue under section 171.096(c) of the Texas Civil Practice and Remedies Code. *See* TEX. CIV. PRAC. & REM. CODE § 171.096(c) ("If a hearing before the arbitrators has been held, a party must file the initial application [to vacate the arbitration award] with the clerk of the court of the county in which the hearing was held."). Yoakum filed a response, asserting that venue was mandatory in Victoria County under section 171.096(b). *See id.* § 171.096(b) ("If the agreement to arbitrate provides that the hearing before the arbitrators is to be held in a county in this state, a party must file the initial application [to vacate the arbitration award] with the clerk of the court of that county."). The trial court denied the Lopezes' motion to transfer venue. The court of appeals denied mandamus relief in a brief memorandum opinion. __ S.W.3d __.

The Lopezes argue that, because the arbitration hearing has already taken place, section 171.096(c) is the applicable venue provision and that the trial court clearly abused its discretion by failing to grant the motion to transfer venue to Travis County. The Lopezes contend that subsection (b) only applies when there is an agreement to arbitrate in a particular county and no arbitration hearing has yet taken place. Yoakum responds by arguing that section 171.096(b) requires venue be in Victoria County, because the parties had an agreement to arbitrate there. Yoakum claims that subsection (b) applies when an arbitration agreement fixes venue, and subsection (c) applies only when an agreement does not specify a venue. We agree with the Lopezes and conclude that when an arbitration hearing has already been held, venue is determined by section 171.096(c), which mandates venue be in the same county where the arbitration hearing was held.

In construing a statute, this Court's "objective is to determine and give effect to the Legislature's intent." *In re M.N.*, 262 S.W.3d 799, 802 (Tex. 2008); TEX. GOV'T CODE § 312.005.

The Legislature's choice of language in subsection (c), "has been held," indicates that this provision applies when an arbitration hearing has already taken place. The language in subsection (b), "is to be held," indicates that this provision applies when the parties have an agreement and an arbitration hearing has not yet taken place. Section 171.096(c) expresses the Legislature's intent that proceedings arising out of arbitration begin in the same county where the arbitration took place. This does not undermine or conflict with the Legislature's expressed intent in section 171.096(b) to allow parties to contract for venue, as it does not interfere with the ability to agree to venue provisions. In this case, the parties themselves chose to disregard their previous contractual agreement. By applying subsection (b), the trial court clearly abused its discretion. *See In re Mo. Pac. R.R. Co.*, 998 S.W.2d 212, 216 (Tex. 1999) (orig. proceeding) (stating that a trial court has no discretion to make erroneous legal conclusions, even in unsettled areas of law).

Mandamus relief is the proper remedy to enforce a mandatory venue provision when the trial court has denied a motion to transfer venue. *In re Cont'l Airlines, Inc.*, 988 S.W.2d 733, 735 (Tex. 1998) (orig. proceeding); TEX. CIV. PRAC. & REM. CODE § 15.0642. Ordinarily, mandamus relief is proper when the trial court has abused its discretion and a party has no appellate remedy. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135–36 (Tex. 2004) (orig. proceeding). However, where a party seeks to enforce a mandatory venue provision a party is only required to show that the trial court clearly abused its discretion by failing to transfer the case and is not required to prove that it lacks an adequate appellate remedy. *In re Applied Chem. Magnesias Corp.,* 206 S.W.3d 114, 117 (Tex. 2006) (orig. proceeding); *In re Mo. Pac.*, 998 S.W.2d at 216; *In re Cont'l Airlines*, 988 S.W.2d at 735.

Section 171.096(c) is a mandatory venue provision, as it says that a party "must" file the initial application in the county where the arbitration hearing was held. TEX. CIV. PRAC. & REM. CODE § 171.096(c); *see Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 493 (Tex. 2001) (recognizing the word "must" as "mandatory, creating a duty or obligation"). Since section 171.096(c) is a mandatory venue provision, the Lopezes are not required to prove that they have no adequate appellate remedy in order to obtain mandamus relief. *See In re Applied Chem. Magnesias,* 206 S.W.3d at 117; *In re Mo. Pac.*, 998 S.W.2d at 216; *In re Cont'l Airlines*, 988 S.W.2d at 735.

We hold that the trial court abused its discretion by incorrectly applying section 171.096(b) instead of section 171.096(c) since the arbitration hearing had already been held. Accordingly, we conditionally grant mandamus relief directing the trial court (1) to vacate the April 1, 2011 order and (2) to grant the Lopezes' motion to transfer venue. A writ will issue only if the trial court fails to comply.

OPINION DELIVERED: June 8, 2012

IN THE SUPREME COURT OF TEXAS

No. 11-0519

EVANSTON INSURANCE COMPANY, APPELLANT,

v.

LEGACY OF LIFE, INC., APPELLEE.

ON CERTIFIED QUESTIONS FROM THE
COURT OF APPEALS FOR THE FIFTH CIRCUIT

Argued January 12, 2012

JUSTICE GUZMAN delivered the opinion of the Court.

This case comes to us on two certified questions from the Fifth Circuit Court of Appeals. The certified questions arise from a suit filed by a daughter against an organ donation charity when she discovered that the charity—contrary to an earlier representation to her—would allegedly profit from harvesting her deceased mother's tissues. The charity requested a defense from its insurer and the insurer denied a defense. The insurer's subsequent suit against the charity resulted in the following certified questions from the Fifth Circuit Court of Appeals:

> 1. Does the insurance policy provision for coverage of "personal injury," defined therein as "bodily injury, sickness, or disease including death resulting therefrom sustained by any person," include coverage for mental anguish, unrelated to physical damage to or disease of the plaintiff's body?

> 2. Does the insurance policy provision for coverage of "property damage," defined therein as "physical injury to or destruction of tangible property, including consequential loss of use thereof, or loss of use of tangible property which has not been physically injured or destroyed," include coverage for the underlying plaintiff's loss of use of her deceased mother's tissues, organs, bones, and body parts?

Evanston Ins. Co. v. Legacy of Life, Inc., 645 F.3d 739, 751 (5th Cir. 2011). We answer both questions in the negative.

I. Factual Background

Legacy of Life, Inc. (Legacy) is an organ donation charity. Debra Alvarez consented for Legacy to harvest some of her terminally ill mother's tissues after she died. Alvarez alleges in her suit against Legacy that she only consented because Legacy represented the tissues would be distributed on a nonprofit basis but that Legacy instead transferred them to companies[1] that sold the tissues for a profit.[2] Alvarez brought various claims against Legacy, seeking compensatory damages, mental anguish damages, restitution, exemplary damages, and attorney's fees. Importantly, Alvarez did not allege that she or her mother suffered a physical injury. Instead, Alvarez alleged that her

[1] Alvarez alleges that Tissue Transplant Technology Ltd. d/b/a Bone Bank Allografts and Live Cell Therapy Information, Inc. were the companies that sold the tissues at a profit. Alvarez alleges that Bone Bank Allografts and Legacy were closely related, sharing the same chief operating officer and quality assurance director and having almost identical addresses.

[2] Two provisions in Texas law criminalize the sale of tissues, except for reasonable charges for such things as processing, transporting, and implanting. TEX. PEN. CODE § 48.02; TEX. HEALTH & SAFETY CODE § 692A.016. Similar statutes have spawned recent litigation over the constitutionality of such laws. *See Flynn v. Holder*, ___ F.3d ___, ___, No. 10–55643, 2012 WL 1001300 (9th Cir. 2012) (rejecting Equal Protection challenge to the National Organ Transplant Act as applied to bone marrow transplants by aspiration and holding that bone marrow transplants by apheresis are not subject to the Act's criminal penalties); *see generally* Eugene Volokh, *Medical Self-Defense, Prohibited Experimental Therapies, and Payment for Organs*, 120 HARV. L. REV. 1813 (2007). The validity of these statutes is not at issue in this proceeding.

mother's estate as the legal and rightful owner of the remains was wrongfully deprived of them, causing restitution damages to the estate and mental anguish damages to Alvarez.

Legacy had a combined medical professional and general liability insurance policy through Evanston Insurance Company (Evanston). Legacy demanded that Evanston defend the Alvarez suit. *Evanston*, 645 F.3d at 741. Evanston denied the request and filed suit in federal court seeking a declaratory judgment that it had no duty to defend because Alvarez did not claim damages for personal injury or property damage. *Id*. at 742–43. Legacy counterclaimed, asserting various insurance claims and requesting a declaratory judgment in its favor. *Id*. at 743.

Evanston and Legacy both moved for summary judgment. *Id*. The district court granted Legacy's motion for partial summary judgment on the duty to defend and denied Evanston's motion for summary judgment. *Id*. The court entered a declaratory judgment that Evanston had a duty to defend, holding that personal injury covers extreme mental and emotional distress and that a Texas court could potentially find human tissues to be property. *Id*. Tellingly, the district court referred to the duty to defend question as "exceedingly close." *Id*. at 744. The Fifth Circuit certified the personal injury and property damage questions to this Court and noted that if Alvarez's claims involve either personal injury or property damage under the policy, Evanston has a duty to defend the entire Alvarez suit. *Id*. at 745, 751.

II. The Duty to Defend

When determining whether an insurer has a duty to defend, we follow the eight corners rule by looking at the four corners of the complaint for alleged facts that could possibly come within the scope of coverage in the four corners of the insurance policy. *GuideOne Elite Ins. v. Fielder Rd.*

Baptist Church, 197 S.W.3d 305, 307 (Tex. 2006). Our precedent favors insureds when examining both the complaint and the policy. As to the complaint, if it includes even one covered claim, the insurer must defend the entire suit.[3] *Zurich Am. Ins. Co. v. Nokia, Inc.*, 268 S.W.3d 487, 491 (Tex. 2008). However, we only defer to a complaint's characterization of factual allegations, not legal theories or conclusions. *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Merchs. Fast Motor Lines, Inc.*, 939 S.W.2d 139, 141 (Tex. 1997) (per curiam). As to the policy, if a term is susceptible to more than one reasonable interpretation, we must resolve that uncertainty in favor of the insured. *Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 746 (Tex. 2006).

III. Personal Injury

With these principles in mind, we first determine whether Alvarez's suit seeks damages for personal injury under Legacy's policy with Evanston. Specifically, the first certified question asks: "Does the insurance policy provision for coverage of 'personal injury,' defined therein as 'bodily injury, sickness, or disease including death resulting therefrom sustained by any person,' include coverage for mental anguish, unrelated to physical damage to or disease of the plaintiff's body?" *Evanston*, 645 F.3d at 751. The policy defines "personal injury" as:

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[3] Texas law provides:

> Where the complaint does not state facts sufficient to clearly bring the case within or without the coverage, the general rule is that the insurer is obligated to defend if there is, potentially, a case under the complaint within the coverage of the policy. Stated differently, in case of doubt as to whether or not the allegations of a complaint against the insured state a cause of action within the coverage of a liability policy sufficient to compel the insurer to defend the action, such doubt will be resolved in insured's favor.

Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Merchs. Fast Motor Lines, Inc., 939 S.W.2d 139, 141 (Tex. 1997) (per curiam).

(a) *bodily injury, sickness or disease including death resulting therefrom sustained by any person*;

(b) false arrest, detention or imprisonment, wrongful entry or eviction or other invasion of private occupancy, malicious prosecution or humiliation, except when maliciously inflicted by, at the direction of, or with the consent or acquiescence of the insured;

(c) the publication or utterance of libel or slander or other defamatory or disparaging material, or a publication or utterance in violation of an individual's right of privacy except when maliciously published or uttered by, at the direction of, or with the consent or acquiescence of the insured. (emphasis added).

When an insurance policy defines its terms, those definitions control. *Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 819, 823 (Tex. 1997). Legacy claims "bodily" only modifies "injury" and that Alvarez's mental anguish qualifies as sickness under the policy. Evanston maintains that "bodily" modifies "injury," "sickness" and "disease" and that an accompanying physical injury is required.

We agree with Evanston. In *Trinity*, we examined a homeowner's policy that defined "bodily injury" as "bodily harm, sickness or disease." *Id*. at 820. Even though Texas tort law allows recovery of mental anguish without any physical manifestations in some circumstances, we held that the policy in *Trinity* did not cover purely emotional injuries. *Id*. at 823. We explained that this interpretation gave effect to the commonly understood meaning of "bodily," which implies a physical harm. *Id*.

Legacy argues that the *Trinity* policy defined "*bodily* injury," which is narrower than the term "*personal* injury" here. *Id*. at 820 (emphasis added). We disagree that this difference warrants a different outcome from that in *Trinity* for two reasons. First, the definitions in *Trinity* and the definition here are virtually identical.[4] If two policies have two different defined terms but similar

[4] Legacy's policy defines "personal injury" as "bodily *injury*, sickness or disease" and the policy in *Trinity* defined "bodily injury" as "bodily *harm*, sickness or disease." 945 S.W.2d at 822 (emphasis added).

definitions, we should afford them similar meanings. *See Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 219 (Tex. 2003) (deferring to contract definition to determine meaning of defined term that has a different definition in the common law). Second, relevant grammatical rules indicate that an adverb or adjective typically modifies all the words in a string that follow it and are separated by a disjunctive.[5] *See McIntyre v. Ramirez*, 109 S.W.3d 741, 746 (Tex. 2003) (stating that "a straightforward reading of subsection (d) leads to the conclusion that the adverb 'ordinarily' modifies both the verb 'received' and the verb phrase 'be entitled to receive'"); *Osterberg v. Peca*, 12 S.W.3d 31, 38–39 (Tex. 2000) (holding that "knowingly" applies to "makes" and "accepts" when they were separated by "or"). This rule certainly does not apply in all situations. As Legacy notes, the broader defined term "personal injury" could caution in favor of "bodily" not modifying all three nouns in subsection (a) here. However, subsections (b) and (c) of the definition of personal injury explain here why "bodily"—as in *Trinity*—modifies the nouns that follow. Subsections (b)–(c) include types of personal injury that require no physical manifestation, such as malicious prosecution, libel and slander. The use of a broader term here (personal injury) than in *Trinity* (bodily injury) encompasses these additional types of injury, but it does not alter bodily injury, sickness or disease to allow for such injuries even without physical manifestations. In other words, the parties included injuries that require no physical manifestation in subsections (b)–(c), and

[5] Legacy asserts that there is syntactic ambiguity in whether "bodily" modifies all three nouns that follow, and that we should use the broader term "personal injury" to clarify that ambiguity. However, as in *Trinity*, we do not find the phrase ambiguous. As addressed *infra*, the parties' choice of a broader defined term here than in *Trinity* reflects that they were including subsections (b)–(c) (for such things as malicious prosecution, libel and slander), not that they were broadening subsection (a) (bodily injury, sickness or disease).

essentially duplicated the definition from *Trinity* in subsection (a), which requires a physical manifestation. To encompass both categories, they selected the broader term "personal injury."

Here, Legacy maintains that Alvarez's injuries qualify as sickness or disease under subsection (a) of the definition of personal injury. Because "bodily" modifies injury, sickness, and disease in subsection (a), a physical manifestation is required for sickness or disease to be covered. Alvarez did not allege a physical injury. Therefore, her claims against Legacy do not trigger Evanston's duty to defend under the personal injury component of its policy. We answer the first certified question in the negative.

IV. Property Damage

Legacy's policy also covered property damage. Accordingly, we must decide whether under that coverage provision Evanston is required to defend the Alvarez suit. The second certified question states:

> Does the insurance policy provision for coverage of "property damage," defined therein as "physical injury to or destruction of tangible property, including consequential loss of use thereof, or loss of use of tangible property which has not been physically injured or destroyed," include coverage for the underlying plaintiff's loss of use of her deceased mother's tissues, organs, bones, and body parts?

Evanston, 645 F.3d at 751. Legacy's policy defines "property damage" as, *inter alia*, "loss of use of tangible property which has not been physically injured or destroyed." Evanston and Legacy agree that human tissues are tangible but disagree on whether they are property. The policy does not define property. Evanston contends that Texas common law and statutes have only recognized body parts

as quasi property. Legacy counters that dictionaries define property as something that can be owned or possessed, and that body parts can be possessed.[6]

A. Background

Legacy argues that we cannot look to the common law or statutes to determine the policy's meaning of property. We disagree. We have referred to property as a "bundle of rights." *See, e.g.*, *Canyon Reg'l Water Auth. v. Guadalupe-Blanco Water Auth.*, 258 S.W.3d 613, 618 (Tex. 2008); *see also* Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 666 (1998) (defining private property as a core bundle of rights). The "bundle of rights" concept is appropriate because property does not refer to a thing but rather to the rights between a person and a thing. JESSE DUKEMINIER & JAMES KRIER, PROPERTY 86 (3d ed. 1993) ("For lawyers, if not lay people, property is an abstraction. It refers not to things, material or otherwise, but to rights or relationships among people with respect to things."). The designation of an object as tangible property means that it has acquired sufficient rights to be recognized as property under the law. *See Heller*, 111 HARV. L. REV. at 666–67 (stating that "ownership of private property includes the possibility that an individual can control all or most of the core bundle"). As the common law and statutes define these rights, it is appropriate to review them to determine if an object has sufficient rights to achieve the status of tangible property.

Some scholars have observed that there are eleven core rights in the bundle of property rights:

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[6] *See* BLACK'S LAW DICTIONARY 1232 (7th ed. 1999) (defining "property" as "[t]he right to possess, use, and enjoy a determinate thing (either a tract of land or a chattel)"); Merriam-Webster Online Dictionary, at http://www.merriam-webster.com/dictionary/property (last visited June 26, 2012) (defining "property" as "something owned or possessed") (all internet materials on file with Clerk's office).

(1) the right to exclusive possession;

(2) the right to personal use and enjoyment;

(3) the right to manage use by others;

(4) the right to the income from use by others;

(5) the right to the capital value, including alienation, consumption, waste, or destruction;

(6) the right to security (that is, immunity from expropriation);

(7) the power of transmissibility by gift, devise, or descent;

(8) the lack of any term on these rights;

(9) the duty to refrain from using the object in ways that harm others;

(10) the liability to execution for repayment of debts; and

(11) residual rights on the reversion of lapsed ownership rights held by others.

Id. at 663 n.187 (citing A.M. Honoré, *Ownership*, *in* OXFORD ESSAYS IN JURISPRUDENCE 107, 112-28 (A.G. Guest ed., 1961)). Many jurisdictions use variations of these rights to form the notion of "fee simple" ownership of real property. *Id*. at 663. Some of the key rights in American jurisprudence that make up the bundle of property rights include the rights to possess, use, transfer and exclude others. *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979); *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945). We have never required a person to possess the full, unfettered bundle of property rights for a thing to be classified as their property. *See Canyon Reg'l Water Auth.*, 258 S.W.3d at 617 ("[W]here an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking." (alteration in original) (quoting *Tahoe–Sierra Pres. v. Tahoe Reg'l Agency*, 535 U.S. 302, 327 (2002))).

Historically, the bodies of deceased persons (and necessarily the human tissues they contain) have held a unique status in the law. Under the English common law, "a dead body is not the subject of property," although next of kin have a right to possess the body of a deceased person to bury it. *Regina v. Price*, 12 Q.B.D. 247, 252–54 (1884). In this respect, Texas common law has largely tracked English common law. Long ago, we recognized that next of kin have only quasi-property rights in the body of a deceased person: "[t]here is no property in a dead man's body, in the usually recognized sense of the word, yet it may be considered a sort of quasi property, in which certain persons have rights therein and have duties to perform," such as the right of possession and control of the burial. *Burnett v. Surratt*, 67 S.W.2d 1041, 1042 (Tex. Civ. App.—Dallas 1934, writ ref'd).[7] As our sister court in Colorado correctly explained:

> Historically, the notion of a quasi-property right arose to facilitate recovery for the negligent mishandling of a dead body. If the plaintiff could show that his property right had been harmed, he would avoid the burden of proving that his emotional distress was accompanied by physical injury. . . . In reality, however, the primary concern of the right is not the injury to the dead body itself, but whether the improper actions caused emotional or physical pain or suffering to surviving family members. The injury is seldom pecuniary; rather, damages are grounded in the mental and physical injuries of survivors.

Culpepper v. Pearl St. Bldg., Inc., 877 P.2d 877, 880 (Colo. 1984).

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[7] *See also Gray v. State*, 114 S.W. 635, 641 (Tex. Crim. App. 1908) (stating that "[a]t common law there can be no property in a dead human body; and after burial of such dead body it becomes a part and parcel of the ground to which it was committed. Nevertheless, the authorities hold the right to bury a corpse and preserve its remains is a legal right which the courts will recognize and protect. While the body is not property in the usually recognized sense of the word, yet it may be considered as a sort of quasi property, to which certain persons may have rights, as they have duties to perform toward it, and the right to dispose of a corpse by decent sepulture includes the right to the possession of the body in the same condition in which death leaves it" (quotation marks omitted)); *Foster v. Foster*, 220 S.W. 215, 218 (Tex. Civ. App.—Texarkana 1920, no writ) (stating that widow "had no property right in the body of her husband. The law accords her the privilege of controlling the place and manner of burial in deference to the sentiments which are presumed to attend the relations of husband and wife").

Medical science has undisputedly progressed significantly since we classified bodies as quasi property to the next of kin in 1934. Doctors have been transplanting kidneys for over 55 years.[8] Living persons can now donate a portion of their liver, pancreas, lung, or intestine.[9] Deceased individuals can donate numerous parts of their bodies.[10] A newborn's umbilical cord blood can be cryogenically frozen for use in future transplants.[11]

Our Legislature, in prescient recognition of the rapid progress of medical science, expanded the common-law quasi-property rights of next of kin with the Revised Uniform Anatomical Gift Act (Anatomical Gift Act), granting next of kin the right to make "an anatomical gift of a decedent's body or part for the purpose of transplantation, therapy, research, or education." TEX. HEALTH & SAFETY CODE § 692A.009(a). The Anatomical Gift Act also sets forth the procedure for making an anatomical gift before death, *id*. at §§ 692A.004–006, and restricts the purposes for selling tissues (to transplantation, therapy, research, or education) and the fees that may be collected (to a reasonable amount for certain services performed), *id*. at §§ 692A.004, 692A.016.[12]

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[8] Nicholas Bakalar, *First Mention: Kidney Transplant*, N.Y. TIMES (July 27, 2009), *available at* http://www.nytimes.com/2009/07/28/health/28first.html.

[9] *Living Donation Q&A*, TRANSPLANT LIVING, http://www.transplantliving.org/livingdonation/questions.aspx (last visited June 27, 2012).

[10] *Which Tissue Can Be Donated and How Is It Used?*, UNIVERSITY OF TEXAS HEALTH SCIENCE CENTER SCHOOL OF MEDICINE AT SAN ANTONIO (June 30, 2011), http://www.uthscsa.edu/allograft/tissue.asp.

[11] *FAQs: Benefits of Banking Cord Blood & Tissue*, CORD BLOOD REGISTRY, http://www.cordblood.com/en/benefits-cord-blood/ cord-blood-faqs (last visited June 27, 2012).

[12] *See also* TEX. PEN. CODE § 48.02(b) (criminalizing the buying and selling of human organs). However, the Anatomical Gift Act grants the right to charge a reasonable amount for the removal, processing, preservation, quality control, storage, transportation, implantation, or disposal of human tissues. TEX. HEALTH & SAFETY CODE § 692A.016(b).

B. Application to Alvarez's Claims

However, before we can use this legal framework to assess whether the tissues at issue here are property, we must first determine whose property the tissues are alleged to be. The answer to that question may be dispositive. Legacy's policy covers loss of use of tangible property. Alvarez is suing because either she or her mother's estate lost use of the tissues. Accordingly, whether the tissues were property to an unrelated third party like Legacy—a party whose interest is commercial, not personal—is not a question we must answer here. We therefore express no opinion on that issue and leave that question for another day. Here, Alvarez seeks damages both for herself and for her mother's estate for the loss of use of her mother's tissues.[13] Therefore, we determine whether Alvarez or her mother's estate's claims for loss of use of the tissues are claims for loss of use of tangible property.[14]

With this legal framework in mind, we first assess whether Alvarez's mother's tissues are Alvarez's property. The common law gives Alvarez the right to direct the burial, which we have called a quasi-property right. *Burnett*, 67 S.W.2d at 1042. The common law also allows next of kin to sue for mental anguish damages when acts are performed on a decedent's body or tissues without the next of kin's consent in certain circumstances. *See Service Corp. Int'l v. Guerra*, 348 S.W.3d

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[13] Alvarez's suit is styled as being on behalf of her mother, and states that her mother's estate "is the rightful and legal owner of her remains." However, Alvarez also seeks damages for emotional distress based on misrepresentations allegedly made to her. While it is unclear whether these emotional distress damages are allegedly due to loss of use of her mother's tissues, we must resolve doubts in favor of coverage. *Merchs. Fast Motor Lines, Inc.*, 939 S.W.2d at 141.

[14] Alvarez cannot trigger Evanston's duty to defend by simply alleging the tissues were her property even if they were not. Whether the tissues are property is a legal conclusion, and we defer only to factual allegations in a complaint when examining the duty to defend. *Nat'l Union*, 939 S.W.2d at 141.

221, 231 (Tex. 2011). In recognition of the many advances in medical science discussed above and the ability to transplant tissues, the Anatomical Gift Act also gives next of kin the right to gift tissues. TEX. HEALTH & SAFETY CODE § 692A.009(a).

Despite these rights Alvarez has in her deceased mother's tissues, there are many rights Alvarez does not have. Some of the key rights that make up the bundle of property rights include the rights to possess, use, transfer, and exclude others. *Kaiser Aetna*, 444 U.S. at 176; *Gen. Motors Corp.*, 323 U.S. at 378. Next of kin have no right to possess a body other than for burial or final disposition. *Burnett*, 67 S.W.2d at 1042. Next of kin have no right to use tissues unless they have been designated by the individual as a transplant recipient. TEX. HEALTH & SAFETY CODE § 692A.011(a)(3). Next of kin have no right to transfer tissues other than as set forth in the Anatomical Gift Act. *Id.* §§ 692A.009, 692A.011. And next of kin have no right to exclude, other than to seek damages in certain circumstances for acts done beyond their consent. *Guerra*, 348 S.W.3d at 231. In light of these limited rights, we cannot say that tissues have attained the status of property of the next of kin.[15]

Legacy asserts that two courts of appeals, *Roman v. Roman*, 193 S.W.3d 40, 43 (Tex. App.—Houston [1st Dist.] 2006, pet. denied), and *Terrill v. Harbin*, 376 S.W.2d 945, 947 (Tex. App.—Eastland 1964, writ. dism'd), have concluded that tissues are property. We disagree with

[15] Our holding is consistent with the majority view that tissues are, at most, quasi property of the next of kin. *See, e.g.*, *Boorman v. Nev. Mem'l Cremation Soc'y, Inc.*, 236 P.3d 4, 10 (Nev. 2010) (rejecting claim for conversion of a decedent's body); *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479, 489 (Cal. 1990) (rejecting claim for conversion of tissues because plaintiff had neither title nor possession of the tissues); *Culpepper v. Pearl Street Bldg., Inc.*, 877 P.2d 877, 882 (Colo. 1984) (refusing to recognize tissues as property to support a claim for conversion). In fact, we are unaware of any court holding that tissues are the property of the next of kin in the ordinary sense.

Legacy's characterization of those holdings. *Roman* involved frozen embryos. 193 S.W.3d at 49. The court of appeals only decided that agreements regarding the disposition of frozen embryos before cryopreservation do not violate public policy. *Id*. at 50. It did not decide whether embryos are in fact property.

In *Terrill*, a widow sued a doctor who performed an autopsy on her deceased husband's body against her will. 376 S.W.2d at 945. The *Terrill* Court determined that venue in the lower court was proper because the autopsy interfered with the widow's right to possession of the body. *Id*. at 947. In doing so, the court noted,

> The right to bury a corpse and preserve its remains is a legal right which is well recognized, and it is held that the courts will protect such right and the right to dispose of a corpse by a decent burial which includes the right to possession of the body in the same condition in which death leaves it. It is also held that a widow has the primary and paramount right to the possession of her husband's body above that of any other person. Any interference with such right of possession of the body of a deceased by mutilation or otherwise disturbing the body without the consent of the next of kin is an actionable wrong for which a claim for damages may be maintained.

Id. (citations omitted). The court was affirming our statement in *Burnett* that next of kin had a right to possess a body and direct the burial, noting that next of kin may sue for damages if someone interferes with that right. *Id*. Today, we reaffirm our holding in *Burnett* that tissues are quasi property of the next of kin but they are not the property of the next of kin.

We next decide whether the mother's tissues are the property of her estate. The Anatomical Gift Act gives an individual the right to designate a recipient of their tissues while they are alive and gives their agent at the time of death the right to designate a recipient immediately before their death. TEX. HEALTH & SAFETY CODE §§ 692A.005, 692A.009(a)(1). The Anatomical Gift Act does not

give the estate the right to designate a recipient once the individual dies. *See id.* § 692A.009(a) (not listing estate or agent as having authority to designate recipient after death). Nor can the estate be compensated financially for the individual's tissues. The Anatomical Gift Act only allows a person to charge a reasonable amount for certain services rendered (such as removal and processing). *Id.* § 692A.016(b). The Act does not allow for compensation for the tissue itself. *Id.* § 692A.016(a) (creating an offense if a person knowingly purchases or sells tissue); *see also* TEX. PEN. CODE § 48.02(b) (criminalizing the buying and selling of human organs). In sum, the individual can designate a recipient for their tissues before their death, but once they die, their estate cannot designate a recipient or receive compensation for the tissues. The estate therefore has fewer rights in tissues than next of kin, who may designate a recipient once the individual dies. *Id.* § 692A.009(a). Because we have held that tissues are not the property of next of kin, we necessarily conclude that tissues are also not the property of the estate. We answer the second certified question in the negative.

V. Conclusion

We hold that the insurance policy's definition of "personal injury" does not include mental anguish, unrelated to physical damage to or disease of the daughter's body. We also hold that loss of use of tangible property does not include the loss of use of the mother's tissues by Alvarez or her mother's estate. We answer both certified questions in the negative.

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Eva M. Guzman
Justice

OPINION DELIVERED: June 29, 2012

IN THE SUPREME COURT OF TEXAS

NO. 11-0589

IN RE ALLCAT CLAIMS SERVICE, L.P. AND JOHN WEAKLY, RELATORS

ON PETITION FOR WRIT OF MANDAMUS

Argued October 24, 2011

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

JUSTICE WILLETT filed an opinion concurring in part and dissenting in part, in which JUSTICE LEHRMANN joined.

In this original proceeding Allcat Claims Service, L.P., a limited partnership, and one of its limited partners seek an order directing the Comptroller to refund franchise taxes Allcat paid that were attributable to partnership income allocated, but not distributed, to its natural-person partners. Allcat claims it is entitled to a refund for two reasons. First, the tax facially violates Article VIII, Section 24 of the Texas Constitution because it is a tax on the net incomes of its natural-person partners that was not approved in a statewide referendum. Second, as applied by the Comptroller to Allcat and its partners, the franchise tax violates Article VIII, Section 1(a) of the Constitution, which requires taxation to be equal and uniform. We hold that: (1) the tax is not a tax imposed on

the net incomes of the individual partners, thus it does not facially violate Article VIII, Section 24; and (2) we do not have jurisdiction to consider the equal and uniform challenge.

I. Background

A. The Bullock Amendment and the Franchise Tax

In 1993 Texas voters adopted Article VIII, Section 24 of the Texas Constitution, frequently referred to as the Bullock Amendment.[1] *See* Tex. S.J. Res. 49, §§ 1–2, 73d Leg., R.S. (1993) (adopted Nov. 2, 1993). Section 24 provides in relevant part that

> [a] general law enacted by the legislature that imposes a tax on the net incomes of natural persons, including a person's share of partnership and unincorporated association income, must provide that the portion of the law imposing the tax not take effect until approved by a majority of the registered voters voting in a statewide referendum held on the question of imposing the tax.

TEX. CONST. art. VIII, § 24(a).

A decade later a Travis County district court determined that the manner in which Texas funded its public schools was unconstitutional. *Neeley v. West Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 753–54 (Tex. 2005). The court enjoined further state funding of the schools, but stayed the effect of its injunction until October 1, 2005, in order to give the Legislature time to cure the constitutional deficiencies. *Id.* The state defendants[2] appealed, and this Court was "[o]nce again . . . called upon to determine whether the funding of Texas public schools violates the Texas Constitution." *Id.* at 751. We issued our opinion on November 22, 2005 and held that the State's

[1] So called after Lt. Gov. Bob Bullock who is widely credited with having taken the lead in authoring the amendment.

[2] Hon. Shirley Neeley, Texas Commissioner of Education; the Texas Education Agency; Hon. Carole Keeton Strayhorn, Texas Comptroller of Public Accounts; and the Texas State Board of Education.

system for financing public schools violated the Texas Constitution. We also changed the effective date of the district court's injunction to June 1, 2006. *Id.* at 796–99.

After the Travis County district court rendered its judgment in November 2004, and while the appeal was pending in this Court, the state actively worked on a different approach to funding public education. The 79th Legislature considered alternative methods of funding in its regular session and in two special sessions that lasted into August 2005. During this same period, the Governor also established the Texas Tax Reform Commission to study how to "modernize [Texas's] tax system and provide long-term property tax relief as well as sound financing for public schools." Press Release, Office of the Governor, Gov. Perry Names 24-Member Texas Tax Reform Commission (Nov. 4, 2005), *available at* http://governor.state.tx.us/news/appointment/5077/. The Commission held its first meeting the day before we issued *West Orange-Cove*.

In the months following our *West Orange-Cove* decision the Commission conducted hearings around the state. Based on its study, research, and those hearings the Commission identified four main concerns with the State's tax system: (1) property taxes were too high; (2) taxes should be as broad and as low as possible; (3) schools should be the priority for state funding; and (4) the State's property taxes make it difficult to attract businesses without substantial incentives. *See* REPORT OF THE TEXAS TAX REFORM COMMISSION, *Tax Fairness: Property Tax Relief for Texans* 16 (2006), *available at* http://govinfo.library.unt.edu/ttrc/files/TTRC_report.pdf. The Commission's proposals included increasing the number of business forms subject to the franchise tax, which is the State's business tax. *Id.* at 18. The Commission noted that

> [f]or nearly a century the [franchise] tax has been applied to corporations. The original purpose of the franchise tax — and that which the Commission finds is still valid — was to collect a modest levy in return for the tremendous value afforded to businesses that chose to benefit from a state-provided liability shield. However, the recent spread of new business forms such as limited-liability partnerships have tapped the state's protections previously available only to corporations while avoiding the very levy designed to reflect the value of that protection. Tax-free status has thus been secured by many firms, to the competitive detriment of those remaining in corporate form.

Id.

As part of the effort to provide lasting property tax relief, establish a stable and long-term source of funding for public schools, and meet the June 1, 2006 deadline set in *West Orange-Cove*, the 79th Legislature, in its third called session, enacted several amendments to the Texas Tax Code. *See* Act of May 2, 2006, 79th Leg., 3d C.S., ch. 1, §§ 1–27, 2006 Tex. Gen. Laws 1, 1–41 (the Act). The amendments were codified in Chapter 171 of the Tax Code and reflect many of the Commission's proposals, including its proposal to increase the number of business forms subject to the franchise tax. For the first time limited partnerships and certain other unincorporated associations were required to pay the tax. *See* TEX. TAX CODE §§ 171.0002, 171.001. It is these amendments and their application that are the subject of this proceeding against the Comptroller and the Attorney General (collectively, the Comptroller).

B. Allcat's Claims

Allcat Claims Service, L.P. is a Texas limited partnership that provides adjusting services to property insurers. It inspects damaged property to determine the cause of the damage and the costs of repair. Allcat's limited partners include relator, John Weakly. For tax years 2008 and 2009 Allcat paid franchise taxes under protest, then filed two suits seeking a refund: this original

proceeding and a suit in the 201st District Court of Travis County. Here, Allcat seeks (1) an order requiring the Comptroller to refund that portion of the 2008 and 2009 franchise taxes it paid that are referable to its natural-person partners' shares of Allcat's income;[3] (2) a declaration that the franchise tax is unconstitutional to the extent it taxes partnership income allocable to its natural-person partners; (3) an injunction directing the Comptroller not to assess, enforce, or collect the franchise tax to the extent it applies to Allcat's income allocated to its natural-person partners; and (4) a declaration that the Comptroller's interpretation of certain franchise tax provisions violates Allcat's right to equal and uniform taxation under the Texas Constitution. Allcat asserts the same equal and uniform taxation claim in the Travis County suit "to preserve the claim in the event this Court decline[s] to exercise jurisdiction over [it]."

The first basis on which Allcat and Weakly (collectively, Allcat) rely for relief, which we reference as the facial challenge, is that the amendments to the franchise tax statutes violate Section 24 of the Constitution because their effect is to impose an income tax on the net incomes of natural persons, despite the fact that the tax has not been approved in a statewide referendum. The second basis, which we reference as the as-applied challenge, is not that the franchise tax statutes are unconstitutional, but rather that the Comptroller's interpretation and application of them violate the equal and uniform taxation clause of the Texas Constitution. *See* TEX. CONST. art. VIII, § 1. Allcat

[3] Allcat at first sought relief as to all of the taxes it paid. It later limited the relief it sought.

also seeks attorney's fees pursuant to the Declaratory Judgments Act (DJA). *See* TEX. CIV. PRAC. & REM. CODE §§ 37.001–.011.[4]

II. The Facial Challenge

A. Jurisdiction

The jurisdiction of all Texas courts, including this Court, derives from the Texas Constitution and state statutes. *Chenault v. Phillips*, 914 S.W.2d 140, 141 (Tex. 1996) (per curiam). Absent an express constitutional or statutory grant, we lack jurisdiction to decide any case. *Id.*

The Constitution is silent about taxpayer suits, but Texas statutes have long vested our courts with the responsibility to adjudicate these disputes. Under applicable statutory provisions, which are not challenged by Allcat, taxpayer suits contesting either (1) the validity of a state tax or (2) the authority of the public official charged with the assessment, enforcement, or collection of the tax, must be brought in a Travis County district court. *See*, *e.g.*, TEX. TAX CODE §§ 112.001 ("The district courts of Travis County have exclusive, original jurisdiction of a taxpayer suit brought under this chapter."); *id.* § 112.051 (requiring that a person must pay the tax in question before bringing a suit "contend[ing] that the tax or fee is unlawful or that the public official charged with the duty of collecting the tax or fee may not legally demand or collect the tax or fee"); *id.* § 112.101(a) (providing that injunctive relief may be issued against the Comptroller prohibiting her assessment or collection of a tax). In contrast to the general provisions of the Tax Code prescribing jurisdiction

[4] *Amicus* briefs supporting Allcat's position were submitted by Niki Laing, CPA; Keller Haslett Storage Ltd.; Austin Analytical, LLC; Yacktman Asset Management Co.; NSBMA, LP; Cherry Creek Plaza Partnership Ltd.; Nestle USA Inc.; the Corporate Housing Providers Association; Tyson Hoffer; Winning Investments, L.P.; and Winning Management, L.L.C. *Amicus* briefs supporting the Comptroller were submitted by the Texas Taxpayers and Research Association and the Texas Association of Realtors.

for taxpayer suits, the Act gives this Court original and exclusive jurisdiction over constitutional challenges to the franchise tax amendments:

> The supreme court has exclusive and original jurisdiction over a challenge to the constitutionality of this Act or any part of this Act and may issue injunctive or declaratory relief in connection with the challenge.

See Act § 24. We first address the Legislature's conferral of original jurisdiction on this Court.

Allcat argues that section 24 is a valid exercise of legislative authority under Article V, Section 3(a) of the Constitution and that the Court has statutory authority to issue certain extraordinary writs under section 22.002(c) of the Government Code. The Comptroller does not contest our jurisdiction but posits that to accept jurisdiction under Article V, Section 3(a), we must first overrule our decisions in *Love v. Wilcox*, 28 S.W.2d 515 (Tex. 1930) and *Lane v. Ross*, 249 S.W.2d 591 (Tex. 1952). She disagrees with Allcat's contention that section 22.002(c) is a valid source of our jurisdiction. For the reasons expressed below, we hold that we have jurisdiction under Article V, Section 3(a)[5] and that neither *Love* nor *Lane* stand as impediments.

The Constitution of 1891 gave the Supreme Court three types of jurisdiction: appellate jurisdiction, jurisdiction to issue writs, and original jurisdiction. The Court's appellate jurisdiction was described as follows:

> The Supreme Court shall have appellate jurisdiction only except as herein specified, which shall be coextensive with the limits of the State. Its appellate jurisdiction shall extend to questions of law arising in cases of which the Courts of Civil Appeals have appellate jurisdiction under such restrictions and regulations as the Legislature may prescribe. Until otherwise provided by law the appellate jurisdiction of the Supreme Court shall extend to questions of law arising in the cases in the Courts of Civil

[5] The Comptroller also suggests that Article V, Section 8 may authorize the Legislature to confer original jurisdiction on this Court. We need not address that position.

> Appeals in which the Judges of any Court of Civil Appeals may disagree, or where the several Court of Civil Appeals may hold differently on the same question of law or where a statute of the State is held void.

TEX. CONST. art. V, § 3 (1891). The next sentence described the Court's writ jurisdiction:

> The Supreme Court and the Justices thereof shall have power to issue writs of habeas corpus, as may be prescribed by law, and under such regulations as may be prescribed by law, the said courts and the Justices thereof may issue the writs of mandamus, procedendo, certiorari and such other writs, as may be necessary to enforce its jurisdiction.

Id. Section 3 then described the Court's original jurisdiction:

> The Legislature may confer original jurisdiction on the Supreme Court to issue writs of quo warranto and mandamus in such cases as may be specified, except as against the Governor of the State.

Id.

In *Love* we held that the sentence last quoted limited the Legislature's authority to confer original jurisdiction on the Court. 28 S.W.2d at 522. The statute involved in that case attempted to give the Court "the power, or authority, or jurisdiction, to issue the Writ of Mandamus, or any other Mandatory or compulsory Writ or Process" against certain political party officials. *Id.* We concluded that "the Constitution limits the original jurisdiction of the court to the issuance of writs of quo warranto and mandamus," and that "so much of the legislative act under examination as attempts to confer upon the Supreme Court the power to issue 'any other mandatory or compulsory

writ or process' save the writ of mandamus, is violative of the Constitution, and is therefore void."[6] *Id.* The Court reaffirmed *Love* in *Lane*. 249 S.W.2d at 593.

In 1981, Article V was amended, principally to confer jurisdiction over criminal appeals on the Courts of Civil Appeals, changing them to the Courts of Appeals. Act of May 25, 1979, 66th Leg., R.S., S.J. Res. No. 36, § 3 (adopted at Nov. 4, 1980 election). Section 3 was also amended to its current form. *Id.* The first sentence referring to appellate jurisdiction was replaced by these two, describing the Court's jurisdiction generally:

> The Supreme Court shall exercise the judicial power of the state except as otherwise provided in this Constitution. Its jurisdiction shall be coextensive with the limits of the State and its determinations shall be final except in criminal law matters.

TEX. CONST. art. V, § 3(a). The other two lengthy sentences of the prior provision describing the Court's appellate jurisdiction became one short one:

> Its appellate jurisdiction shall be final and shall extend to all cases except in criminal law matters and as otherwise provided in this Constitution or by law.

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[6] We also noted that there were other limitations on the Legislature's authority to confer original jurisdiction on the Supreme Court:

> This court has heretofore laid down certain limitations on the power of the Legislature to specify classes of cases which may be brought within the court's original jurisdiction. One is that the right to the duty required to be performed by mandamus shall not be 'dependent upon the determination of any doubtful question of fact.' *Teat v. McGaughey*, 85 Tex. 486, 487, 22 S.W.302, 303 [1893]. Another limitation is that the writ of quo warranto or mandamus be a proper or necessary process for enforcement of the right asserted. *Pickle v. McCall*, 86 Tex. 218, 24 S.W. 265 [1893]. A third is there must be some strong and special reason for the exercise of this extraordinary original jurisdiction by a court designed primarily as the court for the correction by appellate review of errors of inferior courts in determining questions of law. In this connection, the court found no objection to the Legislature requiring it to exercise original jurisdiction by mandamus, where the proceeding 'involves questions which are of general public interest and call for a speedy determination.' *Betts v. Johnson*, 96 Tex. 363, 73 S.W. 4, 5 [1903].

28 S.W.2d at 519.

Id. The provisions describing the Court's writ jurisdiction and original jurisdiction were not changed.

The provision at issue in this case provides that the Court "has exclusive and original jurisdiction over a challenge to [its] constitutionality." Act § 24. It also authorizes the Court to "issue injunctive or declaratory relief in connection with the challenge." *Id.* If the grant of jurisdiction or the relief authorized in the statute exceeds the limits of Article V, Section 3(a), then we simply exercise as much jurisdiction over the case as the Constitution allows, as we did in *Love*. *See* 28 S.W.2d at 522. But, in *Lane*, we held that while "this court has no original jurisdiction to issue a writ of injunction . . . . [i]n cases in which this court's jurisdiction to issue a writ of mandamus has attached the court necessarily has the correlative authority to issue a writ of injunction to make the writ of mandamus effective." 249 S.W.2d at 593. The same may be said of declaratory relief.

The Act clearly expresses legislative intent that the Court consider the constitutionality of its provisions. In this matter, mandamus is a "proper or necessary process for enforcement of the right asserted" because Allcat seeks an order directing the Comptroller to refund part of the taxes it paid. *Love*, 28 S.W.2d at 519. That being so, we necessarily have the correlative authority to provide declaratory and injunctive relief as appropriate.

The Comptroller argues that this suit cannot be considered a mandamus proceeding over which the Court has original jurisdiction under Article V, Section 3(a) because mandamus relief would never be appropriate. She contends that an official does not abuse her discretion by enforcing a statute that is later determined to be unconstitutional. But in *LeCroy v. Hanlon*, 713 S.W.2d 335

(Tex. 1986), we affirmed a judgment declaring a filing fee statute unconstitutional, granting mandamus relief against the district clerk, and issuing injunctive relief precluding the clerk from charging the unconstitutional filing fee. *Id.* at 337, 343; *see also Cramer v. Sheppard*, 167 S.W.2d 147, 156 (Tex. 1942) (mandamus issued directing the Comptroller to issue pay warrants after he refused to issue them based on his improper interpretation of the Constitution). In this matter, if Allcat is correct and the Act is unconstitutional, then the Act does not provide legal authority for the Comptroller to retain the taxes and Allcat will be entitled to mandamus directing a refund.

The Comptroller argues that if mandamus relief is appropriate in cases such as this, then any constitutional challenge can be brought initially in this Court. But as we explained in *Love* and *Lane*, Article V, Section 3(a) imposes a limit: legislative authorization and mandamus being a proper or necessary process for enforcement of the right asserted. For example, in a case the Comptroller cites, *Chenault*, the relators brought an original mandamus proceeding seeking "a declaration that the attorney occupation tax is unconstitutional, an injunction against the officials responsible for collecting the tax, and writs prohibiting enforcement of the tax." 914 S.W.2d at 141. The Court refused to consider the constitutional arguments, stating that "this action is not within the original jurisdiction granted to this Court by either the Texas Constitution or the Legislature." *Id.*

We conclude that section 24 of the Act serves as a specific, limited exception to the generalized provisions of the Tax Code that confer exclusive jurisdiction over suits such as Allcat's on the district courts of Travis County; it does not violate Article V, Section 3(a); and it gives this Court original, exclusive jurisdiction to consider the facial challenge to the Act's constitutionality in order to determine whether mandamus should issue directing the Comptroller to refund taxes that

Allcat paid under protest. We need not and do not address other arguments advanced by the parties regarding our jurisdiction over the facial challenge.

B. Is the Tax Constitutional?

As an initial matter, we note Allcat contends that only Texas law applies to the issues presented. We agree. The Bullock Amendment and Texas partnership law, not some other law such as the federal Internal Revenue Code (IRC), control whether the Act violates the Texas Constitution.

Allcat insists that the franchise tax is, in effect, an income tax notwithstanding the Legislature's express statement to the contrary. *See* Act § 21 ("The franchise tax imposed by Chapter 171, Tax Code, as amended by this Act, is not an income tax . . . ."). It reasons that because the income of a partnership is allocated to each partner according to the partner's partnership interest, the Act taxes each partner's allocated share of Allcat's income. Allcat asserts that, in this manner, the franchise tax is a tax on the net incomes of its partners and violates the Bullock Amendment as to partners who are natural persons.

The Comptroller counters that the franchise tax is not an income tax because it can result in taxes due even if the entity loses money. She further argues that whether the tax is an income tax is irrelevant because Texas has adopted the entity theory for partnership law and a tax imposed on a limited partnership entity does not constitute a tax on the net incomes of the partnership's individual partners. Because it is dispositive, we begin with the Comptroller's second argument.

Under the aggregate theory of partnership law a partnership is not an entity separate and distinct from its individual partners. Rather, the "partnership" name or label is a convenient way of referring to the partners as a group. *See* 1 ALAN R. BROMBERG & LARRY E. RIBSTEIN, BROMBERG

AND RIBSTEIN ON PARTNERSHIP § 1.03(a)–(b) (Release No. 31, 2011–12 Supp.). In contrast, under the entity theory of partnership law the partnership is an entity separate and distinct from its partners.[7] *Id.*

Although it has not always been so, Texas adheres to the entity theory. In 1961 the Legislature adopted the Texas Uniform Partnership Act (TUPA), TEX. CIV. STAT. ANN. art. 6132(b) which "lean[ed] heavily toward the entity idea." *Id*., § 1, cmt. This Court recognized that the aggregate theory had been abandoned for most purposes with the TUPA's adoption:

> [under the aggregate theory] a partnership was considered to be an aggregate of individuals acting under contract . . . . However, after the adoption of [TUPA], a partnership was recognized as an entity legally distinct from its partners for most purposes. The entity theory of partnership is consistent with other laws permitting suit in the partnership name and service on one partner.

Haney v. Fenley, Bate, Deaton & Porter, 618 S.W.2d 541, 542 (Tex. 1981) (per curiam). Yet despite the TUPA, some courts continued to apply the aggregate theory in certain situations. *See, e.g.*, *Lawler v. Dallas Statler-Hilton Joint Venture*, 793 S.W.2d 27, 33–34 (Tex. App.—Dallas 1990, writ denied) (recognizing that Texas is "predominantly an entity theory state" but determining that under the TUPA there were sufficient aggregate features to a partnership for the court to apply the aggregate theory to an employment relationship).

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[7] The practical application of these different approaches yields various consequences. For example, which theory a state embraces for its partnership law—aggregate or entity—can be determinative of whether a partner may be liable for embezzlement or improper use of partnership property. *Compare In re Leal*, 360 B.R. 231, 239–41 (Bankr. S.D. Tex. 2007) (applying Texas partnership law to conclude that a partner was liable to the partnership for conversion of partnership property because he did not have an individual interest in such property), *with State v. Birch*, 675 P.2d 246 (Wash. Ct. App. 1984) (upholding the trial court's dismissal of charges for embezzling partnership funds and providing that whether a state follows an aggregate or entity theory of partnership law is for the Legislature to decide). *See generally* BROMBERG at § 1.03(c) (identifying the aggregate and entity aspects of partnership law in specific areas).

Courts' application of the aggregate theory in certain contexts and the entity theory in others led to some confusion. So, "to allay previous concerns that stemmed from confusion as to whether a partnership was an entity or an aggregate of its members," the 73rd Legislature passed the Texas Revised Uniform Partnership Act (TRPA) in 1993 and thereby "unequivocally embrace[d] the entity theory of partnership by specifically stating . . . that a partnership is an entity distinct from its partners." TEX. REV. CIV. STAT. ANN. art. 6132b-2.01, Comment of Bar Committee—1993. The TRPA, codified in the Texas Business Organizations Code, plainly provides that "[a] partnership is an entity distinct from its partners," and "[a] partner is not a co-owner of partnership property." TEX. BUS. ORGS. CODE §§ 152.056, 154.001(c). Further, it is the partnership interest that is a partner's "personal property for all purposes." *Id.* § 154.001(a); *see also Reid Road Mun. Util. Dist. No. 2 v. Speedy Stop Food Stores, Ltd.*, 337 S.W.3d 846, 855 (Tex. 2011) (noting that the general partner of a limited partnership is not an owner of the limited partnership's property). The same Legislature that adopted the TRPA also adopted the language in the Bullock Amendment. *See* Tex. S.J. Res. 49, §§ 1–2, 73d Leg., R.S. (1993) (adopted Nov. 2, 1993).[8]

In *Kao Holdings, L.P. v. Young*, 261 S.W.3d 60 (Tex. 2008), we distinguished early Texas law that rejected the entity theory from modern practice. In doing so we quoted the following language from *Frank v. Tatum*:

[8] The TRPA originated in the 73rd Legislature as H.R. 273. The House passed H.R. 273 on April 19, 1993 and adopted the conference committee report on May 30. The Senate passed H.R. 273 with amendments on May 18and adopted the conference committee report on May 29. Meanwhile, the Senate adopted the language of the Bullock Amendment pursuant to Senate Joint Resolution 49 on April 27, 1993 and adopted the related conference committee report on May 27, 1993. The House adopted Senate Joint Resolution 49 with amendments on May 21and the conference committee report on May 28.

> It is a general rule that suits in courts can only be maintained by and against persons natural or artificial; that is, individuals or corporations. Unless otherwise provided by statute, a copartnership is not considered a person, and must sue and be sued by its members. . . . The rule that a copartnership must sue or be sued by its members is so universally recognized that there is no need for discussion.

Id. at 62 n.9 (quoting 25 S.W. 409, 409–10 (Tex. 1894)). We then contrasted that view with more current law under which a partnership is an entity separate from the partners:

> In *M Sys. Stores, Inc. v. Johnston*, 124 Tex. 238, 76 S.W.2d 503, 504 (1934), we reiterated that "a partnership is not a legal entity, like a corporation." Much later, in *Haney v. Fenley, Bate, Deaton & Porter*, 618 S.W.2d 541, 542 (Tex.1981), we observed that "after the adoption of the Texas Uniform Partnership Act, TEX. REV. CIV. STAT. ANN. art. 6132b, effective January 1, 1962, a partnership was recognized as an entity legally distinct from its partners for most purposes." *See also* TEX. R. CIV. P. 28 ("Any partnership . . . may sue or be sued in its partnership, assumed or common name for the purpose of enforcing for or against it a substantive right. . . .").

Id.

Allcat urges that the separate entity concept applies only in contexts unrelated to net income, such as property ownership and enforcement of liability. Citing *Destec Energy, Inc. v. Houston Lighting & Power Co.*, 966 S.W.2d 792 (Tex. App.—Austin 1998, no pet.), it argues that Texas has not adopted the entity approach for partnership income, thus partnership income is divided into shares essentially owned by the partners regardless of whether the income shares are actually distributed to the partners. We disagree with Allcat's position and its reading of *Destec*. In *Destec* the court of appeals rejected the aggregate theory of partnership law in deference to the Legislature's adoption of the entity theory in the TRPA. *Id.* at 795–96. That same court recently reviewed the nature of partnership income under the entity theory. *See Smith v. Grayson*, No. 03-10-00238-CV, 2011 WL 4924073, at *5–*6 (Tex. App.—Austin Oct. 12, 2011, no pet. h.). In determining whether

partnership earnings retained by the partnership are separate property of a limited partner or community property of the partner and his wife, the court noted that "[p]artnership earnings are owned by the partnership prior to distribution to the partners and cannot be characterized as either separate or community property." *Id.* at *6. Rather, the limited partner's "right to receive his share of the profits is the only partnership right subject to characterization." *Id.* at *5.

Other courts of appeals have likewise rejected attempts to impose an aggregate theory of partnership law, given the express language of the TRPA. *See*, *e.g.*, *Bexar Appraisal Dist. v. Am. Opportunity for Housing-Perrin Oaks, L.L.C.*, No. 04-10-00278-CV, 2010 WL 4978099, at *3–*5 (Tex. App.—San Antonio Dec. 8, 2010, no pet.) (applying the entity theory to distinguish between the partnership and its partners to determine who could protest the rejection of the tax exempt status of certain property); *Simmons, Jannace & Stagg, L.L.P. v. Buzbee Law Firm*, 324 S.W.3d 833 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (holding that a partnership law firm could not appear *pro se*); *Alice Leasing Corp. v. Castillo*, 53 S.W.3d 433, 443 (Tex. App.—San Antonio 2001, pet. denied) (recognizing that "the Legislature unequivocally embraced the entity theory of partnership law in 1993").

Allcat also argues that section 152.202(a) of the Business Organizations Code (entitled "Credits of and Charges to Partner") should control over section 152.056 (entitled "Partnership as Entity"), thereby making partnership income an exception to the separate entity concept. Section 152.202(a) provides in relevant part: "Each partner is credited with an amount equal to . . . the partner's share of the partnership's profits." TEX. BUS. ORGS. CODE § 152.202(a). This provision, when read in context with section 153.206, providing how limited partnership profits and losses are

allocated, merely specifies that partnership profits are credited and allocated to the partner's partnership interest according to the partnership agreement or as otherwise provided under the TRPA. TEX. BUS. ORGS. CODE § 152.202(a), 153.206; *see also id.* § 153.003 (providing that the provisions of chapter 152 apply to limited partnerships if they are not inconsistent with chapter 153 of the TRPA).[9] The TRPA provides that partners have creditors' rights in regard to distributions of partnership profits, but it does not provide that allocations of partnership profits are property of, subject to the control of, or income to the separate partners. *See* TEX. BUS. ORGS. CODE § 153.207–.210; *see also Smith*, 2011 WL 4924073, at *5–*6; *Cleaver v. Cleaver*, 935 S.W.2d 491, 495 (Tex. App.—Tyler 1996, no writ). And the right to receive a distribution, even assuming it is authorized by the partnership, is subject to the partnership's ability to satisfy its liabilities. *See* TEX. BUS. ORGS. CODE § 153.210 (providing that distributions may not be made if, immediately after giving effect to the distribution, liabilities of the partnership will exceed the fair value of the partnership assets); *see also* TEX. BUS. ORGS. CODE § 153.105 (providing that rights of limited partners may be created only by (1) the certificate of formation; (2) the partnership agreement; (3) other sections of chapter 153; or (4) the other limited partnership provisions). Thus, under Texas law the allocation of partnership income or profits to a partner does not convert the amounts allocated into property of or income to the partner, and section 152.202(a) does not indicate a departure from the entity theory.

[9] Allcat's partnership agreement is not in the record. Neither party argues that its relevant terms differ from the TRPA's provisions. *See* TEX. BUS. ORGS. CODE § 152.002 ("To the extent that the partnership agreement does not otherwise provide, this chapter and the other partnership provisions govern the relationship of the partners and between the partners and the partnership.").

In support of its position, Allcat also references matters extraneous to the legislative history of the Bullock Amendment. Some of these pre-date and some post-date enactment of the Amendment. The most relevant are exemplified by a 1991 letter sent to then-Governor Ann Richards by twenty-two members of the senate. The letter stated that "[a] tax on partnership income . . . is really a tax on personal income that only applies to some persons." Letter from Members of the Texas Senate to Governor Ann Richards, *et al.*, (Jul. 23, 1991) (on file with Baylor University's Collections of Political Materials). This position, Allcat urges, provides the context in which the Amendment was adopted.

We agree that the Bullock Amendment must be construed in light of conditions existing at the time it was adopted. *See City of Beaumont v. Bouillion*, 896 S.W.2d 143, 148 (Tex. 1995); *Jones v. Ross*, 173 S.W.2d 1022, 1024 (Tex. 1943). However, in construing the Texas Constitution, we "'ascertain and give effect to the plain intent and language of the framers of a constitutional amendment 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 presume the language of the Constitution was carefully selected, interpret words as they are generally understood, and rely heavily on the literal text. *See Harris Cnty. Hosp. Dist. v. Tomball Hosp. Auth.*, 283 S.W.3d 838, 842 (Tex. 2009) (citing *Stringer v. Cendant Mort. Corp.*, 23 S.W.3d 353, 355 (Tex. 2000) and *Bouillion*, 896 S.W.2d at 148).

As we have often held, however, the most relevant consideration in construing a constitutional or statutory provision is its text. The permutations placed on that text by others, even those who urge its adoption, must ordinarily yield when the text's plain meaning says the opposite.

Political advocacy may influence votes on important legislative initiatives, but it cannot control a court's ultimate responsibility to decide the law that was finally enacted or adopted. Here, the letter to Governor Richards represents senators' opinions almost two years before the Legislature adopted the TRPA and approved the Bullock Amendment's language and submitted it to Texans for adoption. It represents but a subset of the Legislature and states views that may have changed in the two-year period of debate preceding the enactment of the TRPA and the submission of the Amendment to the voters. Indeed every one of the signatories who were still senators in the 73rd Legislature voted in favor of the TRPA. The passage of time, in conjunction with the plain language of the TRPA's text, forecloses any argument that the Legislature rejected any aspect of the entity theory of partnership law.

The materials Allcat references reflect a disdain for a state income tax on natural persons, absent voter approval, but none of the materials contradicts legislative intent to tax partnerships under the entity theory. The caption of Senate Joint Resolution 49 stated that the resolution "[p]ropos[ed] a constitutional amendment prohibiting a personal income tax without voter approval and dedicating the proceeds of the tax, if enacted, to education and property tax relief," and when the proposed amendment was submitted to the voters, it was described as "Proposition 4: The constitutional amendment prohibiting a personal income tax without voter approval and, if an income tax is enacted, dedicating the revenue to education and limiting the rate of local school taxes." Tex. S.J. Res. 49, 73d Leg., caption, § 3 (1993). The language is not ambiguous and, as such, opinions from senators, newspapers, or other sources cannot override the text approved by the Legislature. *See Tex. Dept. of Pub. Safety v. Cox Tex. Newspapers, L.P.*, 343 S.W.3d 112, 117–18

(Tex. 2011) (recognizing that the Legislature's intent is best manifested by what it enacts); *Molinet v. Kimbrell*, ___ S.W.3d ___, (Tex. 2011) ("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 . . . . The Legislature expresses its intent by the words it enacts."); *AT&T Commc'ns of Tex., L.P. v. Sw. Bell Tel. Co.*, 186 S.W.3d 517, 528–529 (Tex. 2006) ("[T]he statement of a single legislator, even the author and sponsor of the legislation, does not determine legislative intent."). Nor do they reflect intent by the voters to adopt something other than a constitutional amendment prohibiting a personal income tax without voter approval, and providing that if a personal income tax were to be enacted, revenues from it must be dedicated to education. Accordingly, we read the TRPA as stating without equivocation that partnership income remains property of the partnership entity until it is distributed.

Allcat further argues that the Bullock Amendment extends to instances in which a natural person's partnership income is taxed "indirectly." Allcat urges that the Bullock Amendment's partnership clause—"including a person's share of partnership and unincorporated association income"—becomes meaningless if it applies only when the franchise tax statute results in direct taxation of a partner for some part of partnership income, as is the case in the federal taxation scheme. *See* 26 U.S.C. § 701 ("A partnership as such shall not be subject to the income tax imposed by this chapter. Persons carrying on business as partners shall be liable for income tax only in their separate or individual capacities."). The substance of Allcat's argument is that regardless of whether Texas classifies partnership income and profits as partnership property (the entity theory) or property of the partners (the aggregate theory), the Bullock amendment constitutionally transforms

a natural-person partner's allocated share of partnership income into part of the person's "net income" and forbids applying the tax at either the partnership or individual level absent approval in a referendum. Again, we disagree.

When construing statutes we presume the Legislature intended them to comply with the Texas Constitution. TEX. GOV'T CODE § 311.021; *see also Proctor v. Andrews*, 972 S.W.2d 729, 735 (Tex. 1998) ("'Statutes are given a construction consistent with constitutional requirements, when possible, because the legislature is presumed to have intended compliance with [the Constitution].'" quoting *Brady v. Fourteenth Court of Appeals*, 795 S.W.2d 712, 715 (Tex. 1990)). And as previously noted, in construing amendments to the Texas Constitution we ascertain and give effect to the plain intent and language of the framers of the amendments and of the people who adopted them, beginning with and giving primacy to the language that was adopted. *See Wilson*, 713 S.W.2d at 101; *Gragg*, 539 S.W.2d at 866.

To review, Section 24(a) of the Constitution provides that voters must approve "[a] general law enacted by the legislature that imposes a tax on the net incomes of natural persons, including a person's share of partnership and unincorporated association income" before it becomes effective. TEX. CONST. art. VIII, § 24(a). The reference to partnership and unincorporated association income is an explanatory phrase modifying the phrase "the net incomes of natural persons." *Id.*; *see also* TEX. GOV'T CODE § 311.005(13) (defining the term "including" under the Code Construction Act as a term of enlargement). Allcat's argument proposes that the amount of partnership income allocated to a partner becomes the partner's "share" of partnership income once it is allocated, regardless of Texas law and regardless of whether partnership operations, expenses or losses were

to later reduce the allocated amount. That argument would have weight if the partnership were not a separate entity, but it is. Allcat does not argue that the TRPA violates either the Bullock Amendment or some other constitutional provision by making the partnership and its income an entity separate from its partners. Nor does Allcat argue that either the Bullock Amendment or some other constitutional provision restricts Texas to particular taxation methodologies such as ones conforming to the federal income tax system.

Simply put, under Texas law the entity theory applies to partnership income and profits. Individual partners do not own any of either while they remain in the partnership's hands and have not been distributed to the partners. *See, e.g.*, TEX. BUS. ORG. CODE § 152.056; *see also Tex. Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 637 (Tex. 2010) ("[W]e must take statutes as we find them and first and primarily seek the Legislature's intent in its language."). And while a partner's interest in the partnership represents the right to receive the partner's share of partnership profits when they are distributed, it does not follow that for purposes of the Texas franchise tax such right constitutes a partner's "share" of any partnership income or profits while the partnership retains the income and profits without having distributed any of them to the partner.[10]

[10] The Comptroller argues that use of the term "net income" shows that the Legislature is not prohibited from passing a tax on the gross incomes of natural persons. She suggests that to the extent a person's share of partnership income is income at all, it merely amounts to a portion of the person's "gross income" which is not the subject of the Bullock Amendment. The parties and *amici* advance competing arguments about whether the franchise tax is an income tax. They cite authorities concluding that it is and authorities concluding that it is not. For those concluding that it is not see Ga. Dep't of Rev., Individual FAQs, *available at* https://etax.dor.ga.gov/inctax/webfaq/faq-ind.aspx#texasmargin (last visited Nov. 16, 2011); Instructions for Maine Corporate Income Tax 2010 Form 1120ME, Line 4a, at 4, *available at* http://www.maine.gov/revenue/forms/corporate/ 2010/10_1120inst.pdf; Mass. Dep't of Rev., Directive No. 08-7 (Dec. 18, 2008); Minn. Rev. Notice No. 08-08 (Jul. 21, 2008); Pa. Dep't of Rev., Corp. Tax Bulletin 2008-05, (Dec. 1, 2008), *available at* http://pa.gov/portal/server.pt/document/910228/ct_bulletin_2008-05_pdf; Va. Tax Comm'r Ruling, Pub. Doc. No. 08-169 (Sept. 11, 2008). For those concluding that it is see Cal. Franchise Tax Bd., Technical Advice Mem. 2011-03 (Apr. 13, 2011), *available at* http://www.ftb.ca.gov/law/Technical_Advice_Memorandums/2011/20110003.pdf; Kans. Dep't of Rev., Opinion Letter No. O-2008-004 (Sept. 2, 2008), *available at*

The Bullock Amendment prohibits the State from implementing, without voter approval, an income tax on the net incomes of natural persons, including a tax scheme yielding results similar to those of the federal income tax construct as related to partnerships. Under the federal construct, partnership income "flows through" to and is taxed to the partner. The IRC does not tax partnerships as entities, *see* 26 U.S.C. § 701, but instead taxes only the partners and defines a partner's gross income as including "his distributive share of the gross income of the partnership." 26 U.S.C. § 702(c). The federal law flow-through approach to partnership income "certainly represents the aggregate view [of partnerships]." BROMBERG at 1.03(c)(9). Chapter 171 of the Tax Code does not adopt the tax scheme of the IRC even though it draws from entries on certain federal tax forms as its method for determining the amount of franchise taxes a business owes.[11] Allcat's

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http://rvpolicy.kdor.state.ks.gov/Pilots/Ntrntpil/IPILv1x0.NSF/ae2ee39f7748055f8625655b004e9335/e861583bab1caf27862574ba005eb8c3?OpenDocument (last visited Nov. 16, 2011); Mo. Dep't of Rev. Letter Ruling LR 5309 (Dec. 12, 2008), *available at* http://dor.mo.gov/rulings/show.php?num=5309 (last visited Nov. 16, 2011); S.C. Dep't of Rev., Rev. Rul. 09-10 (Jul. 17, 2009), *available at* http://www.sctax.org/NR/rdonlyres/B8314617-023F-4575-9C96-D9449EE53AAF/0/RR0910.pdf; Wisc. Tax Bulletin 156 at 7 (April 2008); Minutes of the August 2, 2006, Board Meeting on Potential FSP: Texas Franchise Tax, at 2–3, *available at* http://www.fasb.org/jsp/FASB/Page/08-02-06_texas_franchise_tax.pdf. Because the arguments do not affect our analysis, we do not address them.

[11] *See* TEX. TAX CODE § 171.1011. With respect to partnerships this section provides:

> (c) Except as provided by this section, and subject to Section 171.1014, for the purpose of computing its taxable margin under Section 171.101, the total revenue of a taxable entity is: . . . .
>
> (2) for a taxable entity treated for federal income tax purposes as a partnership, an amount computed by:
>
> (A) adding:
>
> (i) the amount reportable as income on line 1c, Internal Revenue Service Form 1065;
>
> (ii) the amounts reportable as income on lines 4, 6, and 7, Internal Revenue Service Form 1065;
>
> (iii) the amounts reportable as income on lines 3a and 5 through 11, Internal Revenue Service Form 1065, Schedule K;
>
> (iv) the amounts reportable as income on line 17, Internal Revenue Service Form 8825;
>
> (v) the amounts reportable as income on line 11, plus line 2 or line 45,

position flies directly in the face of the TRPA's specification that partnership profits and losses are allocated to partners as a component of that partner's partnership interest and the partner's rights to a distribution from that property interest are limited to those of a creditor. TEX. BUS. ORGS. CODE §§ 152.202(a), 153.206–.207, 154.001(a). We reject it. The Bullock Amendment does not preclude the taxation of business entities for the privilege of doing business in Texas and taking advantage of the option to limit the liability of the owners of a business as Allcat does by means of the limited partnership structure.

We conclude that the franchise tax constitutes a tax on Allcat as an entity; it does not constitute a tax on the net income of Allcat's natural-person limited partners within the meaning of the Bullock Amendment. We hold that Allcat's facial challenge is without merit.

III. The As-Applied Challenge

> Internal Revenue Service Form 1040, Schedule F; and
> (vi) any total revenue reported by a lower tier entity as includable in the taxable entity's total revenue under Section 171.1015(b); and
>
> (B) subtracting:
>
> (i) bad debt expensed for federal income tax purposes that corresponds to items of gross receipts included in Subsection (c)(2)(A) for the current reporting period or a past reporting period;
> (ii) to the extent included in Subsection (c)(2)(A), foreign royalties and foreign dividends, including amounts determined under Section 78 or Sections 951-964, Internal Revenue Code;
> (iii) to the extent included in Subsection (c)(2)(A), net distributive income from a taxable entity treated as a partnership or as an S corporation for federal income tax purposes;
> (iv) to the extent included in Subsection (c)(2)(A), items of income attributable to an entity that is a disregarded entity for federal income tax purposes; and
> (v) to the extent included in Subsection (c)(2)(A), other amounts authorized by this section . . . .

TEX. TAX CODE § 171.1011(c)(2).

Allcat does not directly attack the provisions of the Act by its as-applied challenge, but instead claims that the Comptroller's interpretation and enforcement of the franchise tax statutes violates its rights under the equal and uniform taxation clause of Article VIII, Section 1 of the Constitution. In other words, by its as-applied claim Allcat challenges the Comptroller's assessment, enforcement, and collection of the tax imposed by the Act. As we did with the facial challenge, we first address our jurisdiction.

Allcat's claim is subject to chapter 112 of the Tax Code which generally vests exclusive jurisdiction over tax suits in the district courts of Travis County. *See, e.g.*, TEX. TAX. CODE §§ 112.001, 112.051–.053, 112.101–.1011. As it does in its facial challenge, Allcat asserts that section 24 of the Act withdraws its claim from the Travis County courts' jurisdiction and provides this Court with exclusive, original jurisdiction. In the alternative, it asserts that this Court has jurisdiction under the statutory jurisdiction afforded by section 22.002(c) of the Government Code. We first address the argument regarding section 24 of the Act.

We held in section IIA that section 24 of the Act constitutes a specific, limited exception to the general grant of jurisdiction in the district courts of Travis County, *see* TEX. GOV'T CODE § 311.026(b) (specifying that specific statutory provisions prevail over general ones in statutory construction), and is a valid legislative conferral of jurisdiction under Article V, Section 3(a) of the Constitution. Assuming, without deciding, that Section 3(a) authorizes the Legislature to confer original jurisdiction on this Court for an as-applied challenge, section 24 of the Act only confers original jurisdiction over challenges to the constitutionality of the Act. It does not authorize this Court to exercise original jurisdiction over challenges to how the Comptroller assesses, enforces,

or collects the franchise tax. Thus, section 24 of the Act does not confer original jurisdiction on this Court over Allcat's as-applied challenge. *See Chenault*, 914 S.W.2d at 141.

Next, we address Allcat's argument that section 22.002(c) of the Government Code gives this Court original jurisdiction. Section 22.002(c) provides

> Only the supreme court has the authority to issue a writ of mandamus or injunction, or any other mandatory or compulsory writ or process, against any of the officers of the executive departments of the government of this state 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). To support its assertion Allcat cites *In re Smith*, 333 S.W.3d 582 (Tex. 2011), and *A&T Consultants, Inc. v. Sharp*, 904 S.W.2d 668 (Tex. 1995). In those cases the Court determined it had jurisdiction because controlling statutes that expressly authorized mandamus relief did not state which court had jurisdiction to issue the writ against a state executive officer. *See In re Smith*, 333 S.W.3d at 585 (citing TEX. CIV. PRAC. & REM. CODE § 103.051(e)); *A&T*, 904 S.W.2d at 672 (citing former TEX. GOV'T CODE § 552.321, *amended by* Act of May 23, 1999, 76th Leg., ch. 1319, § 27 (adding a provision specifying the court in which a suit for writ of mandamus must be filed)). In this case, however, the Tax Code expressly provides not only which courts have jurisdiction to provide relief in taxpayer challenges—the district courts of Travis County—but also addresses whether those courts are authorized to provide mandamus or other similar relief. *See* TEX. TAX CODE §§ 112.001, 112.108.[12]

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[12] Section 112.108 provides as follows:

> Except for a restraining order or injunction issued as provided by this subchapter, a court may not issue a restraining order, injunction, declaratory judgment, *writ of mandamus or prohibition*, order requiring the payment of taxes or fees into the registry or custody of the court, or other similar legal or equitable relief against the state or a state agency relating to the applicability, assessment,

Moreover, even if section 22.002(c) of the Government Code empowered this Court to exercise original jurisdiction over Allcat's as-applied challenge, the more detailed, specific construct of the Tax Code would apply over section 22.002(c)'s general provisions and limitations. *See* TEX. GOV'T CODE § 311.026 (providing that if statutes conflict, "the special or local provision prevails as an exception to the general provision"); *see also A&T*, 904 S.W.2d at 672 ("Any exception to [section 22.002(c) of the Government Code] would require express statutory authorization by the legislature."). And section 24 of the Act is not an exception to the Tax Code in regard to the as-applied challenge.

We hold that we do not have original jurisdiction over Allcat's as-applied challenge.

IV. Attorney's Fees

Allcat seeks to recover attorney's fees pursuant to the DJA. *See* TEX. CIV. PRAC. & REM. CODE §§ 37.001–.011. It argues that we should presume the Legislature intended to incorporate the DJA into section 24 of the Act because section 24 authorizes declaratory relief, thus providing jurisdiction over Allcat's claim for attorney's fees. *See id.* § 37.009 ("In any proceeding under this chapter, the court may award costs and reasonable and necessary attorney's fees as are equitable and just."). The Comptroller points out that even if section 24 validly grants jurisdiction to this Court,

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> collection, or constitutionality of a tax or fee covered by this subchapter or the amount of the tax or fee due, provided, however, that after filing an oath of inability to pay the tax, penalties, and interest due, a party may be excused from the requirement of prepayment of tax as a prerequisite to appeal if the court, after notice and hearing, finds that such prepayment would constitute an unreasonable restraint on the party's right of access to the courts. *The court may grant such relief as may be reasonably required by the circumstances.* A grant of declaratory relief against the state or a state agency shall not entitle the winning party to recover attorney fees.

TEX. TAX CODE § 112.108 (emphasis added).

its language plainly authorizes only declaratory and injunctive relief—not attorney's fees. *See* Act § 24 (stating that the Court "may issue injunctive or declaratory relief in connection with the [constitutional] challenge"). We agree with the Comptroller that section 24 does not reflect legislative intent to incorporate the DJA.

When construing a statute we presume that every word in the statute was used for a purpose. *In re M.N.*, 262 S.W.3d 799, 802 (Tex. 2008). Just as importantly, we presume that every word excluded from the statute was excluded for a purpose. *Id.*

Assuming, without deciding, that Article V, Section 3(a) authorizes the Legislature to confer jurisdiction for us to award attorney's fees in an original proceeding such as this, section 24 of the Act does not reference the DJA. The presumption Allcat contends for is the opposite of the long-standing judicial presumption that words excluded from a statute were excluded for a purpose. We will not apply it. We conclude that we do not have jurisdiction over the claim for attorney's fees.

The Comptroller advances several reasons why Allcat should not recover attorney's fees if we have jurisdiction over the claim. Because we do not have jurisdiction over the claim, we do not address her contentions. *See Valley Baptist Med. Ctr. v. Gonzalez*, 33 S.W.3d 821, 822 (Tex. 2000) (noting that an appellate court's opinion is advisory if the court does not have jurisdiction over the pending matter).

V. Response to the Dissent

The dissent says section 24 of the Act does not confer mandamus jurisdiction on the Court because it does not use the word "mandamus." The dissent reads section 24 too narrowly. The Legislature clearly intended section 24 to confer jurisdiction on this Court for all taxpayer suits

challenging the constitutionality of the Act. The second part of section 24 references injunctive or declaratory relief, but nowhere does the Act purport to limit the jurisdictional grant to those types of relief. Certainly the first part of section 24 does not limit the jurisdiction it attempts to confer on the Court. And although the conferral of jurisdiction in section 24 is broader than that authorized by Article V, Section 3(a), this does not mean that mandamus jurisdiction is not included within section 24's jurisdictional grant. As we noted in section IIA, when the Legislature attempts to confer jurisdiction in excess of that allowed by the Constitution, we exercise jurisdiction only to the extent allowed by the Constitution. *See Love*, 28 S.W.2d at 522. In this regard, should declaratory or injunctive relief have been appropriate in this case, we would not have looked to the jurisdiction purportedly granted in section 24 for authority. We decided in *Love* and *Lane* that such a grant would not be constitutional. Rather, we would have determined whether such relief was necessary to make our mandamus jurisdiction effective, that is, whether it was correlative to our mandamus jurisdiction. *Lane*, 249 S.W.2d at 593.

The dissent also says that Chapter 112 of the Tax Code explicitly prohibits mandamus relief in this type of suit, and the Act is not an exception to that prohibition. We disagree. While section 112.108 of the Tax Code may generally limit the granting of mandamus relief under certain circumstances, section 24 of the Act is a later-enacted, specific grant of original jurisdiction—including mandamus jurisdiction—over the type of proceeding Allcat brings: a challenge to the constitutionality of the Act. Assuming a conflict exists between section 112.108 and the Act, we agree with the dissent that when statutes are in conflict, the more specific, and later, enactment controls. *See* TEX. GOV'T CODE § 311.026. In this instance, that is the Act. *Compare*

Act of May 24, 1989, 71st Leg., R.S., ch. 232, § 16, 1989 Tex. Gen. Laws 232, *with* Act of May 2, 2006, 79th Leg., 3d C.S., ch. 1, §§ 1–27, 2006 Tex. Gen. Laws 1.

The dissent next argues that mandamus is not appropriate here because there is no ministerial duty for the Comptroller to "independently sit in judgment of the constitutionality of every statute she is charged with enforcing." ___ S.W.3d ___ (Willett, J., dissenting). But we do not address whether she has such a duty, or whether it would have been within her discretion to refuse to enforce the Act as to Allcat's natural person partners because she believed applying it to them would violate the Bullock Amendment. The Comptroller here enforced the statute and relies on it as authority to refuse Allcat's claim for a refund. We determine only that Allcat has not shown entitlement to a refund on the basis that the Comptroller has no legal authority to retain the taxes she collected from Allcat. That is, Allcat has not shown the Act is unconstitutional.

Finally, the dissent discusses at length the question of whether the Legislature violated the separation of powers doctrine by mandating a time limit for us to decide challenges such as Allcat's. *See* TEX. CONST. art. II, § 1. The separation of powers issue is neither subtle nor unimportant. However, the issue (1) is not raised or briefed by the parties, (2) is not alleged to have any harmful effect on the outcome of the proceeding or our decision, and (3) does not affect the validity of our decision. Given the state of the record, any opinion on the issue would be advisory. *See, e.g., Valley Baptist Med. Ctr.*, 33 S.W.3d at 822 ("Under article II, section 1 of the Texas Constitution, courts have no jurisdiction to issue advisory opinions."); *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993) (noting that the distinctive feature of an advisory opinion is that it decides an abstract question of law without binding the parties, and a judgment based on the opinion

does not remedy an actual or imminent harm). Nevertheless, the dissent's extensive discussion on this issue warrants at least some response.

Article II, Section 1 of the Texas Constitution provides as follows:

> 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, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.

TEX. CONST. art. II, § 1. We discussed in section IIA how a statute conferring more jurisdiction on this Court than Article V, Section 3(a) authorizes is invalid to the extent it exceeds the Legislature's constitutional power to confer jurisdiction. The principle involved in that determination applies to the provisions of Article II, Section 1: the Legislature cannot validly exercise a power properly attached to the judiciary except as expressly permitted by the Constitution, or exceed the limits imposed on it by the Constitution.

However, this Court does not function in a vacuum. We recognize that our decision will have ramifications. The Legislature apparently concluded that expediting a judicial decision in matters such as this will be in the best interests of all involved. We see no valid reason that this Court cannot cooperate with priorities expressed by other branches of government so long as we fulfill our constitutional duties and neither impair our judicial prerogatives and functions, nor impair the rights of the parties. We do not see how expediting disposition of this matter violates our constitutional duties or impairs our judicial prerogatives or functions; and the parties have neither

alleged nor shown that they have been harmed or prevented from properly presenting their positions by the manner of the proceedings.

VI. Conclusion

We deny Allcat's requests for relief relating to its facial challenge because the Act does not violate Article VIII, Section 24 of the Constitution. We dismiss the as-applied challenge and attorney's fees claim for lack of jurisdiction.

Phil Johnson
Justice

OPINION DELIVERED: November 28, 2011

IN THE SUPREME COURT OF TEXAS

NO. 11-0589

IN RE ALLCAT CLAIMS SERVICE, L.P. AND JOHN WEAKLY, RELATORS

ON PETITION FOR WRIT OF MANDAMUS

Argued October 24, 2011

JUSTICE WILLETT, joined by JUSTICE LEHRMANN, concurring in part and dissenting in part.

Our system of government endows judges with a genuinely stunning power—that of judicial review, the power to declare laws unconstitutional. But this power, the "proper and peculiar province of the courts,"[1] is by no means boundless. The Texas Constitution that defines our judicial authority also delimits it. And one constitutional curb on judicial power is that of jurisdiction—our very authority to decide cases in the first place.

Ultimately, it falls to us, the courts, to police our own jurisdiction. It is a responsibility rooted in renunciation, a refusal to exert power over disputes not properly before us. Rare is a government official who disclaims power, but liberties are often secured best by studied inaction rather than hurried action.

* * *

[1] THE FEDERALIST NO. 78, at 427 (Alexander Hamilton) (E.H. Scott ed., 1898).

Today's decision may well be the Term's most consequential, not because of the dollar amounts at stake, but because of the constitutional principles at stake—and the restraint the Court fails, regrettably, to exercise. With little fanfare, and rushed by an arguably unconstitutional "deadline," the Court expands the limits of mandamus far beyond the limits of our Constitution. Along the way, the Court redefines one of mandamus's two elements, making it far easier for parties to assert mandamus jurisdiction.

The upshot is that litigants will be able to attack a statute's constitutionality via mandamus, a remedy we once could honestly describe as "extraordinary."[2] Now, any time the Legislature desires a quick answer, it can leapfrog lower-court review altogether and declare virtually any case within this Court's limited original jurisdiction. As explained below, I believe we lack exclusive original mandamus jurisdiction here.

The Court, however, is perhaps not alone in its overreaching. The Legislature, like the judiciary, is bound by the Constitution, which curbs legislative power as surely as it curbs judicial power. Specifically, the Separation of Powers provision limits the Legislature's ability to interfere with the inner workings of the judiciary, and vice versa. The judicial branch is the Legislature's constitutional partner, but not a junior partner.

The Act in this case purports to dictate how and when the Supreme Court must perform its judicial duties, by ordering the Court to hear this case—and more, to decide it within 120 days of filing. The parties have not addressed whether such a deadline can be squared with our

[2] *See, e.g., Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992).

Constitution's most cardinal principle: that powers be separated among supposedly co-equal branches of government. Perhaps a future case will present the issue squarely.

I agree with the Court that we lack jurisdiction over Allcat's *as-applied* challenge (based on the limits in the Constitution, not simply those in the Act itself) and its request for attorney fees. As for Allcat's *facial* challenge, we can only reach it by overreaching. From that part of today's opinion, which I believe disregards the Constitution's limits on our jurisdiction, I respectfully dissent.

I. The Court Lacks Original Mandamus Jurisdiction over Relators' Facial Challenge.

The Court asserts exclusive original mandamus jurisdiction even though:

1. no statute grants us such jurisdiction;

2. the Constitution expressly requires such a statute; and

3. other statutes explicitly forbid mandamus relief in taxpayer suits like this.

More disconcerting, the Court then declares mandamus relief appropriate even though there is no "abuse of discretion" for us to correct nor any "ministerial duty" for us to enforce.

In short, the Court dramatically redefines not just the limits on our mandamus jurisdiction, but one of the essential elements of what once was deemed an "extraordinary" form of relief.[3]

A. No Statute Gives Us Jurisdiction to Grant Mandamus Relief.

The Court does not, and cannot, identify any explicit pronouncement from the Legislature giving us original jurisdiction to grant mandamus relief in this case.

[3] *See id.*

This sounds technical but is hardly insignificant. The Constitution restricts our original jurisdiction, meaning we cannot assert what we have not been assigned. Our original jurisdiction is limited to just those cases where the Legislature has expressly conferred on us the authority to issue writs of quo warranto or mandamus. The Legislature has not done so here.

1. Before We Can Exercise Original Mandamus Jurisdiction, the Legislature Must Give Us Authority to Issue Mandamus Relief.

The last sentence of Article V, Section 3(a) covers our original jurisdiction:

> The Legislature may confer original jurisdiction on the Supreme Court to issue writs of quo warranto and mandamus in such cases as may be specified, except as against the Governor of the State.[4]

Our original jurisdiction is not self-effectuating. We can exercise only what the Legislature has conferred, and it can confer only what the Constitution allows it to confer: jurisdiction "to issue writs of quo warranto and mandamus in such cases as may be specified."[5]

2. The Act Does Not Confer Such Jurisdiction on This Court.

In this case, section 24(a) of the Act purports to give us exclusive original jurisdiction over any challenge to the Act's constitutionality: "The supreme court has exclusive and original jurisdiction over a challenge to the constitutionality of this Act or any part of this Act and may issue injunctive or declaratory relief in connection with the challenge."[6]

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[4] TEX. CONST. art. V, § 3(a).

[5] *Id.*

[6] Act of May 2, 2006, 79th Leg., 3d C.S., ch. 1, § 24(a), 2006 Tex. Gen. Laws 1, 40 [hereinafter "Act"].

Notably, section 24(a) makes no mention of giving this Court original jurisdiction to issue writs of mandamus. In fact, the word "mandamus" does not appear anywhere in the Act.[7]

My question, then, is this: Given that the only way we can have original jurisdiction over a case is if the Legislature confers on us original jurisdiction to issue writs of mandamus (or quo warranto), and given that the Act makes no mention of giving this Court such jurisdiction, where does our original mandamus jurisdiction over this case come from?

3. A Grant of Exclusive Original Jurisdiction Is Not the Same as a Grant of Jurisdiction to Issue a Writ of Mandamus.

The Court contends that we have original mandamus jurisdiction over Allcat's facial challenge because (1) "[t]he Act clearly expresses legislative intent that the Court consider the constitutionality of its provisions," (2) mandamus is "proper or necessary" here, and (3) "[i]f the grant of jurisdiction or the relief authorized in the statute exceeds the limits of Article V, Section 3(a), then we simply exercise as much jurisdiction over the case as the Constitution allows, as we did in *Love*."[8]

Unpacking these statements, it appears the Court uses a three-step process to conclude we have jurisdiction.

Step 1: Under our Constitution and *Love v. Wilcox*, the Legislature can confer on us original jurisdiction to issue writs of mandamus or quo warranto (but it cannot give us any *more* original jurisdiction).

Step 2: If the Legislature "expresses legislative intent" to grant us original jurisdiction, and if mandamus is deemed "proper or necessary," then

[7] *See generally* the Act.

[8] *Ante* at ___ (citing *Love v. Wilcox*, 28 S.W.2d 515, 522 (Tex. 1930)).

we have such original jurisdiction to whatever extent the Constitution allows.

Step 3: If the Legislature confers *more* jurisdiction than the Constitution allows, or authorizes us to issue relief that the Constitution doesn't, we simply read the jurisdictional grant narrowly, "exercis[ing] [only] as much jurisdiction . . . as the Constitution allows."

The problem is that Steps 2 and 3 do not flow from Step 1. In fact, they are logically incompatible with it. When it comes to this Court's original jurisdiction, the Constitution gives the Legislature an extra-thin slice of conferral authority: It can do no more than "confer original jurisdiction . . . *to issue writs of quo warranto and mandamus*."[9] The Act at issue here does not even attempt to do this.[10]

This fact sets this case apart from *Love*. There, the legislative conferral stated that "[t]he Supreme Court shall have the power, or authority, or jurisdiction, to issue the Writ of Mandamus, or any other Mandatory or compulsory Writ or Process."[11] It thus gave the Court, in clear and specific terms, the authority and jurisdiction to issue writs of mandamus in certain situations.[12] The problem in that case was that the Legislature gave us *too much* authority. Its express conferral went beyond the writs we *could* issue pursuant to our original jurisdiction, to those we *could not*. We concluded the Legislature had made a proper, express grant of original jurisdiction—to issue writs

[9] TEX. CONST. art. V, § 3(a) (emphasis added); *see also Love*, 28 S.W.2d at 522 ("[T]he Constitution limits the original jurisdiction of the court to the issuance of writs of quo warranto and mandamus.").

[10] *See* Act § 24(a).

[11] 28 S.W.2d at 521–22.

[12] *Id.*

of mandamus in original proceedings—along with an improper grant—to issue, for example, original writs of injunction.[13]

Here, by contrast, the Act does not make *any* proper grant of original jurisdiction; it simply announces that this Court "has exclusive and original jurisdiction over any challenge to the Act's constitutionality."[14] The Act, unlike the statute in *Love*, makes no mention of giving us the "power, or authority, or jurisdiction" to issue writs of mandamus in such cases.[15] Yet under the Constitution and our own caselaw, this is the only original jurisdiction the Legislature can confer on us.[16]

Thus, the Court today concocts a proper grant of original jurisdiction out of an Act that makes only an improper one. The Court justifies this move by noting that the Act exhibits clear "legislative intent" that we be the Court of first and last resort for challenges to the Act's constitutionality, and by noting that mandamus is "proper or necessary" here.[17] Never mind that neither "legislative intent," nor our independent determination that mandamus is "proper or necessary," has much to do with the paramount constitutional point: Under Article V, Section 3(a),

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[13] *See id.* at 522.

[14] Act § 24(a).

[15] *See Love*, 28 S.W.2d at 522.

[16] *See* TEX. CONST. art. V, § 3(a); *Love*, 28 S.W.2d at 522. I do not disagree with the Court's point that, where our mandamus jurisdiction attaches, the Court has the correlative authority to grant injunctive or declaratory relief. *See ante* at ____ (citing *Lane v. Ross*, 249 S.W.2d 591, 593 (Tex. 1952)). But the key point the Court skates over is that we have this correlative authority only in those cases *where our mandamus jurisdiction has attached*. *See Lane*, 249 S.W.2d at 593. Attachment occurs only where the Legislature expressly gives us the authority to issue writs of mandamus (or quo warranto). My analysis of this sub-issue might be different if section 24(a) said something like the following: "The supreme court has the power, or authority, or jurisdiction, to issue writs of mandamus in conjunction with challenges to the constitutionality of this Act." But the Act says nothing of the sort. And section 24(a)'s express grant of authority to issue injunctions or declaratory judgments does not change this fundamental fact.

[17] *Ante* at ___.

the Legislature may only confer on us original jurisdiction *to issue writs of mandamus or quo warranto*.[18] If the Legislature fails to do so, I would not, given the Constitution's restrictive language, improvise a conferral of original jurisdiction that is simply not there.

The consequence of today's rather striking departure from our precedent is that only two limiting factors remain on our original jurisdiction: (1) the Court's ability to discern "legislative intent" to confer such jurisdiction, and (2) the Court's ability to reimagine the underlying dispute as a mandamus case.[19] And these, of course, are only as limited as the Court's willingness to remake mandamus into something more ordinary than extraordinary.

In sum, the Court today discovers original mandamus authority in a conferral statute that says nothing about mandamus authority. The Court identifies no other source of jurisdiction. Bereft of a proper grant of original jurisdiction, the Court errs by exercising jurisdiction over Allcat's facial challenge.

B. Chapter 112 of the Tax Code Sets the Rules for Taxpayer Suits and Explicitly Bars Mandamus Relief; the Act Makes No Exception.

The Court takes upon itself the daunting task of finding original mandamus jurisdiction here where no statute has expressly conferred it. Making matters more complicated is the fact that this suit is a challenge to a *tax law*. And the Legislature has already created a number of statutory rules, restrictions, and requirements that apply in such taxpayer suits. Chapter 112 of the Tax Code sets forth those restrictions.[20] They limit where and when a taxpayer can bring her suit, what

[18] *See* TEX. CONST. art V, § 3(a).

[19] I discuss this second factor further *infra* Section I.C.

[20] *See generally* TEX. TAX CODE ch. 112.

prerequisites she must meet before filing, and what relief she is (and is not) entitled to. And while the Act here creates certain exceptions to those rules, the Act does not create an exception to Chapter 112's prohibition on mandamus relief in taxpayer suits.[21]

1. Chapter 112 Prohibits Mandamus Relief in Suits Like This.

The language of the relevant provision—section 112.108 of the Tax Code—is so specific that it merits reproducing in its entirety:

> Except for a restraining order or injunction issued as provided by this subchapter, *a court may not issue* a restraining order, injunction, declaratory judgment, *writ of mandamus* or prohibition, order requiring the payment of taxes or fees into the registry or custody of the court, *or other similar legal or equitable relief against the state or a state agency relating to the* applicability, assessment, collection, or *constitutionality of a tax or fee covered by this subchapter* or the amount of the tax or fee due, provided, however, that after filing an oath of inability to pay the tax, penalties, and interest due, a party may be excused from the requirement of prepayment of tax as a prerequisite to appeal if the court, after notice and hearing, finds that such prepayment would constitute an unreasonable restraint on the party's right of access to the courts. The court may grant such relief as may be reasonably required by the circumstances. A grant of declaratory relief against the state or a state agency shall not entitle the winning party to recover attorney fees.[22]

Thus, section 112.108 explicitly prohibits any court from granting injunctive or declaratory relief or issuing any writ of mandamus or any other legal or equitable relief not already allowed elsewhere in Chapter 112.[23]

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[21] Importantly, no one disputes this is a Chapter 112 taxpayer suit and that Chapter 112's restrictions thus apply. The Court, in discussing jurisdiction over Allcat's facial challenge, states explicitly and unequivocally that "Allcat's claim is subject to chapter 112 of the Tax Code." *Ante* § III. The parties appear to agree. In its brief, Allcat cites to sections 112.051–.053 to show it complied with the Code's pre-filing requirements.

[22] TEX. TAX CODE § 112.108 (emphasis added).

[23] In addition to this restriction, Chapter 112 creates others, such as mandating that a taxpayer bring her taxpayer suit in the district court of Travis County. TEX. TAX CODE § 112.001. This is, in turn, a legislatively created exception to the default jurisdiction rule in our Constitution: Under Article V, Section 8, the district courts have exclusive original jurisdiction over all matters unless the Legislature specifies otherwise. *See* TEX. CONST. art. V, § 8. Section 24(a) of

2. Section 24(a) of the Act, While Purporting to Allow Certain Relief Notwithstanding Chapter 112, Does Not Mention Mandamus.

Section 24(a) purports to create an exception to this "no relief" rule. In particular, it announces that this Court can issue declaratory or injunctive relief in connection with a constitutional challenge made in a specific breed of taxpayer suit—specifically, challenges to the Act.[24] But section 24(a) does *not* create an exception to the Tax Code's prohibition on courts, including this Court, issuing writs of mandamus.[25]

This Court generally has the authority to issue mandamus relief against government officials,[26] but Chapter 112 of the Tax Code creates an exception to that power, taking it away in the limited context of taxpayer suits. The Act—specifically, section 24(a)—does not give it back. Indeed, as discussed above, the Act doesn't mention mandamus anywhere.[27] As the Act does not establish an "exception to the exception," we lack mandamus authority here.[28]

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the Act, in terms of its jurisdiction grant, purports to create an "exception to the exception" requiring taxpayers to bring their constitutional challenges to the Act in this Court.

[24] *See* Act § 24(a).

[25] Importantly, because the Act does not give us original mandamus jurisdiction in suits challenging the Act, it cannot give us authority to grant declaratory or injunctive relief in such suits either. As discussed *supra* Section I.A., we held in *Love* that the Legislature cannot give us jurisdiction to issue such relief in original proceedings, absent a contemporaneous issuance of a writ of mandamus. *Love*, 28 S.W.2d at 522. We refined this point in *Lane*, noting that we can issue injunctions or declaratory judgments, in original proceedings, to make our mandamus writs effective—but *Lane* did not change the fact that the Legislature cannot give us authority, in original proceedings, to issue stand-alone injunctions or declaratory judgments. *Lane*, 249 S.W.2d at 593. Because the Legislature lacks that power, its attempt to do so here is invalid.

[26] *See* TEX. GOV'T CODE § 22.002(a).

[27] *See supra* § I.A.

[28] As the Court notes in concluding that we *lack* jurisdiction over Allcat's as-applied challenge, the Government Code's conferral of mandamus jurisdiction does not override Chapter 112's prohibition on mandamus, either. *See ante* § III. We have held that Government Code section 22.002(c) grants us original jurisdiction over mandamus proceedings

3. The Moral of the Story: The Tax Code Prohibits Us from Exercising Mandamus Jurisdiction over This Case.

The plain language of Chapter 112 prohibits courts from granting mandamus relief in taxpayer suits like this. The Act here does not make an exception to this rule, even while it envisions the availability of injunctive and declaratory relief.

The Court seems fully aware of this. In fact, section 112.108's bar on mandamus relief provides part of the foundation for the Court's conclusion that we lack jurisdiction over Allcat's as-applied challenge.[29]

To my mind, what's good for the goose is good for the gander. Or, in this case, the opposite: If it's no good for the gander, it's no good for the goose either. Just as the Tax Code's bar on mandamus relief forbids us from exercising original mandamus jurisdiction over Allcat's *as-applied* challenge, it also bars us from exercising such jurisdiction over Allcat's *facial* challenge.

C. Mandamus is Inappropriate in a Case Like This, Because There Is No Ministerial Duty to Compel the Executive to Perform.

I come now to what I see as the most tenuous part of the Court's holding. For the Court to conclude that we can exercise exclusive original mandamus jurisdiction here, it must first shoehorn this case into the "mandamus" category. But under our mandamus jurisprudence, it is impossible to do so.

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against executive government officers, and gives us exclusive authority to issue the writ against them. *See A & T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 673–74 (Tex. 1995). However, this conflicts with Chapter 112's more specific, later-enacted prohibition on courts issuing mandamus relief in taxpayer suits.

[29] *See ante* § III.

This is not a mandamus proceeding because one of the two elements required for mandamus relief is entirely absent. Mandamus is appropriate only to correct an abuse of discretion or to compel a government officer to perform a ministerial duty.[30] Neither is present here. The Comptroller—the officer Allcat seeks to mandamus—has neither abused her discretion nor failed to perform a ministerial duty.

My view is uncomplicated: Deciding whether a statute is constitutional is not the proper subject of a mandamus proceeding. And that's all this case is—a garden-variety constitutional challenge. There is no ministerial duty to compel, no abuse of discretion to correct. There is only Allcat's argument that the Act is unconstitutional. This is simply not a mandamus case.

1. The Elements of Mandamus

To obtain mandamus relief, a relator must demonstrate two things: (1) a lower court or government official committed a clear abuse of discretion or has failed to perform a ministerial duty;[31] and (2) he has no adequate remedy at law and therefore needs the writ.[32] My primary quibble is with the first element.

The purpose of mandamus—and the role it is invoked to play here—is to compel a government agent to perform a *ministerial* act or duty.[33] But this is, for lack of a better term, a truly extraordinary remedy: By issuing the writ, the Court essentially controls the conduct of a

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[30] *Walker*, 827 S.W.2d at 839.

[31] *Id.* at 839–40.

[32] *Id.*

[33] *Id.* at 839. As the *Walker* Court noted, since the 1950's the Court has increasingly used the writ to correct "clear abuse[s] of discretion" by trial courts. *Id.* (citing cases).

government officer by telling her what she must do.[34] Therefore, the writ will issue only when the duty to be performed is "clear and definite and involves the exercise of no discretion—that is, when the act is ministerial."[35] The meaning of "ministerial act" is terribly important because it helps set the boundaries of the judiciary's power to issue writs of mandamus. Thus, we have long defined that term narrowly:

> The distinction between ministerial and judicial and other official acts seems to be that where the law prescribes and *defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment,* the act is ministerial; but where the act to be done involves the exercise of discretion or judgment in determining whether the duty exists, it is not to be deemed merely ministerial.[36]

2. The Alleged "Duty" that the Court Identifies

The Court suggests that Allcat seeks a writ of mandamus compelling the Comptroller to refund taxes Allcat paid under the Act; this alleged duty, if it exists, flows from the fact that the Act is unconstitutional.[37] The Court denies the writ: Because Allcat failed to show the Act is unconstitutional, "Allcat has not shown entitlement to a refund."[38] That is, Allcat has failed to prove the existence of any ministerial duty for us to compel the Comptroller to perform.

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[34] *See Turner v. Pruitt*, 342 S.W.2d 422, 423 (Tex. 1961).

[35] *Id.*

[36] *State Bar of Tex. v. Heard*, 603 S.W.2d 829, 832 (Tex. 1980) (emphasis added) (quoting *Comm'r of the Gen. Land Office v. Smith*, 5 Tex. 471, 479 (1849)).

[37] *See ante* at ___ (asserting that "Allcat seeks an order directing the Comptroller to refund part of the taxes it paid" and therefore concluding that mandamus is "proper or necessary" here); *id.* at ___ ("In this matter, if Allcat is correct and the Act is unconstitutional, then the Act does not provide legal authority for the Comptroller to retain the taxes and Allcat will be entitled to mandamus directing a refund.").

[38] *Id.* at ___.

The only problem with the Court's reasoning is that it is circular. To qualify as a "mandamus" case, there must *already* exist, *at the time of filing*, a ministerial duty that the petitioner wants enforced. But the Comptroller does not have a duty to pay a refund on an unconstitutional tax until that tax is first declared unconstitutional. Unless and until this happens, there neither is nor can be any duty to issue a refund, precisely because there is no "unconstitutional" tax. There is, simply, a tax, which is presumptively constitutional until proven otherwise.[39]

The duty the Court identifies—and uses to satisfy the first element of mandamus—is a *conditional* duty: the duty to refund taxes paid on an unconstitutional law *if that law turns out to be unconstitutional*. But a *conditional* duty is not a *ministerial* duty correctable by mandamus. That is, the conditional duty to issue a refund for a potentially unconstitutional tax cannot provide the basis for jurisdiction over a mandamus proceeding challenging the constitutionality of that same tax.

The Court turns for support to our decision in *LeCroy v. Hanlon*.[40] But *LeCroy* was not even an original proceeding—the trial court there had granted a writ of mandamus, but we did not. Nor were we ever asked to *review* the trial court's decision to issue the writ, because the petitioner (the State, against whom the writ had been issued) only sought review of the injunctive and declaratory relief that the trial court had granted.[41] More importantly, we did *not* hold in *LeCroy* that mandamus is an appropriate vehicle for attacking the constitutionality of a statute. In that case, we focused

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[39] *See, e.g.*, *Walker v. Gutierrez*, 111 S.W.3d 56, 66 (Tex. 2003) (noting that when this Court reviews the constitutionality of a statute, we "presum[e] the statute is constitutional," and "the party challenging the constitutionality of a statute bears the burden of demonstrating that the enactment fails to meet constitutional requirements").

[40] 713 S.W.2d 335 (Tex. 1986).

[41] *Id.* at 337.

solely on the merits of the parties' constitutional arguments. In fact, the word "mandamus" appears just twice in the entire opinion; both instances occur during our discussion of the case's procedural history.[42]

The only other case the Court cites is *Cramer v. Sheppard*.[43] But like *LeCroy*, *Cramer* provides no support for the proposition that the constitutionality of a statute is an appropriate subject for a mandamus proceeding. The Court is correct that in *Cramer* we mandamused the Comptroller to make a payment he had refused to make.[44] But mandamus did *not* issue to stop the Comptroller from enforcing what turned out to be an unconstitutional statute. In fact, no party even made a constitutional argument in *Cramer*—much less attacked the constitutionality of a statute.[45]

The "duty" the Court identifies, then, is not a mandamus-able one. Yet for this case to fall into the "mandamus" category—which it must, before we can exercise exclusive original mandamus jurisdiction—there must have existed a ministerial duty, owed by the Comptroller to Allcat, at the time Allcat filed its case.

3. The Alleged "Duty" that Allcat Identifies

[42] *See id.* at 336–37.

[43] 167 S.W.2d 147 (Tex. 1942).

[44] *See id.* at 156.

[45] *See generally id.*

Allcat *does* allege such a duty. In its own words, Allcat seeks a writ of mandamus compelling the Comptroller and the Attorney General to do their constitutional duty "to preserve, protect, and defend the Constitution"[46]—*by refusing to enforce this (allegedly) unconstitutional tax*.

The problem for Allcat is that this alleged "duty" fails our "precision and certainty" test for ministerial duties—nowhere is it defined "with such precision and certainty as to leave nothing to the exercise of discretion or judgment."[47] There is no statute or case to cite, no clear statement of a duty that an executive must independently sit in judgment of the constitutionality of every statute she is charged with enforcing, *and refuse* to enforce statutes she unilaterally concludes are unconstitutional.

4. The Comptroller's Actual Duty

I do not mean to suggest that this case is totally devoid of ministerial duties. As a matter of fact, the Comptroller *does* have a duty here, a solemn one: to enforce the laws that the Legislature has charged her with enforcing. Indeed, our Constitution is designed such that core legislative power—the power to enact laws—is vested in the Legislature, while the executive is charged with enforcing those laws.[48] The power of *suspending* laws—of refusing to enforce them—is vested

[46] TEX. CONST. art. XVI, § 1.

[47] *Heard*, 603 S.W.2d at 832.

[48] *See* TEX CONST. art. II, § 1.

solely in the Legislature.[49] As the Comptroller argued, if the Separation of Powers provision means anything, it is that the Executive must enforce the laws that the Legislature passes, unless and until the judiciary says otherwise.

5. The Rare Exception: *Corsicana Cotton Mills*

There is a narrow exception to this general rule. If the Executive is called upon to enforce an unconstitutional law, she can refuse to enforce it, and she can use her determination that the law is unconstitutional as a *defense* in a mandamus proceeding to *compel* her to enforce the law.[50] This was our holding in *Corsicana Cotton Mills, Inc. v. Sheppard*.[51]

There, the Legislature had passed a law requiring the Comptroller to reimburse a Texas corporation for erroneously paid franchise taxes. Apparently, the corporation had been overpaying its taxes for years. (It was undisputed that this overpayment was the corporation's fault and that no State agent had ever done anything to induce it.[52]) When the corporation realized its error, it lobbied the Legislature for a state warrant for repayment.[53] The Legislature complied.[54]

The dispute arose when the Comptroller refused to enforce the statute. That is to say, he refused to repay the corporation. Thus, the corporation sought a writ of mandamus in an original

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[49] *See id.* art. I, § 28 ("No power of suspending laws in this State shall be exercised except by the Legislature.").

[50] *See Corsicana Cotton Mills, Inc. v. Sheppard*, 71 S.W.2d 247, 251 (Tex. 1934).

[51] *Id.*

[52] *Id.* at 248.

[53] *Id*.

[54] *Id.*

proceeding in this Court to compel the Comptroller to obey the statute and make the legislatively required payment.[55]

The Comptroller argued the statute was unconstitutional.[56] We agreed and refused to issue the writ. We concluded that "[w]hen a legislative act requires an officer to perform a ministerial duty, he should perform it if the act is not unconstitutional."[57] At the same time, we noted that,

> When the law requires an officer to act, although the act be ministerial merely, if he is directly responsible for his official acts he may refuse to act, *if in his judgment* the law is in conflict with some constitutional provision, and, in case proceedings are instituted to coerce him, he may set up the supposed defect in the law as a defense.[58]

6. Allcat's Approach Turns *Corsicana Cotton Mills* on Its Head.

There is a major difference between the approach that Allcat advocates, and the one we adopted in *Corsicana Cotton Mills*. To use the Comptroller's parlance, this is the difference between using the law as a *sword*, and using it as a *shield*. Under the latter approach, the Executive can defend herself in a mandamus action, whereby a party seeks to compel her to *enforce* a statute, by arguing that in her judgment the law is unconstitutional. This is the approach we endorsed in *Corsicana Cotton Mills*.

Under Allcat's approach, a relator can use *its own* determination that a law is unconstitutional as a sword to compel the Executive *not* to enforce a law that *the relator itself* has determined to be unconstitutional.

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[55] *Id.*

[56] *Id.* at 249.

[57] *Id.* at 251.

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

The fundamental difference here between the two approaches is that Allcat is not seeking to mandamus the Comptroller to perform a *ministerial duty*. Yet this is the one and only species of duty that we can mandamus the Executive to perform.[59] The "duty" that Allcat seeks to enforce involves the Comptroller's independent, reasoned "judgment [that] the law is in conflict with some constitutional provision."[60] Absent a clear and immediately relevant pronouncement by a court on a statute's constitutionality, the only possible way the Executive can conclude that a statute is unconstitutional, and that she should therefore not enforce it, is by exercising *judgment*. By definition, this is not a ministerial duty or action.

Nor can I see how it can possibly be an abuse of discretion for the Comptroller to enforce a statute that no court has held unconstitutional.

Allcat does not cite any precedent from this jurisdiction to the contrary. Probably, it cannot. This may explain why the Court characterizes the alleged "duty" here in the way it does, rather than adopting Allcat's approach and simply announcing that the Executive has a mandamus-able, nondiscretionary duty to independently judge the constitutionality of statutes, and to refrain from enforcing any she suspects are invalid.

But there are two hiccups with the Court's approach. First, this duty is not the one that Allcat identifies and seeks to enforce. Second, as discussed above, it is logically impossible for such a duty to exist until *after* a court has first struck down the underlying law as unconstitutional. Thus, to have any hope of transforming this non-mandamus case into a mandamus case, the Court seems

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[59] *See Walker*, 827 S.W.2d at 839.

[60] *See Corsicana Cotton Mills*, 71 S.W.2d at 251.

logically required to adopt Allcat's position because, in order for us to exercise mandamus jurisdiction here, there must be an abuse of discretion or a ministerial duty to be compelled at the time Allcat filed suit.[61] Under Allcat's approach, at least, the Court's jurisdiction is not dependent on how it decides the merits of the case. The only problem with that approach is that the "duty" it turns on is nonexistent under Texas law.

7. Conclusion: The Court Errs in Exercising Mandamus Jurisdiction.

Allcat seeks a writ of mandamus to compel the Comptroller to perform a ministerial duty she does not have. The Court, perhaps in an attempt to navigate around this problem, recharacterizes the mandamus that Allcat seeks. But the duty the Court identifies logically cannot exist until *after* we first decide the merits of Allcat's suit. The bottom line is, neither "duty" satisfies the first element of mandamus.

It's hardly a mystery why no support exists for either position. Mandamus is (or is supposed to be) an extraordinary remedy, used only to correct a clear abuse of discretion or to compel government officers to perform a duty that is wholly non-discretionary. Mandamus is not a jurisdictional talisman that parties can wave to produce instant Supreme Court review.

The consequence of today's holding is to completely overhaul this element of mandamus, thus making mandamus relief far more available and inviting increasing resort to mandamus proceedings in this Court. Not long ago, one of my colleagues lamented that the Court was dragging Texas into "a whole new world" of mandamus practice.[62] He criticized the Court for stretching the

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[61] *See Walker*, 827 S.W.2d at 839.

[62] *See In re McAllen Med. Ctr., Inc.*, 275 S.W.3d 458, 474–75 (Tex. 2008) (Wainwright, J., dissenting).

writ's second element ("no adequate remedy at law") beyond what he believed our caselaw allowed.[63] Today, the Court turns its sights to mandamus's first element, and in my view dismantles an important limit on the judiciary's writ power. I fear that the lure of instant Supreme Court review of select legislation will prove increasingly irresistible.

In conjunction with the Court's expansive holding that we have original mandamus jurisdiction even absent express conferral, today's mandamus makeover virtually guarantees that parties who crave a quick final answer to their constitutional questions can now make a beeline for this Court, bypassing the normal judicial process, so long as there's even a whiff of "intent" that the Legislature wanted it to be so.[64]

The Court identifies only one potential source of jurisdiction—a legislative declaration that we have exclusive original jurisdiction over cases like this. But this legislative conferral is invalid because it gives us original jurisdiction the Constitution does not allow, and it fails to give us the only type of original jurisdiction the Constitution does allow. Accordingly, I respectfully dissent from the Court's conclusion that we have jurisdiction over Allcat's facial challenge.

II. Constitutional Postscript—The Act's 120-Day "Deadline" for This Court's Decision Raises Separation of Powers Concerns.

Section 24(b) of the Act declares that this Court "shall rule on a challenge filed under this section on or before the 120th day after the date the challenge is filed."[65] The Court does not discuss

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[63] *Id.*

[64] *See ante* at ___ ("The Act clearly expresses legislative intent that the Court consider the constitutionality of its provisions.").

[65] Act § 24(b).

the deadline, as no party raised it (unsurprising, as the Court *itself* is the "party" most directly affected). That said, such a deadline at minimum raises a constitutional eyebrow.

The Texas Constitution, in a single sentence, declares an emphatic and elemental principle: The powers of government are divided among three distinct branches, and no branch may exercise the powers of another *unless the Constitution expressly allows it*.[66] In fact, our explicit Separation of Powers provision—something the U.S. Constitution lacks[67]—prohibits not just the *exercise* of one

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[66] Article II, Section 1 states:

> 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, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.

TEX. CONST. art. II, § 1.

This concept has a rich history in Texas, predating even the Republic itself. In fact, there has been a Separation of Powers provision in every one of Texas's Constitutions. The wording in the current Constitution is identical to the wording used in our four previous state constitutions. TEX. CONST. art. II, § 1, interp. commentary (Vernon 2007); *see* Harold H. Bruff, *Separation of Powers Under the Texas Constitution*, 68 TEX. L. REV. 1337, 1340 (1990) [hereinafter "Bruff, *Separation of Powers*"]. The Republic of Texas had a shorter version in its Constitution, but the idea was exactly the same. *See* THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 89 (George D. Braden ed., 1977) [hereinafter "Braden, CONSTITUTION OF TEXAS"]. Texas even had a Separation of Powers provision *before* it was Texas: Such provisions appeared in both the Mexican national constitution of 1824 and the Coahuila y Tejas state constitution of 1827. *Id.*; Bruff, *Separation of Powers*, at 1341 n.24.

[67] The Texas Constitution differs—and has always differed—from its federal counterpart in that it explicitly separates the branches of government (whereas the federal Constitution includes no such provision). *See* Braden, CONSTITUTION OF TEXAS, at 89; *see generally* U.S. CONST. The fact that Texas has an express separation of powers provision "reflects a belief on the part of those who drafted and adopted our state constitution that one of the greatest threats to liberty is the accumulation of excessive power in a single branch of government." *See Armadillo Bail Bonds v. State*, 802 S.W.2d 237, 239 (Tex. Crim. App. 1990). So said our constitutional twin, the Texas Court of Criminal Appeals, in striking down an unconstitutional infringement by the Legislature of the judiciary's powers.

The Framers of the U.S. Constitution saw the separation of powers principle as fundamental to their new republic—even if they did not explicitly enshrine the concept in that document. *See, e.g.*, THE FEDERALIST NO. 47, at 266 (James Madison) (E.H. Scott ed., 1898) (arguing that "[n]o political truth is certainly of greater intrinsic value" than the separation of powers doctrine). Madison reasoned that "[t]he accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many . . . may justly be pronounced the very definition of tyranny." *Id.* Madison, in turn, thought Montesquieu had written one of the most compelling discussions of the doctrine, and quoted him extensively when urging ratification of the U.S. Constitution:

> When the legislative and executive powers are united in the same person or body . . . there can be no liberty, because apprehensions may arise lest *the same* monarch or senate should *enact* tyrannical laws, to *execute* them in a tyrannical manner . . . Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary controul, for *the judge* would be the

branch's powers by another branch, but also any *interference* with another branch's exercise of its own authority.[68]

Section 24(b) arguably does precisely that. By setting a hard-and-fast deadline for deciding a case, it threatens to interfere with our sworn adjudicatory duties under our Constitution. Imagine if the constitutional tables were turned and this Court purported to dictate the time and manner of legislative decision-making, if we tried to seize control of the legislative calendar and prescribe in minute detail how, when, in what numbers, in what committees, for what purposes, or for how long elected lawmakers could meet (or, for that matter, what laws they could and could not consider). The outcry would be deafening—and rightly so.

Preservation of the judiciary as a co-equal branch is vital because Texans look to the courts—not least to this Court—to safeguard their liberties and legal rights, check abuses of authority by other branches, and preserve our constitutional framework. In other words, a judiciary cannot secure others' freedom without first securing its own. Since our Constitution vests the judicial power in the judiciary alone and mandates that we exercise the judicial power of the State,[69]

> *legislator*. Were it joined to the executive power, *the judge* might behave with all the violence of *an oppressor*.

Id. at 268–69 (quoting Montesquieu, THE SPIRIT OF THE LAWS, Book XI, ch.6).

Madison, like Montesquieu, and like Blackstone as well, saw the separation of powers "to be one of the chief and most admirable characteristics of the English Constitution." *Langever v. Miller*, 76 S.W.2d 1025, 1035 (Tex. 1934). And John Adams reasoned that balancing one state power against the other two was the way to keep human nature in check and preserve any degree of freedom. TEX. CONST. art. II, § 1, inter. commentary (Vernon 2007).

[68] *State Bd. of Ins. v. Betts*, 308 S.W.2d 846, 851–52 (Tex. 1958); *see Gen. Servs. Comm'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 600 (Tex. 2001).

[69] *See* TEX. CONST. art. V, § 1 (vesting the "judicial power" of Texas in this Court and other courts); *id.* § 3(a) (delineating the powers of this Court).

this Court—and every Texas court—must jealously (and zealously) insist on judicial independence and a genuinely co-equal system of government.

Section 24(b) is obviously well meaning, demanding a swift answer so lawmakers and taxpayers alike can act with certainty and alacrity. I understand the impulse; more, I commend it:

> 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,' 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.[70]

But courts must stand guard against drip-by-drip incursions against judicial independence, however ostensibly benign and laudable.

A. Application, and Limits, of the Separation of Powers Doctrine—in Texas and Beyond

Thankfully, we have seldom had occasion to review a statute that tells us what to do and when to do it. The few times we have considered the meaning of the Separation of Powers provision as it relates to the legislative and judicial branches, it has generally been in the context of laws that delegated allegedly judicial functions to other branches.[71]

Our general rule is that a constitutional flag is raised when the legislative (or executive) branch interferes with "the functioning of the judicial process in a field constitutionally committed

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[70] *Robinson v. Crown Cork & Seal Co.*, 335 S.W.3d 126, 165 (Willett, J., concurring) (citations omitted).

[71] *See Betts*, 308 S.W.2d at 851–52; *Little-Tex Insulation Co.*, 39 S.W.3d at 599.

to the control of the courts."[72] Thus, "the controlling factor" for determining whether another branch has encroached vis-à-vis the judiciary is "the presence or absence of interference with effective judicial control" of tasks that are inherently judicial.[73]

1. At the Limits: Judicial Rulemaking by the Legislature, and by the Judiciary

Occasionally, our Constitution, notwithstanding its three-way split of government power, lets one branch exercise a power that arguably belongs to another.[74] For example, while the Constitution lets the judiciary promulgate rules for the court system,[75] it allows the Legislature to override those rules.[76] It even allows the Legislature to cut judicial rules out of whole cloth.[77]

But this power is not limitless. On several occasions, the Court of Criminal Appeals has struck down legislatively imposed judicial rules for violating the Separation of Powers provision.[78]

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[72] It appears that we first announced this rule in *State Board of Insurance v. Betts*. At issue there was a statute that gave the executive a role in the liquidation of insurance companies. 308 S.W.2d at 849. Specifically, the statute allowed the State Board of Insurance to appoint a receiver for bankrupt insurance companies and to administer their liquidation—with judicial supervision. *Id.* The Court noted that the process of liquidation is not an inherently judicial function; at the same time, it noted that the courts have an important role to play in such proceedings. Because the law refrained from interfering with the court's exercise of a judicial function—but still gave them a role to play in something of judicial importance—this Court upheld the law. *See id.* at 851–52. The Court reached a similar conclusion in *General Services Commission v. Little-Tex Insulation Co. See* 39 S.W.3d at 594–98, 600.

[73] *Betts*, 308 S.W.2d at 851.

[74] TEX. CONST. art. II, § 1, interp. commentary (Vernon 2007). In fact, the Framers of our Constitution built an explicit "escape clause" into the Separation of Powers provision. TEX. CONST. art. II, § 1 (stating that no branch may exercise any power of the other branches "except in the instances [t]herein expressly permitted").

[75] *See* TEX. CONST. art. V, §§ 31(a), (b).

[76] *Id.* §§ 31(a)–(c).

[77] *Id.*

[78] *See Armadillo Bail Bonds*, 802 S.W.2d at 241; *see also Meshell v. State*, 739 S.W.2d 246, 252–57 (Tex. Crim. App. 1987) (holding that the "Speedy Trial Act" violated the Separation of Powers provision by infringing on judicial powers established by TEX. CONST. art. V, § 21).

Just as we have held that interfering with the "functioning of the judicial process" violates the separation of powers,[79] our sister High Court has balked when the Legislature "*unduly* interferes with another branch so that the other branch cannot *effectively* exercise its constitutionally assigned powers."[80]

In *Armadillo Bail Bonds v. State*, for example, the Court of Criminal Appeals considered a law that restricted district courts' ability to enter a final judgment when a criminal defendant forfeited his bail bond.[81] Specifically, the law barred the court from entering final judgment *for at least eighteen months* after forfeiture.[82] To guide its analysis, the Court posed two questions: First, is the law grounded in the Legislature's own constitutionally assigned powers?[83] Second, even if so, does the law unduly interfere, or even *threaten* to unduly interfere, with the judiciary's effective exercise of *its* constitutionally assigned powers?[84]

The Court of Criminal Appeals struck down that temporal restriction as an unconstitutional encroachment on one of the judiciary's core functions: rendering judgments.[85] The Court went so far as to note that upholding the Legislature's rule would necessarily pull the judiciary down a

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[79] *Betts*, 308 S.W.2d at 851.

[80] *Armadillo Bail Bonds*, 802 S.W.2d at 239 (emphasis in original).

[81] *See id.* at 238–39.

[82] *Id.*

[83] *Id.* at 241.

[84] *Id.*

[85] *Id.*

slippery slope: If the Legislature truly had the power to prevent the court from entering judgment for eighteen months, then it could keep the Court from *ever* entering a final judgment.[86]

The Court's point seems to be this: The Constitution may give the Legislature authority over what rules the courts use, but rendering judgment and deciding questions of law are core judicial functions beyond the Legislature's grasp.[87] The separation of powers bars the Legislature from "infring[ing] upon the substantive rights of the Judicial department under the guise of establishing 'rules of court,'" precisely because that would "render[] the separation of powers doctrine meaningless."[88] Thus, the Separation of Powers clause bars the Legislature from hindering our ability to render judgment or decide questions of law—even though the Legislature has the constitutional authority to create rules that would otherwise do just that.[89]

2. Other Jurisdictions Overwhelmingly Agree.

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[86] *Id.*

[87] *See id.* at 240.

[88] *Id.*

[89] The Court of Criminal Appeals has since *upheld* legislatively enacted rules that affect the schedules of the district courts. *See State v. Williams*, 938 S.W.2d 456 (Tex. Crim. App. 1997). *Williams* does not invalidate or even restrict the reasoning from *Armadillo Bail Bonds*, however. In *Williams*, the law at issue required district courts to dismiss with prejudice charges against an extradited defendant if the state did not commence trial within 120 days of the defendant's arrival in Texas. 938 S.W.2d at 457–58. Notably, the law included an out: The court could grant "any reasonable or necessary continuance" if it wanted. *Id.* at 458 n.3. The Court of Criminal Appeals concluded that the law did not unconstitutionally infringe on the judiciary's freedom to exercise core judicial powers. *Id.* at 459. In doing so, the Court reasoned that district courts do not have constitutionally protected authority over whether a case is dismissed. *Id.* Even if correct, this does not affect the holding or reasoning from *Armadillo Bail Bonds*—rendering judgment and deciding questions of law are core judicial functions, and the Legislature cannot interfere with the judiciary's exercise of these. *See* 938 S.W.2d at 458–59.

So far as I can tell, other states' courts are virtually unanimous on this point. With one lonely exception,[90] every single high court has concluded it is an inherently judicial task to determine when to render a judicial decision, and the separation of powers bars legislatures from telling courts when to do so.[91]

A factually similar case from the Supreme Court of Montana is particularly instructive. There, a statute essentially required district court judges and supreme court justices to write and issue any opinion within 120 days of when the case was filed.[92] After discussing many decisions from other jurisdictions striking down such laws, the Montana high court did the same. The court concluded that the law unconstitutionally interfered with the judiciary's internal operations;[93] therefore, it violated Montana's separation of powers provision—a provision that closely resembles our own.[94] The judiciary, and the judiciary alone, should decide when a judicial decision should issue.[95]

The court drove home its message with this intriguing analogy: It likened the *legislature's* deadline-setting for the judiciary, to the *judiciary* telling the legislature how to run its internal

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[90] *See State ex rel. Emerald People's Util. Dist. v. Joseph*, 640 P.2d 1011 (Or. 1982).

[91] *See, e.g.*, *In re Grady*, 348 N.W.2d 559 (Wis. 1984); *Coate v. Omholt*, 662 P.2d 591 (Mont. 1983); *Sands v. Albert Pike Motor Hotel*, 434 S.W.2d 288 (Ark. 1968); *Waite v. Burgess*, 245 P.2d 994 (Nev. 1952); *State ex rel. Kostas v. Johnson*, 69 N.E.2d 592 (Ind. 1946); *Holliman v. State*, 165 S.E. 11 (Ga. 1932); *Atchison, T. & S.F. Ry. Co. v. Long*, 251 P. 486 (Okla. 1926); *Schario v. State*, 138 N.E. 63 (Ohio 1922).

[92] *Coate*, 662 P.2d at 593. A judge who *failed* to issue his opinion before the 120-day deadline was in automatic violation of the law and could face sanctions (including a pay dock). *Id.*

[93] *Id.* at 596–97.

[94] *See* MONT. CONST. art. III, § 1; *Coate*, 662 P.2d at 594.

[95] *Coate*, 662 P.2d at 596.

operations. The legislature's telling the courts when to render decisions was exactly the same "as if the judiciary would impose limitations on the legislature . . . such as the number of committees, the time within which a committee must act, the time each legislator must attend sessions, limiting the time of discussion, limiting the time one bill must pass from one house to the other," and so forth.[96] The judiciary could no more tell the Legislature how to do such things than the Legislature could tell the courts the time and manner in which they must perform their core functions of rendering judgments and deciding questions of law. Such actions by definition offend the separation of powers.

"There are spheres of activity so fundamental and so necessary to a court, so inherent in its very nature as a court, that to divest it of its absolute command within these spheres is to make meaningless the very phrase *judicial power*."[97] Granted, our Constitution—like the constitutions in many other states—gives the Legislature ultimate authority over setting the rules of court. But there exists "a realm of proceedings which are so vital to the efficient functioning of a court as to be beyond legislative power."[98] This is an area of "minimum functional integrity of the courts, what is essential to the existence, dignity and functions of the court as a constitutional tribunal."[99] The overarching principle seems to be this: "Any statute which moves so far into this realm of judicial affairs as to dictate to a judge how he shall judge or how he shall comport himself in judging or

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[96] *Id.* at 597.

[97] A. Leo Levin and Anthony G. Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PENN. L. REV. 1, 30 (1958).

[98] *Id.* at 31–32.

[99] *Id.* at 32.

which seeks to surround the act of judging with hampering conditions clearly offends the constitutional scheme of the separation of powers and will be held invalid."[100]

The reason *why* is simple and clear to someone committed to freedom and limited government. It is the principle articulated by Adams, Blackstone, Madison, and Montesquieu: The best way to avoid tyranny and to guarantee the rights and freedom of the people is to keep the powers of the government separate, and to ensure that no single branch ever anoints itself with so much power that it can dominate the other branches and, eventually, the people.

B. Besides Implicating Separation of Powers Concerns, Section 24(b) Collides with Pragmatic and Principled Concerns, Too.

We have held the Legislature violates the Separation of Powers provision when it thwarts "the functioning of the judicial process in a field constitutionally committed to the control of the courts."[101] The question, again not raised by any of the parties (though the answer seems rather self-evident), is whether a core function of the judiciary is to render judgments and to issue reasoned judicial opinions that clarify the law and help guide the actions of millions of Texans scattered across 254 counties.

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[100] *Id.*

[101] *See Betts*, 308 S.W.2d at 851–52.

Does section 24(b) interfere with our ability to do this by setting an arbitrary deadline for deciding cases? At first blush, it would seem the 120-day deadline impacts the functioning of the judiciary in one of the simplest ways imaginable: by telling us how to manage our own affairs. The Legislature would rightly take exception if this Court, or any court, dictated to them the fine details of how they carry out their oaths of office—prescribing by judicial fiat precisely how our 181 elected legislators ought to legislate. This Court would never contemplate intruding so deeply into the Legislature's internal operations as to commandeer powers that are inherently legislative.

One pragmatic argument against a short-fuse deadline is that 120 days from initial filing may simply not be enough time to render a surpassingly thoughtful and well-reasoned decision. Such adjudicatory work is, undeniably, one of our bread-and-butter core functions. Ours is government of laws, but what use are courts if they cannot give each matter the full attention it requires, to think through every aspect of every relevant question of fact and law, to ensure that the correct outcome (in their opinion, if no one else's) is reached and that their analysis is regarded as exhaustive and scholarly?

Four months—120 days—might seem like plenty of time to decide a case. And no doubt many courts can and should move faster. This Court has commendably erased a backlog that had persisted for years, and we began the current fiscal year on September 1 with the fewest cases held over in recorded history. But the truth is that, generally speaking, 120 days *from initial filing* is rarely enough time for a Supreme Court case to be decided. Procedurally under our rules, there are many, many steps that must occur—*cumulatively taking at least 110 days*—all before the Court even

hears oral argument, much less researches and drafts competing opinions and refines them into finished products.

Under our rules, once the petitioner files his petition, the respondent gets 30 days to file a response (though he routinely requests an extension, or two, or more), and the petitioner another 15 days to file a reply to the response (though he, too, often seeks an extension or two).[102] If we then request full briefing, the parties get another 65 days between them to file opening, response, and reply briefs on the merits (again often requesting extensions along the way).[103] That's 110 days already (assuming no extensions have been requested and granted)—and we haven't even agreed to grant the case yet, much less scheduled oral argument (of which parties are usually given a minimum of twenty-one days notice). Then, after oral argument, the Court engages in spirited analysis and discussion of the legal issues. Opinion drafts by the authoring justice, and then any concurring or dissenting opinions, are circulated and conferenced, often many times, before the Court is confident enough with its reasoning and judgment to issue an opinion. And frequently, the more the Court debates the issues, the majority view becomes the minority view, and vice versa, meaning the competing writings have to be converted.

In terms of its statewide budgetary impact (not to mention its jurisprudential impact), this case may be the most consequential of the Term. It thus demands, and deserves, our most meticulous study. Fast-forwarding and vacuum-packing a multi-billion dollar challenge to a major piece of the Texas tax system does a grave disservice not only to the parties involved, but also to the

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[102] *See* TEX. R. APP. P. 53.7, 56.1.

[103] TEX. R. APP. P. 55.7.

wider public that deserves methodically researched and reasoned Supreme Court rulings to guide their actions. This case may have been filed 120 days ago, but we heard the parties' oral arguments only 35 days ago. Allcat might justifiably wonder whether today's outcome might have been different had the Court taken more time to marinate in these high-stakes questions of law.

One of the ironies of section 24(b) is that such deadlines prejudice the State more than anyone else. Allcat and the other Relators had five years to gird for what they knew would be a brief (but pitched) legal battle. The State—specifically, the Attorney General and the Comptroller—had to throw together its arguments under an expedited briefing schedule we were forced to impose.

A pro-State observer might conclude, "No harm, no foul"—after all, the State won. But the State might lose the next expedited case. And who's to say that loss might not be attributable, at least in part, to the very fact that this Court felt obliged to rush to judgment, literally, in order to meet a no-exceptions deadline.

True, a rule mandating faster judicial decisions would ensure faster judicial decisions, but there's often an inverse correlation between faster and better. When parties appear before a court, there is more at stake for them, and for our system of government, than getting a quick answer. Quick answers are, I concede, quick (if nothing else), but the judiciary's legitimacy, and elegance, derive from the fact that judges are expected to *explain* how we reasoned our way to a legal

conclusion. Reasoning takes time.[104] So does legislating, which may explain why important matters sometimes fall through the cracks as lawmakers sprint to beat their own 140-day clock.[105]

Every case in this Court deserves painstaking judicial review, whether it involves only a few dollars or, as here, untold billions. But considered review requires consideration. Obviously, urgent matters sometimes arise that require urgent answers—for example, parental-notification cases. Nobody disputes that. But allowing the Legislature free rein to fast-forward select judicial decisions threatens to subvert the quality of those decisions, dilute the judiciary's independence and co-equal status, undermine the vitality of judicial review, and concentrate too much power in the hands of a single branch—precisely what the separation of powers doctrine is designed to combat.[106]

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[104] This dissent would doubtless be at least two-thirds shorter were the Court not sprinting to abide the November 28 deadline.

[105] *See* Chuck Lindell, *Legislature's Mistake Jeopardizes License Plate Law*, AUSTIN AMERICAN-STATESMAN, Nov. 15, 2011, *available at* http://www.statesman.com/news/texas-politics/legislatures-mistake-jeopardizes-license-plate-law-1971446.html (noting that in "the frantic final day of the legislative session," the Legislature "mistakenly omitted the $200 fine for driving a vehicle without license plates, possibly jeopardizing the enforcement of related laws").

[106] Not too long ago, the Legislature was more attentive to separation of powers concerns, and more inhibited about encroaching on judicial power via mere statute. In 1997, Article V of the Constitution was amended by adding Section 31(d). *See* TEX. CONST. art. V, § 31(d) (adopted at Nov. 4, 1997 election). That provision states as follows: "*Notwithstanding Section 1, Article II, of this constitution* and any other provision of this constitution, if the supreme court does not act on a motion for rehearing before the 180th day after the date on which the motion is filed, the motion is denied." *Id.* (emphasis added). With this amendment, the Legislature and the voters filled a gap in the Texas Rules of Appellate Procedure—if this Court did not act on a motion for rehearing after denying a petition or after rendering final judgment, that motion was automatically denied. *See id.*

The text alone of this amendment illustrates an important point. Specifically, it indicates that the Legislature thought that enacting such a rule via statute at least implicated the Separation of Powers provision. This may very well explain why the Legislature worded the amendment such that the 180-day rule would apply "[n]otwithstanding Section 1, Article II" of the Constitution—that is, notwithstanding the Separation of Powers provision.

And it's important to note that, when this amendment passed, the Legislature already had the *power* to amend this Court's rules or adopt rules of its own. *See* TEX. CONST. art. V, §§ 31(a)–(c) (giving the Legislature final authority over the rules governing the judiciary). In fact, it had possessed that power for twelve years. *See id.* So when the Legislature chose to act, it clearly knew it had the authority to create this rule. But it apparently thought the Constitution, specifically the Separation of Powers provision, barred it from doing so *absent a constitutional amendment to the contrary*. *See id.* art. II, § 1.

Caselaw from other jurisdictions—plus the Court of Criminal Appeals—suggests a host of "where do you draw the line" concerns with section 24(b). As our sister High Court noted in *Armadillo Bail Bonds*, if the law in that case were allowed to stand, then the Legislature had the power to *forever* block a court from entering judgments.[107] Applied to this case, if the Legislature can order the Supreme Court to decide a case within 120 days, why not thirty days, or seven days, or less? There is no principled way to draw such a line. Hence, if the Legislature can mandate *this* deadline, they can mandate *any* deadline, no matter how arbitrary.[108] While our Constitution may give ultimate authority to the Legislature to set the "rules of court," it does not give the Legislature *carte blanche* to encroach upon the judiciary's substantive rights.[109]

In sum, I have reservations over the constitutionality of section 24(b). The Court refrains from addressing the issue, as no party raised it. Perhaps a future case will squarely ask whether the Constitution permits one branch of government to instruct another on core matters in this way.

III. Conclusion

Spurred by a short fuse of dubious constitutionality, the Court has been harried and hurried into reinventing our mandamus jurisprudence beyond its constitutional and prudential limits. I concur with the Court that we lack jurisdiction over Allcat's as-applied challenge and its request for attorney fees. From the remainder of the Court's opinion, I respectfully dissent.

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[107] 802 S.W.2d at 241.

[108] *See Coate*, 662 P.2d at 597.

[109] *Armadillo Bail Bonds*, 802 S.W.2d at 241.

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Don R. Willett
Justice

OPINION DELIVERED: November 28, 2011

IN THE SUPREME COURT OF TEXAS

NO. 11-0596

CITY OF DENTON, PETITIONER

v.

RACHEL PAPER, RESPONDENT

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

PER CURIAM

The Texas Tort Claims Act generally limits a governmental unit's potential liability for premise-liability damages by classifying the user of the government's real property as a licensee rather than an invitee. TEX. CIV. PRAC. & REM. CODE § 101.022(a). This limitation does not apply, however, when the government's duty to warn involves a special defect such as an excavation or obstruction on a highway, road, or street. *Id.* § 101.022(b). The principal question in this premises-liability suit against a city is whether a depression or sunken area in a roadway, a few inches deep, constitutes an ordinary premises defect or a special defect within the meaning of the Tort Claims Act. *See id.* § 101.022(a)–(b). The distinction is significant because, as noted, the Tort Claims Act imposes a lesser duty of care on the government when the premises claim does not involve a special defect.

The court of appeals held that the sunken area in the road was a special defect because it "was in the same kind or class as an excavation or obstruction and posed an unexpected and unusual danger to ordinary users (bicyclists) of the roadway." ___ S.W.3d ___, ___ (Tex. App.—Fort Worth 2011) (mem. op.). We, however, disagree that the premises defect here is of the same class as an excavation or obstruction. We further conclude that there is no evidence that the City had actual knowledge of the dangerous condition and accordingly reverse the court of appeals' judgment and dismiss the case.

The City of Denton Waste Water Department excavated a section of Willowwood Street while installing a sewer tap. During the installation, the City erected barricades and warned of the construction. Upon completing the job, the City repacked the excavated cut-out and removed the barricades.

Rachel Paper, who lives on Willowwood, was riding her bicycle on the street about a week later. Her bike's front wheel encountered a sunken area in the roadway, and she was pitched over the handlebars, landing on her chin and breaking several teeth. The depression or hole that caused the accident was in the area where the City had installed the sewer tap.

Paper sued the City, claiming that its negligence in creating and failing to repair, or warn of, the street's dangerous condition caused her accident and injuries. The City denied her allegations and, after a discovery period, moved for summary judgment. The City argued that the street's condition was not a special defect but rather an ordinary premises defect of which Paper was aware and the City was not. The trial court, however, denied the City's traditional and no-evidence summary judgment motions, concluding that the condition was indeed a special defect, which meant

that the City owed Paper the same duty of care as that owed an invitee. ___ S.W.3d at ___. The City pursued an interlocutory appeal, TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8), and the court of appeals affirmed the trial court's order denying summary judgment. ___ S.W.3d ___. The City then petitioned for our review, and we requested briefs on the merits. TEX. R. APP. P. 55. Although our jurisdiction over interlocutory appeals is limited, *see City of Dallas v. Reed*, 258 S.W.3d 620, 622 (Tex. 2008) (per curiam), we have jurisdiction here because the court of appeals' decision is inconsistent with our special-defect jurisprudence, which we discuss below. *See* TEX. GOV'T CODE §§ 22.225(b)–(c), 22.001(a)(2).

The Tort Claims Act generally limits the duty of a governmental unit regarding a premises defect to the duty owed to a licensee on private property. TEX. CIV. PRAC. & REM. CODE § 101.022(a). When the premises-liability claim involves a special defect, however, the government's duty is not so limited. *See id*. § 101.022(b) (imposing invitee duty for special defects). The Tort Claims Act does not define the term "special defects" except to state that they include "excavations or obstructions on highways, roads, or streets." *Id*. We have construed special defects to include other defects of the same kind or class as the two expressly mentioned in the statute. *Tex. Dep't of Transp. v. York*, 284 S.W.3d 844, 847 (Tex. 2009) (per curiam). Whether a premises defect is special or ordinary is usually a question of law. *Reyes v. City of Laredo*, 335 S.W.3d 605, 607 (Tex. 2010) (per curiam).

After her accident, one of Paper's friends photographed the accident scene and made a rough estimate of the deepest part of the sunken area by placing a mechanical pencil in the hole. The friend subsequently testified at his deposition that the depth of the area in question was "a few inches, a

couple of inches" or "almost a pencil length deep." No opinion was given as to the width of the sunken area. As the appeal concerns a motion for summary judgment, we examine the evidence in the light most favorable to the nonmovant. *See Star-Telegram, Inc. v. Doe*, 915 S.W.2d 471, 474 (Tex. 1995). We assume then that the depth of the sunken area varied from two inches to a few inches more at its deepest point. The court of appeals noted from photographs in the record that the "deepest part of the hole" was "located several feet into the right lane from the shoulder" and that "Paper could not have navigated around the sunken area . . . without crossing into the oncoming lane of traffic." ___ S.W.3d at ___. While the photographs confirm that the hole was near the center of the right lane, they also indicate, contrary to the court's observation, that ample room existed for a bicycle to navigate around this hole without having to enter the opposing traffic lane.

In concluding that the accident involved a special defect, the court of appeals reasoned that the sunken area was "not analogous to a pothole encountered in the ordinary course of events" because it resulted from "the City's cutting a hole in the street." ___ S.W.3d at ___. This reasoning suggests that a pothole similar to the condition here would not be a special defect but that the same hole caused by a governmental unit's ineffective repair would be. Liability for a premises defect under the Tort Claims Act, however, "is predicated not upon the actions of the governmental unit's employees but by reference to the duty of care owed by the governmental unit to the claimant for premise and special defects . . . ." *DeWitt v. Harris Cnty.*, 904 S.W.2d 650, 653 (Tex. 1995) (citing TEX. CIV. PRAC. & REM. CODE § 101.022). A condition's quality as a special defect thus bears not so much upon the government's role in its creation as it does on the nature of the condition itself. The circumstances surrounding the governmental unit's involvement in the creation of a premises

defect may be relevant to the issue of the government's knowledge of the defect, but will not serve to transform an otherwise ordinary premises defect into a special one. The court of appeals suggested distinction thus finds no support in the Act.

Instead, as we have said, "the central inquiry is whether the condition is of the same kind or falls within the same class as an excavation or obstruction." *York*, 284 S.W.3d at 847 (citing *Cnty. of Harris v. Eaton*, 573 S.W.2d 177, 179 (Tex. 1978)). In determining whether a particular condition is like an excavation or obstruction and therefore a special defect, we have mentioned several helpful characteristics, such as: (1) the size of the condition; (2) whether the condition unexpectedly and physically impairs an ordinary user'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. *The Univ. of Tex. at Austin v. Hayes*, 327 S.W.3d 113, 116 (Tex. 2010) (per curiam) (citing *York*, 327 S.W.3d at 847).

We have held, however, that variations in public roadways of a few inches are not the same as the excavations or obstructions mentioned in the Act. *See, e.g., Reed*, 258 S.W.3d at 622 (holding that a two- to three-inch difference in elevation between traffic lanes was not a special defect); *City of El Paso v. Bernal*, 986 S.W.2d 610, 611 (Tex. 1999) (per curiam) (holding that a worn or depressed area of a sidewalk approximately three feet by six feet in size with a depth of three inches was not a special defect). Similarly, the sunken area or pot hole here, ranging from two inches to a few inches more at its deepest point and located in the center of one lane of traffic is not the excavation or obstruction contemplated by the statute. The pot-hole-like condition here is nothing like the special defect found to exist in *County of Harris v. Eaton*.

Eaton involved an abnormally large hole in the road. This hole varied from six to ten inches in depth and was four- to nine-feet wide, extending over ninety percent of the width of the highway. *Eaton*, 573 S.W.2d at 178. Indeed, we commented that the condition "reached the proportions of a ditch across the highway." *Id.* at 179. We further observed that "one could not stay on the pavement and miss it," implicating another special-defect consideration—the condition unexpectedly and physically impaired the vehicle's ability to travel on the roadway. *Id.* Upon encountering the "ditch" in *Eaton*, the vehicle flipped coming to rest on its roof. *Id*. at 178.

Unlike the roadway's condition in *Eaton*, the sunken area here did not physically impair Paper's ability to travel. *See State v. Rodriguez*, 985 S.W.2d 83, 86 (Tex. 1999) (per curiam) (concluding that "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"). Rather, the photographs indicate that the sunken area could have been avoided without leaving the roadway or entering the opposing lane. Paper herself admits that she was not looking at the road immediately ahead of her at the time of the accident but instead was focused on a stop sign at the end of the street.

"The class of special defects contemplated by the statute is narrow." *Hayes*, 327 S.W.3d at 116. It does not include common potholes or similar depressions in the roadway. *See, e.g., Hindman v. State Dep't of Highways & Pub. Transp.*, 906 S.W.2d 43, 46 (Tex. App.–Tyler 1995, writ denied) (observing that special defects do not include "every pothole or bump encountered on a public highway in Texas capable of upsetting a cyclist"). Such irregularities in the roadway unfortunately are to be expected. Typically, they will not present an unusual danger to the traveler.

Although this is not a special defects case, Paper also contends that the City is liable here for an ordinary premises defect. The Tort Claims Act provides that, in an ordinary premises liability claim, the governmental unit owes only the duty "that a private person owes to a licensee on private property, unless the claimant pays for the use of the premises." TEX. CIV. PRAC. & REM. CODE § 101.022(a). Under Texas law, a licensor of real property owes a duty not to injure the licensee by willful or wanton acts or omissions or gross negligence. *State Dep't of Highways & Public Transp. v. Payne*, 838 S.W.2d 235, 237 (Tex. 1992). When the governmental unit has actual knowledge of a dangerous condition and the licensee does not, the government must either warn the licensee or make the condition safe. *State v. Tennison*, 509 S.W.2d 560, 562 (Tex. 1974).

Paper contends that the City knew about the hole on her street because the City created the condition when it failed to make adequate repairs after installing the sewer tap. The City, on the other hand, argues that it completed repairs to the street a week before Paper's accident and that the construction area was level with the street at the time. The City attached to its summary judgment motion the affidavit of a Field Supervisor in the Wastewater Department who had personal knowledge of the project. He averred that the sewer tap was installed and the street cut out was packed to street level with back fill and flex base to create a hard road surface on March 22. The work crew had to return the next day, however, because the sewer line sank slightly after pack down. The Field Supervisor avers that the sewer line was raised and the street cut out repacked again on March 23. Finally, he swears that when his crew left the project that day, "the area of construction was level with the street and was not hazardous." The City provided additional affidavits to demonstrate that it had not received any complaints about the project or the street repair between the

project's completion on March 23 and Paper's accident a week later on April 1. *See Univ. Of Tex-Pan Am. v. Aguilar*, 251 S.W.3d 511, 513 (Tex. 2008) (per curiam) (observing "that courts generally consider whether the premises owner has received reports of prior injuries or reports of the potential danger represented by the condition").

To prove the actual-knowledge element of a viable premises-defect claim, the licensee must show that at the time of the incident, the landowner knew about the dangerous condition. *See City of Corsicana v. Stewart*, 249 S.W.3d 412, 413–15 (Tex. 2008) (per curiam). The City arguably knew that the repaired area of the street might sink again 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." *Reyes*, 335 S.W.3d at 608 (quoting *City of Dallas v. Thompson*, 210 S.W.3d 601, 603 (Tex. 2006) (per curiam)). "Awareness of a potential problem is not actual knowledge of an existing danger." *Reyes*, 335 S.W.3d at 609.

Here, Paper presented no evidence that the City actually knew a dangerous condition existed after completion of its work on Paper's street the week before her accident. She assumes that the City left the hole on her street after installing the sewer tap or was otherwise aware of the dangerous condition that subsequently developed, but she provides nothing to contradict the City's summary judgment evidence. Because Paper has no evidence that the City knew about this hazard before her accident, it was error to deny the City's motion for summary judgment.

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.

Opinion delivered: August 17, 2012

IN THE SUPREME COURT OF TEXAS

NO. 11-0597

LEXINGTON INSURANCE COMPANY, AS SUBROGEE OF BURR COMPUTER ENVIRONMENTS, INC. AND J. SUPOR AND SONS TRUCKING AND RIGGING CO., PETITIONER,

v.

DAYBREAK EXPRESS, INC., RESPONDENT

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

PER CURIAM

The principal question in this case is whether, for purposes of Section 16.068 of the Texas Civil Practice and Remedies Code, an action for cargo damage against a common carrier, brought under the Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. § 14706, relates back to an action for breach of an agreement to settle the cargo-damage claim. The answer depends on whether the cargo-damage claim is, in the words of Section 16.068, "wholly based on a new, distinct, or different transaction or occurrence" than the breach-of-settlement claim. A divided court of appeals held that a cargo-damage claim does not relate back and is therefore barred by limitations. 342 S.W.3d 795 (Tex. App.–Houston [14th Dist.] 2011). We disagree and accordingly reverse the judgment of the court of appeals and render judgment for the plaintiff.

J. Supor and Son Trucking and Rigging Company engaged respondent Daybreak Express, Inc. to transport computer equipment belonging to Burr Computer Environments, Inc. from New Jersey to Texas. When the shipment arrived, Burr claimed it was damaged. Despite Burr's contention that Daybreak's adjuster had agreed on Daybreak's behalf to settle the claim for $166,655, Daybreak would pay only $5,420. Burr also asserted a claim against Supor, whose insurer, petitioner Lexington Insurance Co., paid Burr $87,500. Then, as subrogee, Lexington sued Daybreak, but only for breaching the settlement agreement, not for damaging Burr's equipment.

An interstate carrier's responsibility for goods it transports is governed by the Carmack Amendment. Enacted in 1906, the Carmack Amendment "supersedes all state laws as to the rights and liabilities and exemptions created by such transaction." *Adams Express Co. v. Croninger*, 226 U.S. 491, 505 (1913) (internal quotation marks omitted). Because the only action against an interstate common carrier for cargo damage is under federal law, Daybreak removed the case to federal court. It cited *Hoskins v. Bekins Van Lines*, 343 F.3d 769, 778 (5th Cir. 2003), which states:

> Congress intended for the Carmack Amendment to provide *the exclusive cause of action for loss or damages to goods arising from the interstate transportation of those goods by a common carrier.* Accordingly, we hold that the complete pre-emption doctrine applies. Because the Carmack Amendment provides the exclusive cause of action for such claims, . . . claims [for such loss or damages] "only arise[ ] under federal law and [can], therefore, be removed . . . ."

(emphasis in original, citation omitted). But the federal court distinguished *Hoskins:*

> In the present case, by contrast, Lexington does not seek to impose liability on Daybreak for damages arising from the interstate transport of property. Instead, Lexington seeks to enforce an agreement it alleges Daybreak entered into in order to settle claims for damages to a shipment of electrical equipment. Resolution of this contract claim does not turn on the rights and responsibilities of Daybreak as a carrier in interstate commerce. The point of the alleged settlement agreement was precisely

> that Lexington's subrogor would *not* pursue the claims that may fall under the Carmack Amendment. Because this is not a suit to recover for loss or damage to property against a carrier but rather one to enforce a settlement agreement, the case will be remanded to state court.

Lexington Ins. Co. v. Daybreak Express, Inc., 391 F. Supp. 2d 538, 541 (S.D. Tex. 2005) (footnote omitted).

Although Lexington successfully avoided removal by not asserting a cargo-damage claim, on remand, it amended its petition to assert one. Lexington filed its amended pleading more than four years after Daybreak rejected Burr's claim, and Daybreak contended the claim was barred by limitations. But Lexington argued that the cargo-damage claim related back to its original action for breach of the settlement agreement, which was filed within two years of Daybreak's rejection of Burr's claim and not barred by limitations. The relation-back doctrine, codified in Section 16.068, states:

> If a filed pleading relates to a cause of action . . . 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 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.

TEX. CIV. PRAC. & REM. CODE § 16.068. The trial court agreed with Lexington, and after a bench trial, rendered judgment against Daybreak for $85,800.

A divided court of appeals reversed. 342 S.W.3d 795 (Tex. App.–Houston [14th Dist.] 2011). The court held that Section 16.068 applies to a Carmack Amendment claim. *Id*. at 803-804. Since the parties do not argue to the contrary, we assume this is correct. The majority then concluded that the cargo-damage and breach-of-settlement claims were based on wholly different

transactions, one centering on the transport of Burr's equipment and the other on the existence of a settlement agreement. *Id.* at 804. Further, the court reasoned, if the shipment and settlement were not different transactions, the Carmack Amendment would preempt the breach-of-settlement claim and removal would have been proper.

> The expansive reach of complete preemption under the Carmack Amendment means that ***any*** cause of action arising from the interstate transportation of goods by a common carrier "is either wholly federal or nothing at all" regardless of how it is labeled. . . . Lexington's claim for breach of the purported settlement agreement cannot be both un-preempted and less than wholly distinct from the interstate transportation of goods by a common carrier.

Id. at 806 (quoting *Hoskins*, 343 F.3d at 773, emphasis in original, internal quotation marks partially omitted).

"Transaction or occurrence" is a concept fundamental to modern civil procedure. *See, e.g.,* TEX. R. CIV. P. 38 (third-party practice), 40 (joinder), 50 (pleading), 97 (counterclaims and cross-claims); TEX. CIV. PRAC. & REM. CODE § 16.068 (limitations); *Barr v. Resolution Trust Corp.*, 837 S.W.2d 627 (Tex. 1992) (res judicata). The United States Supreme Court has observed that "'[t]ransaction' is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship." *Moore v. N.Y. Cotton Exch.*, 270 U.S. 593, 610 (1926). Rule 15(c)(1)(B) of the Federal Rules of Civil Procedure employs a standard similar to Section 16.068, allowing relation back of a claim, pleaded by amendment, "that arose out of the conduct, transaction, or occurrence set out — or attempted to be set out — in the original pleading." FED. R. CIV. P. 15(c)(1)(B). "[T]he search . . . is for a common core of operative facts in the two pleadings." 6 CHARLES ALAN WRIGHT,

ARTHUR R. MILLER, & MARY K. KANE, FEDERAL PRACTICE & PROCEDURE § 1497 (3rd ed. 2010). "Although not expressly mentioned in the rule, the courts also inquire into whether the opposing party has been put on notice regarding the claim or defense raised by the amended pleading." *Id.*; *see also* 2 ROY W. MCDONALD & ELAINE A. GRAFTON CARLSON, TEXAS CIVIL PRACTICE § 10.18 (2d ed. 2002) ("The inquiry applied should be the pragmatic one of notice . . . .").

In the present case, the cargo-damage claim and the breach-of-settlement claim both arose out of the same occurrence: Daybreak's shipment of Burr's computer equipment. The settlement was an effort to reach agreement on the damages recoverable under the Carmack Amendment. Although Lexington might recover on the breach-of-settlement claim without proving the amount of damage to the equipment, that damage was the basis for the settlement agreement. Daybreak might well argue that it is unreasonable to believe that it agreed to pay thirty times more than it actually paid. Daybreak had fair notice that the amount of damage might be in issue, as well as whether an agreement had been reached.

The court of appeals' conclusion that the two claims are based on two separate transactions is contradicted by our decision in *Leonard v. Texaco, Inc.*, 422 S.W.2d 160 (Tex. 1967). There, a surface owner sued the mineral lessee for property damages caused by the lessee's seismic operations. Later, after limitations had run, the surface owner amended his petition to add a claim that the lessee had breached an agreement to pay for the damages, possibly to avoid having to prove negligence. Id. at 161, 162; see *Humble Oil & Ref. Co. v. Williams*, 420 S.W.2d 133, 134 (Tex. 1967) ("A person who seeks to recover from the lessee for damages to the surface has the burden of alleging and proving either specific acts of negligence or that more of the land was used by the lessee

than was reasonably necessary."). In *Leonard*, the surface owner prevailed on the contract claim at trial, but the court of civil appeals reversed, holding under Section 16.068's predecessor, which contained the same relation-back standard, that the contract claim did not relate back to the property damage claim and was therefore barred by limitations. We disagreed. Id. at 162. Though the initial claim "sounded in tort and alleged an excessive use of land" and the later claim "set up a promise to pay . . . damages" that sounded in contract, we concluded: "it cannot be said" that the latter was "wholly based upon and growing out of a different transaction or occurrence." *Id*. at 163.

In *Leonard*, as in the present case, one claim centered on damage to property and the other on an alleged agreement to pay for the damage. And in each case, the requirements for proof of the two claims were somewhat different. But the claims in each cases arose out of the same occurrence and involved the same injury to property. *Leonard*'s holding that the two claims were not based on wholly different transactions forecloses the court of appeals' contrary conclusion in this case.

The federal district court's holding that Lexington's breach-of-settlement claim is not preempted by the Carmack Amendment does not compel the conclusion that it is based on a wholly different transaction than the cargo-damage claim. Again, "'[t]ransaction' is a word of flexible meaning." *Moore*, 270 U.S. at 610. Preemption assures uniform, predictable standards of responsibility for common carriers in transactions involving interstate shipments. Relation back allows an untimely claim not wholly based on a different transaction than a timely claim. The two principles serve different purposes.

We hold that under Section 16.068, Lexington's cargo-damage claim was not barred by limitations. Accordingly, we grant Lexington's petition for review, and without hearing oral

argument, reverse the judgment of the court of appeals and render judgment for Lexington, as the trial court did. TEX. R. APP. P. 59.1.

Opinion delivered: August 31, 2012

IN THE SUPREME COURT OF TEXAS

NO. 11-0644

TEXAS COMMISSION ON HUMAN RIGHTS, TEXAS WORKFORCE COMMISSION, DAVID POWELL, AND ROBERT GOMEZ, PETITIONERS,

v.

MARILOU MORRISON, RESPONDENT.

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

PER CURIAM

In *Casteel*,[1] we held that error is presumed harmful and a new trial is required when a trial court submits a broad-form liability question containing both valid and invalid theories of liability because the appellate court cannot determine whether the jury relied on an invalid theory. In this employer retaliation case, a broad-form jury question allowed the jury to find liability based on a legal theory that was jurisdictionally barred and thus could not support liability. As in *Casteel*, we cannot determine whether the jury relied on the invalid theory. Accordingly, we reverse the judgment of the court of appeals and remand the case for a new trial.

[1] *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 389 (Tex. 2000).

Marilou Morrison began her employment with the Texas Commission on Human Rights (TCHR) in 1991[2] and after several promotions ultimately reached the highest-ranking investigator position. During her employment, TCHR's long-time executive director retired. According to Morrison, the new executive director made derogatory comments to her about her race and rejected more qualified minority job applicants in favor of hiring white employees. After Morrison applied but was not chosen for a team leader position the following year, she requested TCHR's information related to the denied promotion. There was conflict between Morrison and her colleagues and supervisors for over two years,[3] culminating in a "severe act of threat and intimidation" that Morrison allegedly perpetrated on Vickie Covington, the employment investigations manager. TCHR terminated Morrison's employment.

Morrison filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC), which included several bases for discrimination but did not include the denied promotion. Morrison then sued TCHR for retaliation. At trial, counsel and various witnesses discussed the denied promotion. During the jury charge conference, the trial court proposed the following question on liability:

> Did the Texas Commission on Human Rights (TCHR) take adverse personnel actions against Marilou Morrison because of her opposition to an unlawful discriminatory practice?

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[2] At all relevant times Morrison worked for TCHR. However, in 2003, the Legislature abolished TCHR and moved its duties to the Texas Workforce Commission's Civil Rights Division. Act of June 18, 2003, 78 Leg., R.S., ch. 302, 2003 Tex. Gen. Laws 1279, 1279-81.

[3] TCHR alleged Morrison had not met average monthly case closure rates and that she had violated TCHR protocol by failing to notify her supervisor before leaving the office.

The charge did not define "adverse personnel actions." TCHR objected, arguing the broad-form submission improperly commingled adverse personnel actions. Specifically, TCHR objected that the term adverse personnel actions would allow the jury to find liability without unanimity because there were multiple occurrences the jury could view as adverse personnel actions. TCHR tendered a liability question that focused solely on the termination. The trial court denied the objection. The jury found TCHR liable for retaliation and awarded $300,000 in compensatory damages. After post-trial hearings, the trial court entered a judgment reinstating Morrison to her position and awarding her $300,000 in compensatory damages, $300,000 in attorney's fees, and other equitable remedies.

On appeal, TCHR argued, *inter alia*, that the jury charge allowed a finding of liability based on invalid legal theories. The court of appeals concluded that TCHR waived its objection.[4] 346 S.W.3d 838, 848. Because we hold that TCHR did not waive its objection and error is presumed, we reverse and remand for a new trial.

"When a single broad-form liability question erroneously commingles valid and invalid liability theories and the appellant's objection is timely and specific, the error is harmful when it cannot be determined whether the improperly submitted theories formed the sole basis for the jury's finding." *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 389 (Tex. 2000).

We first address whether TCHR preserved error. Texas Rule of Civil Procedure 274 provides, "[a] party objecting to a charge must point out distinctly the objectionable matter and the grounds of the objection. Any complaint as to a question, definition, or instruction, on account of

[4] The court of appeals also reduced Morrison's compensatory damage award to $50,000, pursuant to the statutory cap in section 21.2585(d)(1) of the Texas Labor Code. 346 S.W.3d 838, 853.

any defect, omission, or fault in pleading, is waived unless specifically included in the objections." TEX. R. CIV. P. 274. It is essential that the trial court is put on notice of the complaint "timely and plainly." *State Dep't of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235, 240–41 (Tex. 1992).

The jury was asked:

> Did the Texas Commission on Human Rights (TCHR) take adverse personnel actions against Marilou Morrison because of her opposition to an unlawful discriminatory practice?

The charge did not define "adverse personnel actions." Morrison first contends that TCHR's only objection to the liability question was that it could result in a non-unanimous verdict.[5] Morrison argues the trial court could not be expected to glean from the language of TCHR's objection that there was a potential *Casteel* issue. We disagree. During the charge conference, TCHR argued that the charge lumped TCHR's different actions together, that the case was "really, about retaliation and termination," and that it would not be possible to determine what adverse acts would form the basis of the jury's verdict. This is the problem we identified in *Casteel*–commingling valid and invalid theories of liability in a broad-form question. 22 S.W.3d at 388. This is especially true given that, from the outset of the underlying proceeding, the scope of what adverse personnel actions could form the basis of the suit was a contentious issue. As we have recently stated, *Casteel* error may be preserved without specifically mentioning *Casteel*. *See Thota v. Young*, 366 S.W.3d 678, 691 (Tex. 2012) ("[Appellant] did not have to cite or reference *Casteel* specifically to preserve the right for the appellate court to apply the presumed harm analysis . . . .").

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[5] Combining different theories for recovery under one question does not necessarily invalidate a charge. *See Tex. Dep't of Human Servs. v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) ("Broad-form questions reduce conflicting jury answers, thus reducing appeals and avoiding retrials.").

Morrison also argues TCHR was required to request a correct question or instruction (and that its proposed question was not correct). We disagree. We require only objections, not correct questions, to preserve *Casteel* error. *See, e.g.*, *Romero v. KPH Consol., Inc.*, 166 S.W.3d 212, 228–29 (Tex. 2005). Despite not having the burden to tender a correct question, TCHR submitted a proposed question that would only allow a finding of liability based on Morrison's termination—again indicating to the Court the over-broad nature of the question. We conclude the trial court was sufficiently put on notice and aware of TCHR's objection. *See* TEX. R. APP. P. 33.1(a)(1)(A); *Thota*, 366 S.W.3d at 690 ("[W]e have long favored a common sense application of our procedural rules that serves the purpose of the rules, rather than a technical application that rigidly promotes form over substance.").

Having determined TCHR properly preserved its *Casteel* complaint, we turn to whether the broad-form question on liability allowed a finding on invalid theories, thereby triggering *Casteel's* presumption of harm. Texas Rule of Civil Procedure 277 states that "[i]n all jury cases the court shall, whenever feasible, submit the cause upon broad-form questions," but this does not create an inflexible mandate. *Casteel*, 22 S.W.3d at 388. A broad-form question cannot be used to "put before the jury issues that have no basis in the law or the evidence." *Romero*, 166 S.W.3d at 215. When a jury question contains both valid and invalid theories, "[an] appellate court cannot determine whether the jury based its verdict on an improperly submitted invalid theory," and thus remand for retrial is the only option. *Casteel*, 22 S.W.3d at 388.

TCHR argues that the charge improperly allowed the jury to base liability on Morrison's denied promotion. The denied promotion was not part of Morrison's EEOC claim, which is a

prerequisite to suit against a governmental entity such as TCHR. *See* TEX. GOV'T CODE § 311.034; *In re United Servs. Auto Ass'n*, 307 S.W.3d 299, 308 (Tex. 2010); *Hoffmann-La Roche, Inc. v. Zeltwanger*, 144 S.W.3d 438, 446 (Tex. 2004). While evidence of the denied promotion had some relevance in the underlying proceeding, and TCHR concedes as much, it could not properly form the basis for liability. Because the jury question allowed liability for "adverse personnel actions," the jury could have improperly found liability based upon the denied promotion.

Morrison contends, however, that no invalid theory was directly submitted to the jury, and the mere possibility the jury may find liability based on an invalid theory does not constitute harm. However, when a broad-form question allows a finding of liability based on an invalid theory, an appealing party does not have to prove that the jury actually relied on the invalid theory. *Casteel*, 22 S.W.3d at 388. The very characteristic of broad-form submission prevents parties or the Court from knowing for certain what theory the jurors relied upon. Instead, the court must reverse and remand for retrial because the harm occurs when the appellant is unable to properly present its arguments on appeal due to the nature of the question.[6] The harm to TCHR is not that the jury reached the wrong verdict, but rather that TCHR has been prohibited from demonstrating on appeal that the jury's verdict was based upon the invalid legal theory. *See id*. (noting that "it is possible that the jury based [the defendant's] liability solely on one or more of these erroneously submitted

[6] *See Casteel*, 22 S.W.3d at 388 ("[W]hen a jury bases a finding of liability on a single broad-form question that commingles invalid theories of liability with valid theories, the appellate court is often unable to determine the effect of this error. . . . To hold this error harmless would allow a defendant to be held liable without a judicial determination that a factfinder actually found that the defendant *should* be held liable on proper, legal grounds.").

theories. At any rate, it is impossible for us to conclude that the jury's answer was not based on one of the improperly submitted theories").[7]

In conclusion, TCHR timely objected to the question at issue, which allowed the jury to find liability based on an invalid legal theory. Therefore, we presume harm. *Id.*; TEX. R. APP. P. 44.1(a), 61.1.[8] Without hearing oral argument, TEX. R. APP. P. 59.1, we reverse the court of appeals' judgment and remand the case to the trial court for a new trial.

OPINION DELIVERED: August 31, 2012

[7] Morrison also argues that there is sufficient evidence to uphold the verdict against TCHR. We expressly rejected this argument in *Casteel*. 22 S.W.3d at 388. The issue is not the lack of evidence but the inability of TCHR to demonstrate harm caused by the ability of the jury to find liability based on an invalid legal theory.

[8] In light of our disposition, we do not reach TCHR's remaining arguments.

IN THE SUPREME COURT OF TEXAS

NO. 11-0855

IN RE NESTLE USA, INC., SWITCHPLACE, LLC, AND NSBMA, LP, RELATORS

ON PETITION FOR WRIT OF MANDAMUS

Argued January 12, 2012

JUSTICE HECHT delivered the opinion of the Court.

In this original proceeding, petitioners seek a declaration that the Texas franchise tax[1] is unconstitutional, an injunction prohibiting its collection, and mandamus relief compelling the Comptroller to refund the taxes they paid from 2008 through 2011. Petitioners did not pay their taxes under protest or request a refund from the Comptroller, statutory prerequisites to taxpayer suits in the district court[2] but not, relators contend, for suit in this Court. We disagree. We hold that the statutory prerequisites are conditions on the legislative waiver of the State's immunity from suit. Accordingly, we dismiss the case for want of jurisdiction.

Petitioners are Nestle USA, Inc., a Delaware corporation, Switchplace, LLC, a Texas limited-liability company, and NSMBA, LP, a Texas limited partnership. Nestle and its affiliates manufacture and distribute food and beverages in the United States. In Texas, Nestle engages only

[1] TEX. TAX CODE §§ 171.0001-.501.

[2] *Id.* §§ 112.051-.052, 112.151.

in wholesale activities. Switchplace, headquartered in Dallas, is a global temporary housing company that provides accommodations for relocation, business travel, temporary assignments, and other related services for businesses and their employees. NSMBA rents large equipment, such as generators, air conditioners, cooling towers, and trailers, for use in construction. Petitioners contend that the Texas franchise tax violates the Equal and Uniform Clause of the Texas Constitution[3] and the Equal Protection,[4] Due Process,[5] and Commerce Clauses[6] of the United States Constitution.

Taxpayer suits generally, and suits challenging the franchise tax in particular, are permitted by chapter 112 of the Tax Code. Section 112.052(a) provides that "[a] person may bring suit against the state to recover [a] . . . franchise . . . tax . . . if the person has first paid the tax under protest as required by Section 112.051".[7] Section 112.051 applies to a tax collected by the Comptroller "under any law".[8] It requires that the protest must be submitted with the payment,[9] must be in writing,[10] and must "state fully and in detail each reason for recovering the payment."[11] A copy of the protest must

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[3] TEX. CONST. art. VIII, § 1(a).

[4] U.S. CONST. amend. XIV, § 1.

[5] *Id.*

[6] *Id.* art. I, § 8.

[7] TEX. TAX CODE § 112.052(a).

[8] *Id.* § 112.051(a).

[9] *Id.* § 112.052(a).

[10] *Id.* § 112.051(b).

[11] *Id.*

be attached to the original petition,[12] and "[t]he issues to be determined in the suit are limited to those arising from the reasons expressed in the written protest as originally filed."[13] Suit must be brought against the tax collector, the Comptroller, and the Attorney General[14] within ninety days after the protest payment is made.[15] Chapter 112 also allows injunctive relief, subject to conditions that include the prior filing of a statement of grounds with the Attorney General, and either the payment of taxes due or the posting of a bond for twice the amount due.[16]

Chapter 112 also allows a taxpayer to sue following the Comptroller's denial of an administrative refund claim.[17] The taxpayer must move the Comptroller for rehearing of the denial of the claim, pay any additional tax found due,[18] and bring suit against the Comptroller and Attorney General[19] within thirty days after the motion is denied.[20]

Chapter 112 allows no other actions to challenge or seek refunds of the taxes to which it applies. Section 112.108 prohibits the issuance of any "restraining order, injunction, declaratory judgment, writ of mandamus or prohibition, order requiring the payment of taxes or fees into the

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[12] *Id.* § 112.053(c).

[13] *Id.* § 112.053(b).

[14] *Id.* § 112.053(a).

[15] *Id.* § 112.052(b).

[16] *Id.* § 112.101(a); *see also* §§ 112.1011-.108.

[17] *Id.* § 112.151.

[18] *Id.* § 112.151(a)(2), (3).

[19] *Id.* § 112.151(b).

[20] *Id.* § 112.151(c).

registry or custody of the court, or other similar legal or equitable relief against the state or a state agency relating to the applicability, assessment, collection, or constitutionality of a tax"[21] other than an order issued as provided under the statute.[22] The only exception is that prepayment of the tax as a prerequisite to suit is excused when it "would constitute an unreasonable restraint on the party's right of access to the courts."[23]

Petitioners did not pay their taxes under protest or ask the Comptroller for a refund.[24] They contend that the requirements of chapter 112 apply only to taxpayer suits brought in the district court and not to one brought as an original proceeding in this Court. Section 112.001 mandates that taxpayer suits permitted by chapter 112 be brought in the district court in Travis County.[25] But in 2006, the Legislature overhauled the Texas Franchise Tax Act and as part of those revisions, in section 24 of the bill, conferred on this Court "exclusive and original jurisdiction over a challenge to the constitutionality of this [bill] or any part of this [bill]".[26] Petitioners argue that section 24 jurisdiction creates a right to sue independent of chapter 112.

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[21] *Id*. § 112.108.

[22] *Id.* §§ 112.101-.108 ("Subchapter C. Injunctions").

[23] *Id*.

[24] Switchplace filed an amended return in 2008 that resulted in a non-related refund claim of $15,729.39. No portion of that refund claim was denied.

[25] *Id*. § 112.001.

[26] Act of May 2, 2006, 79th Leg., 3d C.S., ch. 1, § 24, 2006 Tex. Gen. Laws 1, 40 (House Bill 3).

The text of section 24 does not support petitioners' argument. As we noted in *In re Allcat Claims Service, L.P.*,[27] section 24 is simply "a specific, limited exception" to section 112.001.[28] In all other respects, we observed, a taxpayer suit "is subject to chapter 112".[29] We did not specifically consider the applicability of chapter 112's protest-payment and refund-claim prerequisites to section 24 suits because the taxpayer in *Allcat* had complied with chapter 112. But the history of 112 shows the importance of its requirements in all taxpayer suits it permits.

Chapter 112's procedures originated in the Suspense Statute of 1933.[30] The Suspense Statute provided that state taxes could be paid under protest and would then be held in suspense pending resolution of the taxpayer's complaint in a suit brought by him against the public official who had collected the tax. Before then, a taxpayer could challenge a state tax in a suit for injunctive[31] or

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[27] ___ S.W.3d ___ (Tex. 2011).

[28] *Id*. at ___.

[29] *Id*. at ___.

[30] Act of June 7, 1933, 43d leg., R.S., ch. 214, §1, 1937 Tex. Gen. Laws 637, codified formerly as TEX. REV. CIV. STAT. ANN. art. 7057b, recodified by Act of July 30, 1959, 56th Leg., 3d C.S., ch. 1, § 1, 1959 Tex. Gen. Laws 187, 190-191, as TEX. REV. CIV. STAT. ANN. TAX.-GEN. art. 1.05, recodified by Act of May 31, 1981, 67th Leg., R.S., ch. 389, § 1, 1981 Tex. Gen. Laws 1490, 1511-1517, as TEX. TAX CODE §§ 112.001-.156.

[31] *See Rogers v. Daniel Oil & Royalty Co.*, 110 S.W.2d 891, 894 (Tex. 1937) ("We assume that, absent the suspense statute, the [plaintiff] would have the right . . . to resort to a court of equity for injunctive relief [if not subject to the tax complained of].")

declaratory relief,[32] but could sue for a refund only with legislative permission[33] or by alleging payment under duress.[34] The Suspense Statute obviated the necessity of proving duress,[35] and to the extent it offered an adequate remedy at law, would have precluded injunction suits that did not comply with its provisions.[36] The Suspense Statute was recodified as chapter 112 in 1981. The statute did not preclude declaratory judgment actions,[37] but in 1989, section 112.108 was added, making the actions it permitted exclusive for challenging state taxes covered by the chapter.[38] The

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[32] *Cobb v. Harrington*, 190 S.W.2d 709, 712 (Tex. 1945) ("This action is for the purpose of obtaining a judgment declaring that respondents are not [subject to the tax and that the tax collectors] are acting wrongfully and without legal authority. The acts of officials which are not lawfully authorized are not acts of the State, and an action against the officials by one whose rights have been invaded or violated by such acts, for the determination and protection of his rights, is not a suit against the State within the rule of immunity of the State from suit.").

[33] *Nat'l Biscuit Co. v. State*, 135 S.W.2d 687, 688 (Tex. 1940) (quoting the Legislature's joint resolution giving permission to sue for a refund of franchise taxes: "There is no provision of law, nor has there been any provision of law whereby this money unlawfully exacted could be returned or recovered except through a direct appropriation by the Legislature . . . .").

[34] *Austin Nat'l Bank v. Shepherd*, 71 S.W.2d 242, 246 (Tex. 1934) ("A person who pays an illegal tax under duress has a legal claim for its repayment.").

[35] *Dallas Cnty. Cmty. Coll. Dist. v. Bolton*, 185 S.W.3d 868, 879 (Tex. 2005) ("In the years after *Nabisco* and *Austin Nat'l Bank*, the Legislature systematically adopted refund mechanisms and protest requirements in various statutes that obviated the need to show business compulsion in many cases. . . . For example, the Legislature adopted mechanisms for the refund of a tax . . . collected by the comptroller . . . .") (internal quotation marks omitted).

[36] *Rogers*, 110 S.W.2d at 894 ("We think [the Suspense Statute] is complete and adequate to protect the protesting taxpayer as to the principal amount paid. It is true that the protesting taxpayer must obey or perform the various procedural provisions of the suspense statute as to time and otherwise, but we are unable to see how this fact can be held to constitute it incomplete or inadequate."); see TEX. TAX CODE § 112.101-.108 (providing the present procedure for injunctive relief).

[37] *Cobb*, 190 S.W.2d at 713 ("The general purpose of the suspense statute is to provide an adequate legal remedy whereby the taxpayer may test the validity of the law imposing the tax or the authority of the official who seeks to enforce payment of the tax, and by providing the remedy, to prevent interference by injunction with the collection of taxes. . . . It does not follow, however, that respondents are precluded by the suspense statute from maintaining this action for a declaratory judgment.").

[38] Act of June 2, 1989, 71st Leg., R.S. ch. 232, § 16, 1989 Tex. Gen. Laws 1070, 1074, adopting TEX. TAX CODE § 112.108. In *R Communications, Inc. v. Sharp*, 875 S.W.2d 314 (Tex. 1994), we held that the Open Courts provision of the Texas Constitution did not allow the Legislature to condition all declaratory relief on prepayment of taxes. Section 112.108 has since been amended to preclude an Open Courts violation. Act of May 26, 1995, 74th Leg.,

actions permitted are a suit after payment under protest, suit for injunction after payment or posting of a bond, and a suit for a refund.[39]

The rights and restrictions of chapter 112 are part of "the State's entire tax collection scheme".[40] A section 24 action brought originally in this Court, free of chapter 112's restrictions, would severely disrupt that scheme. If a taxpayer were not required to lodge its complaints first by protest or a refund claim, the Comptroller would lack notice of the assertion of illegality, perhaps — as this case illustrates — for years. From the first Suspense Statute, it has been important that the tax collector know of disputes and their potential effect on revenues. Were taxpayers permitted to delay in suing for a refund, the monetary burden of a loss on the State could be greatly increased. In this case, petitioners acknowledge that if they were to prevail and all franchise taxes determined to be illegal were refunded to all similarly situated taxpayers, the impact on the state fisc would be enormous. It is unreasonable to think that the Legislature would have been as cautious as it has been for nearly seventy years in permitting taxpayer suits and then create an original taxpayer suit in this Court with no limitations whatever. Section 24 cannot reasonably be read to do so.

Petitioners argue that even if the protest-payment and refund-claim requirements of chapter 112 apply to original proceedings in this Court, they were excused from compliance because protests and claims were futile; the Comptroller would never forego collection of the franchise tax. But the

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R.S., ch. 579, § 13, 1995 Tex. Gen. Laws 3374, 3377.

[39] TEX. TAX CODE §§ 112.052, 112.101, and 112.151. Petitioners do not argue that the limitations of these actions is unconstitutional, as did the taxpayers in *R Communications*, 875 S.W.2d at 314-315. Nor do petitioners contend that an *ultra vires* suit against the Comptroller is outside chapter 112's provisions. *See City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009).

[40] *R Commc'ns*, 875 S.W.2d at 318.

purpose of such procedures is not solely to obtain favorable action by the Comptroller; the procedures require a taxpayer to state complaints specifically, limit the taxpayer to those complaints in a subsequent action, allow the tax collector to consider the impact on revenue, and put the taxpayer on a short clock to sue. Apart from these reasons for not excusing petitioners from compliance with chapter 112, there is an even firmer impediment. Because these taxpayer rights of action are created by statute, waiving the State's immunity from suit, "the courts may act only in the manner provided by the statutes which created the right."[41]

Petitioners have not complied with chapter 112. To compel a tax refund by mandamus is to grant retrospective monetary relief. Retrospective monetary claims, even by way of mandamus or declaratory relief, are generally barred by immunity, absent legislative consent.[42] If chapter 112 does not permit suit, the only possible legislative waiver of immunity is section 24. But a waiver of sovereign immunity must be "clear and unambiguous".[43] Section 24's grant of jurisdiction to this Court is not a clear and unambiguous waiver of immunity.[44]

Therefore, we cannot grant the mandamus relief petitioners request. And, as we held in *Allcat*, we have the constitutional power to grant injunctive and declaratory relief in original

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[41] *Dan Ingle, Inc. v. Bullock*, 578 S.W.2d 193, 194 (Tex. Civ. App.–Austin 1979, writ ref'd) (citing *Robinson v. Bullock*, 553 S.W.2d 196, 197 (Tex. Civ. App.–Austin 1979, writ ref'd n.r.e.).

[42] *See City of Houston v. Williams*, 216 S.W.3d 827, 828-829 (Tex. 2007) (per curiam); *Tex. Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 855-856 (Tex. 2002) ("[P]rivate parties cannot circumvent the State's sovereign immunity from suit by characterizing a suit for money damages, such as a contract dispute, as a declaratory-judgment claim."). *But cf. Austin Nat'l Bank v. Shepherd*, 71 S.W.2d 242, 246 (Tex. 1934) (mandamus proceeding prior to Suspense Statute to compel refund of taxes paid under duress).

[43] TEX. GOV'T CODE § 311.034.

[44] *See Tooke v. City of Mexia*, 197 S.W.3d 342, 342-343 (Tex. 2006) (holding that phrases like "sue and be sued" and "plead and be impleaded" are insufficient to waive immunity).

proceedings only as necessary to effectuate mandamus relief. Since chapter 112 precludes us from granting the latter, we cannot grant the former.

For these reasons, petitioners' action is dismissed for want of jurisdiction.

Nathan L. Hecht
Justice

Opinion delivered: February 10, 2012

IN THE SUPREME COURT OF TEXAS

NO. 11-0888

CITY OF BEAUMONT, PETITIONER,

v.

YVONNE COMO , RESPONDENT

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

PER CURIAM

The City notified a building owner that her property was in disrepair and that, unless she repaired it, the City might demolish it. After the owner failed to remedy the problem, the City declared the property a public nuisance and condemned it. Rather than appeal the nuisance determination, the property owner asserted a takings claim after the demolition. Because she is precluded from doing so, we reverse in part the court of appeals' judgment and render judgment dismissing her claims.

Yvonne Como owned a commercial building in the City of Beaumont. The City informed Como that her building was vacant, neglected, deteriorated, and dilapidated, and that the City had scheduled a Dilapidated Structure Public Hearing. The City warned Como that if she failed to address the situation, the City might demolish the structure.

Before the hearing, Como requested a copy of the City's file, which included reports and evaluations made after the City had inspected her property. She then notified the City that she would not attend the hearing and emphasized her belief that the City was singling out her property even

though nearby buildings in similar condition had not been slated for demolition. At the hearing, the City Council passed an ordinance deferring action on the building for at least forty-five days. Como was required to secure the building during this time.

After the forty-five days had lapsed, the City notified Como that her building remained in disrepair and that the City had scheduled another Dilapidated Structure Public Hearing. Como responded that she would not attend the hearing and that she disagreed that her building qualified as a dangerous structure under the applicable ordinances. At the hearing, the City Council passed an ordinance declaring Como's building (along with eighty-seven other structures) a public nuisance and condemned it—a decision Como never appealed. Six months later, the City began demolishing the building.

More than a year after demolition, Como sued the City, ultimately asserting eight claims. The first three—a takings claim, an Equal Protection claim, and an Equal Rights Amendment claim—were brought under the Texas Constitution, and the fourth was based on the Texas Public Information Act. The last four—another takings claim, an improper seizure claim, and two Equal Protection claims—were brought under the United States Constitution. The City filed an immunity-based plea to the jurisdiction, which the trial court granted.

Como appealed, and the court of appeals initially affirmed the trial court's judgment but then granted rehearing after our initial opinion in *City of Dallas v. Stewart*, 54 Tex. Sup. Ct. J. 1348 (July 1, 2011), *opinion withdrawn*, *substituted opinion at* 361 S.W.3d 562 (Tex. 2012). 345 S.W.3d 786, 789. The court read *Stewart* to hold that a nuisance determination could not be finally determined in an administrative proceeding. *Id.* at 792. Thus, even though "Como could have, but did not, avail herself of her right to challenge the City's decision, the administrative-level decision to demolish

Como's property [did] not preclude Como from seeking a de novo review of that decision in a constitutional suit." *Id.* The court determined that Como's state and federal takings claims survived and reversed and remanded the trial court's judgment on those claims. *Id.* at 799. The court affirmed the remainder of the judgment, except for Como's Public Information Act claim, which the court dismissed as moot. *Id.* The City petitioned this Court for review.

We have since clarified that a property owner is not entitled to de novo review of an administrative nuisance determination in all circumstances. *See City of Dall. v. Stewart*, 361 S.W.3d 562, 580 (Tex. 2012) (stating that "de novo review is required only when a nuisance determination is appealed").[1] Instead, "a party asserting a taking based on an allegedly improper administrative nuisance determination must appeal that determination and assert [her] takings claim in that proceeding." *Patel v. City of Everman*, 361 S.W.3d 600, 601 (Tex. 2012) (per curiam); *see also Stewart*, 361 S.W.3d at 579 (holding that "takings claims must be asserted on appeal from the administrative nuisance determination"). A party must also "avail [herself] of statutory remedies that may moot [her] takings claim, rather than directly institute a separate proceeding asserting such a claim." *Id.*; *see also City of Dall. v. VSC, LLC*, 347 S.W.3d 231, 234–37 (Tex. 2011) (holding that the plaintiff "must have utilized [available administrative] procedures before a takings suit [could] be viable" and "reject[ing] taking claim because [plaintiff] did not pursue an established remedy to recover its claimed interest in the seized property"). Here, Como never appealed her nuisance determination. Because she "cannot attack collaterally what she cho[se] not to challenge directly,"

[1] This principle was implicit in our original *Stewart* opinion, with which the court of appeals' opinion conflicts, giving us jurisdiction over this interlocutory appeal. *See* TEX. GOV'T CODE § 22.225(c), (e); *see also City of Dall. v. Stewart*, 54 Tex. Sup. Ct. J. 1348 (July 1, 2011), *opinion withdrawn*, *substituted opinion at* 361 S.W.3d 562 (Tex. 2012).

Stewart, 361 S.W.3d at 580, her takings claims are barred, and the trial court correctly dismissed them.

Accordingly, without hearing oral argument, we grant the petition for review, reverse in part the court of appeals' judgment, and render judgment dismissing Como's claims. TEX. R. APP. P. 59.1, 60.2(c).

OPINION DELIVERED: August 31, 2012

IN THE SUPREME COURT OF TEXAS

NO. 12-0208

IN RE REBECCA RAMIREZ PALOMO, RELATOR

ON PETITION FOR WRIT OF MANDAMUS

PER CURIAM

Rebecca Ramirez Palomo and Fernando Sanchez each applied to the chair of the Webb County Democratic Party to be placed on the general primary election ballot as a candidate for the office of judge of the 341st Judicial District Court.[1] Sanchez requested the chair to declare Ramirez ineligible,[2] asserting that she had not been "a practicing lawyer . . . for four (4) years next preceding" this year's general election, as required by Article V, Section 7 of the Texas Constitution.[3] Specifically, Sanchez contended that Ramirez could not practice law from November 2008 to

[1] TEX. ELEC. CODE § 172.021(a) ("To be entitled to a place on the general primary election ballot, a candidate must make an application for a place on the ballot."); *id*. § 172.022(a) ("(a) An application for a place on the general primary election ballot must be filed with: . . . (2) the county chair or the secretary, if any, of the county executive committee, for an office filled by voters of a single county."); TEX. GOV T CODE § 24.487(a) ("The 341st Judicial District is composed of Webb County.").

[2] TEX. ELEC. CODE § 145.003(b) ("A candidate in the general election for state and county officers may be declared ineligible before the 30th day preceding election day by: (1) the party officer responsible for certifying the candidate s name for placement on the general election ballot . . . .").

[3] 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 . . . .").

November 2009, during which she claimed a non-practicing-attorney exemption from the State Bar's Mandatory Continuing Legal Education (MCLE) requirements. When the chair refused Sanchez's request, he petitioned the court of appeals for mandamus relief,[4] which it granted, concluding that Ramirez is ineligible to serve in the office she seeks and directing that her name be removed from the ballot.[5] We then granted Ramirez's petition for mandamus relief and directed the county chair to place Ramirez's name on the ballot.[6] We issued our order without opinion so as not to delay printing of the ballots.[7] We now explain the basis for the order. We conclude that the county chair did not violate any duty imposed by law and that the court of appeals therefore exceeded its writ power.[8]

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[4] TEX. ELEC. CODE § 273.061 ("The supreme court or a court of appeals may issue a writ of mandamus to compel the performance of any duty imposed by law in connection with the holding of an election or a political party convention, regardless of whether the person responsible for performing the duty is a public officer.").

[5] ___ S.W.3d ___ (Tex. App.–San Antonio 2012, orig. proceeding).

[6] 55 Tex. Sup. Ct. J. 460 (March 28, 2012).

[7] The primary election cycle has already been significantly delayed this year by redistricting litigation in federal court. The court of appeals directed the county chair to remove Ramirez's name from the ballot on March 9, before the March 12 deadline for certifying candidates set by the United States District Court. *See Perez v. Texas*, No. 11-CV-360-OLG-JES-XR [Lead Case] (W.D. Tex.) (Order dated March 1, 2012, and Amended Order Regarding Election Schedule dated March 19, 2012). Sanchez argues that this Court cannot act after that deadline. But we have often ordered candidates placed on the ballot after statutory deadlines to protect the electoral process. *E.g.*, *Bird v. Rothstein*, 930 S.W.2d 586, 587 (Tex. 1996); *Davis v. Taylor*, 930 S.W.2d 581, 584 (Tex. 1996); *LaRouche v. Hannah*, 822 S.W.2d 632, 634 (Tex. 1992); *Painter v. Shaner*, 667 S.W.2d 123, 124 (Tex. 1984). Nothing in the federal court's order setting dates for conducting this year's delayed primary elections suggests that the deadlines should be treated any differently than the statutory deadlines they replace.

[8] *See Strake v. Court of Appeals for First Supreme Judicial Dist. of Tex.*, 704 S.W.2d 746, 747 (Tex. 1986) ("In a case involving a public officer over which the court of appeals has mandamus power, that court makes an independent inquiry whether the act, or refusal to act, of the public officer is contrary to a clearly established legal duty. If so, the reviewing court will issue the writ. In reviewing by writ of mandamus the action of a court of appeals our focus remains on the point of origin of the case . . . . We first determine if the action at the point of origin was proper. If we find it to be proper and the court of appeals has held otherwise, it has thus abused its discretion and we will grant the writ of mandamus directing the court of appeals to set aside its writ of mandamus."), *citing Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916 (Tex.1985); *see also Fitch v. Fourteenth Court of Appeals*, 834 S.W.2d 335, 338 (Tex. 1992).

A party officer responsible for certifying a candidate's name for placement on the general election ballot must declare the candidate ineligible if "facts indicating that the candidate is ineligible are conclusively established by [a] public record."[9] The issue in this case is whether public records conclusively establish that Ramirez has not been continuously in practice since November 6, 2008.

Ramirez has been licensed to practice law in Texas since 1999. To practice law in Texas, a lawyer must be a member of the State Bar of Texas.[10] Every member of the State Bar must complete fifteen hours of MCLE each year.[11] A "compliance year" begins on the first day of the member's birth month,[12] but every member gets a one-month automatic grace period after the end

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[9] TEX. ELEC. CODE § 145.003(f)(2). Section 145.003(b) states that "[a] candidate in the general election for state and county officers *may* be declared ineligible before the 30th day preceding election day by: (1) the party officer responsible for certifying the candidate's name for placement on the general election ballot . . . ." *Id*. § 145.003(b) (emphasis added). Section 145.003(f) states that "[a] candidate may be declared ineligible *only if*: (1) the information on the candidate's application for a place on the ballot indicates that the candidate is ineligible for the office; or (2) facts indicating that the candidate is ineligible are conclusively established by another public record." *Id*. § 145.003(f) (emphasis added). And Section 145.003(g) states: "When presented with an application for a place on the ballot or another public record containing information pertinent to a candidate's eligibility, the appropriate authority shall promptly review the record. If the authority determines that the record establishes ineligibility as provided by Subsection (f), the authority *shall* declare the candidate ineligible." *Id*. § 145.003(g) (emphasis added).

[10] TEX. GOV'T CODE § 81.051(b) ("Each person licensed to practice law in this state shall, not later than the 10th day after the person's admission to practice, enroll in the state bar by registering with the clerk of the supreme court.").

[11] TEX. STATE BAR R. art. XII, § 6(A), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtitle G, app. A (West 2005) ("Every member shall complete fifteen (15) hours of continuing legal education during each compliance year as provided by this article.").

[12] TEX. STATE BAR R. art. XII, § 2(L), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtitle G, app. A (West 2005) ("'MCLE compliance year' means the twelve (12) month period that begins each year on the first day of an attorney's birth month and ends on the last day of the month that immediately precedes the attorney's birth month in the following year.").

of the compliance year to complete the requirements.[13] Failure to comply with the annual requirement results in automatic suspension.[14]

MCLE regulations recognize several exemptions to MCLE requirements. An exemption is good for an entire compliance year or not at all:

> An exemption or special case status shall apply to the entire MCLE compliance year (first day of the birth month through the last day of the month immediately preceding the birth month). Any change in status during the compliance year shall be promptly reported to the MCLE Director on the appropriate reporting form.[15]

One exemption is for lawyers who are not practicing:

> Members who have not engaged in the practice of law in Texas during the entirety of an MCLE compliance year are eligible to claim an exemption from the MCLE requirements. Members who are engaged in the practice of law at the beginning of a MCLE compliance year but who later cease from practice during that compliance year are not eligible for this non-practicing exemption.[16]

MCLE rules and regulations do not impose a deadline for claiming an exemption other than the deadline for compliance.

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[13] TEX. STATE BAR R. art. XII, § 8(B), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtitle G, app. A (West 2005) ("A member who has not completed his or her CLE requirements by the first day of the birth month, will receive an automatic grace period through the last day of the birth month to complete and report any remaining CLE credits. Members shall not be fined or penalized for completing and reporting CLE credits by the last day of the birth month (grace period).").

[14] TEX. STATE BAR R. art. XII, § 8(E), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtitle G, app. A (West 2005) ("If by the last business day of the fourth month following the birth month (or reporting month if the member has been granted an extension in accordance with this article for completion of CLE requirements) the member has still not cured his or her non-compliance, the member shall be automatically suspended from the practice of law in Texas . . . .") But automatic suspension is not immediate. Section 7.1 of the Texas MCLE Regulations gives lawyers an additional three months after the grace period in which to comply or to satisfactorily explain their non-compliance. State Bar of Texas, Texas MCLE Regulations § 7.1, *available at* http://www.texasbar.com/Content/NavigationMenu/ForLawyers/MCLE/MCLERules/MCLERegulations.pdf.

[15] State Bar of Texas, Texas MCLE Regulations § 5.0.

[16] *Id.* § 5.3.1.

Ramirez was born in November. State Bar records establish that she claimed the non-practicing exemption on November 21, 2008, and ceased to claim it on November 3, 2009, after having fully satisfied her MCLE requirements for her compliance year ending October 31, 2009 ("CY 2009"). Ramirez contends that the exemption was for the compliance year ending October 31, 2008 ("CY 2008"), just prior to her claim for exemption, and thus does not preclude her from meeting the constitutional practice requirement. Sanchez argues that Ramirez was ineligible to practice law from the date she claimed the exemption until she changed her status, and is estopped from asserting otherwise.

The other public record evidence cited to us comes from two sworn statements provided to the parties by the Clerk of this Court and two published State Bar lists of licensed lawyers not eligible to practice law in Texas. The Clerk stated that records in his custody reflected that Ramirez "has never been administratively suspended from the practice of law since she was first licensed" and that

> effective November 21, 2008 to November 5, 2009 Ms. Ramirez claimed the Minimum Continuing Legal Education (MCLE) non-practicing exemption and was, therefore, not eligible to practice law in Texas while claiming this exemption. Members who are not currently practicing law in Texas can remain on the active rolls but claim the MCLE non-practicing exemption to be exempt from the annual MCLE requirements. The records further reflect Ms. Ramirez lifted the MCLE non-practicing exemption on November 5, 2009.[17]

[17] As noted, other State Bar records show that Ramirez notified the State Bar that she no longer claimed exempt status on November 3, rather than November 5. This discrepancy is immaterial.

The two State Bar lists, one dated December 31, 2008, and the other July 2, 2009, both within CY 2009, include Ramirez's name.[18]

The court of appeals noted the parties' "disagreement [about] the time period that the [exemption] applied to" but concluded, based on the Clerk's statement, that the exemption covered the period between the date Ramirez claimed it and the date she relinquished it.[19] We think this conclusion misconstrues the Clerk's statement and the rules and regulations governing MCLE requirements.

The Clerk's statements that Ramirez's *claim* of exemption was "effective" from the date she made it until she lifted it, and that she was ineligible to practice "while claiming" the exemption, are both literally correct but do not resolve the disagreement over the period *covered* by the exemption. Specifically, the statements do not foreclose the conclusion that the claim made during CY 2008's grace period covered that compliance year, or that the revocation made during CY 2009's grace period did not reinstate Ramirez's MCLE requirements for that compliance year. The statements establish only the time period during which *the claim* was being made. To read the statements to mean that Ramirez was ineligible to practice law from the time she claimed the exemption until she lifted it is inconsistent with MCLE rules and regulations.

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[18] A letter dated October 31, 2011, from the State Bar's executive director refers to attached "records of the Membership Department regarding the MCLE non-practicing exemption status from November 11/21/2008 – 11/5/2009 of Rebecca Ramirez." A letter dated November 30, 2011, from the State Bar's MCLE Compliance Director states that Ramirez's claimed exemption "cover[ed] MCLE compliance requirements for the 2008 MCLE compliance year which began November 1, 2007 and ended October 31, 2008." We need not consider either statement in our analysis and express no view on whether the letters could be considered "public records" or could be used to question or explain other public records.

[19] ___ S.W.3d ___, ___ (Tex. App.–San Antonio 2012, orig. proceeding).

Under those rules and regulations, a claim of exemption has no effect on a lawyer's obligation to comply with MCLE requirements until the deadline for their completion, which is the end of the grace period — the lawyer's birth month — after the compliance year.[20] The regulations expressly contemplate that a lawyer's status may change during the year.[21] A lawyer might claim the non-practicing exemption early in the compliance year, fully intending not to practice, yet change her mind before the compliance deadline, withdraw the claim, and complete all MCLE requirements for the year. Or a lawyer can wait until the compliance deadline — or perhaps even later — to claim an exemption from MCLE for the preceding year. All that matters is whether the lawyer is entitled to an exemption from MCLE requirements by the deadline for completion.

Because a compliance year's grace period overlaps the following compliance year, a claim of exemption made during the grace period could cover either year, but only if the lawyer did not practice during any part of that year.[22] A claim during the grace period cannot relate to the compliance year just ended if the lawyer practiced at all during that year, or to the compliance year just beginning if the lawyer practices at any time during that year.

A lawyer claiming the MCLE non-practicing exemption is not classed as an inactive member of the State Bar. A lawyer who "file[s] with the executive director and the clerk of the supreme court

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[20] A further extension is permitted under very limited circumstances if requested before the end of the grace period. State Bar of Texas, Texas MCLE Regulations § 5.11.

[21] State Bar of Texas, Texas MCLE Regulations § 5.0.

[22] The evidence before us indicates that during the grace period, a lawyer can claim an exemption on the State Bar's website only for the compliance year just ended. Ramirez contends that this is what she did.

written notice requesting enrollment as an inactive member",[23] by statute, "may not practice law in this state".[24] No such prohibition is associated with a claim for the MCLE non-practicing exemption. A lawyer may claim the exemption prospectively in good faith yet return to practice at will, so long as she then complies with MCLE requirements. An inactive member may return to active status only "upon written application to the clerk and payment of fees for the current year."[25] No such formality is required for revoking the MCLE exemption. MCLE regulations require that a change in status be "promptly reported",[26] but delay is not penalized. Not until all deadlines for completing requirements have passed is the penalty of suspension for non-compliance imposed.

The public records before us do not indicate that Ramirez was ever suspended from practice. They indicate only that Ramirez might have claimed the MCLE non-practicing exemption for CY 2009 — a year in which she actually met her MCLE requirements — but probably intended to claim the exemption for CY 2008. The State Bar records showing Ramirez listed among suspended lawyers on two dates during CY 2009 raise a question whether she was eligible to practice, but the only apparent basis for such suspensions would have been that she failed to meet MCLE

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[23] TEX. GOV'T CODE § 81.052(b).

[24] *Id*. § 81.053(a); *see also* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 8.04(a)(11), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtitle G, app. A (West 2005) ("A lawyer shall not . . . engage in the practice of law when the lawyer is on inactive status or when the lawyer's right to practice has been suspended or terminated . . . ."); Tex. RULES DISCIPLINARY P. R. 1.06(V)(6), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtitle G, app. A-1 (West Supp. 2011) ("'Professional Misconduct' includes . . . [e]ngaging in the practice of law either during a period of suspension or when on inactive status.").

[25] TEX. STATE BAR R. art. XII, § 7(C), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtitle G, app. A (West 2005).

[26] State Bar of Texas, Texas MCLE Regulations § 5.0.

requirements in CY 2008, which could have been covered by her non-practicing exemption. Public records certainly do not "conclusively establish[]" that she did not practice law during that period. The county chair was therefore not authorized, let alone required, to declare Ramirez ineligible,[27] and the court of appeals clearly abused its discretion in reaching the contrary conclusion.

Accordingly, we grant Ramirez's petition for mandamus and, without hearing oral argument,[28] direct the court of appeals to vacate its order of March 9, 2012. We are confident the court of appeals will promptly comply, and our writ will issue only if it does not. We have already ordered the county chair to take all actions necessary for Ramirez's name to be placed on the ballot, and the chair has complied.

OPINION DELIVERED: April 27, 2012

[27] TEX. ELEC. CODE § 145.003(f).

[28] TEX. R. APP. P. 52.8(c).

IN THE SUPREME COURT OF TEXAS

NO. 12-0305

IN RE TOMÁS URESTI, RELATOR

ON PETITION FOR WRIT OF MANDAMUS

PER CURIAM

In this primary election case Choco Gonzalez Meza, Chair of the Bexar County Democratic Party, determined that petitions filed with Monica Caballero's application for a place on the Bexar County Democratic Party primary election ballot as a candidate for Justice of the Peace did not contain the required number of valid signatures. *See* TEX. ELECTION CODE § 172.021(e). Caballero sued Meza, the Bexar County Democratic Party, and Bexar County, and sought injunctive relief precluding them from omitting her name from the ballot. Tomás Uresti, Caballero's opponent for the office, intervened. After holding a hearing, the trial court issued a temporary injunction effectively compelling Meza to place Caballero's name on the ballot. Uresti applies to this Court for a writ of mandamus directing the trial court to vacate its temporary injunction. Caballero responds that Uresti's petition for writ of mandamus is moot because the primary election, which she won, has concluded. We agree.

Once an election begins, a challenge to the candidacy of an individual becomes moot. *See Polk v. Davidson*, 196 S.W.2d 632, 634 (Tex. 1946) ("[W]hen the time comes that the issues cannot be heard and a final judgment entered adjudging the validity or invalidity of the nominee's certificate

so that absentee ballots can be printed and available to voters as and when required by statute, the contest is moot and must be dismissed."); *see also Skelton v. Yates*, 119 S.W.2d 91, 92 (Tex. 1938); *Bejarano v. Hunter*, 899 S.W.2d 346, 352 (Tex. App.—El Paso 1995, orig. proceeding); *Law v. Johnson*, 826 S.W.2d 794, 797 (Tex. App.—Houston [14th Dist.] 1992, no writ); *Smith v. Crawford*, 747 S.W.2d 938, 940 (Tex. App.—Dallas 1988, orig. proceeding).

In responding to Caballero's assertion of mootness, Uresti does not claim that the case is not moot; rather, he claims that the "capable of repetition yet evading review" exception to the mootness doctrine applies. Under this doctrine, "'the challenged act is of such short duration that the appellant cannot obtain review before the issue becomes moot'" and there is "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) (quoting *Gen. Land Office v. OXY U.S.A., Inc.*, 789 S.W.2d 569, 571 (Tex. 1990)). But Uresti has not shown a reasonable expectation that he will be subjected to the same action again. *See Williams v. Lara*, 52 S.W.3d 171, 184 (Tex. 2001) (providing that to invoke the capable of repetition yet evading review exception, a reasonable expectation must exist that the "same complaining party will be subjected to the same action again").

Uresti's complaint centers on his allegation that Caballero signed an affidavit on several of her petition pages stating that she had witnessed each signature on the page and read a required statement to each signer when she had actually not done so. Uresti does not point to, nor does he claim, that there is evidence of a reasonable expectation that a candidate would perform similar actions in a subsequent election in which he is a candidate. In the election cases Uresti cites, there was evidence of a reasonable expectation that the challenged actions would occur again. *See Blum*,

997 S.W.2d at 264 (finding that although an election had already occurred rendering a challenge to the wording of a ballot proposition moot, the exception applied because the trial court indicated it would sustain a contest to the election and order a new one); *Bejarano*, 899 S.W.2d at 351 (finding a reasonable expectation that the same action would occur again in an election contest where the city clerk who reviewed election applications had accepted insufficient applications for years and testified that statutorily required information on applications was "superfluous and unnecessary"). Uresti does not claim that there is evidence of a similar situation here.

Without hearing oral argument, *see* TEX. R. APP. P. 52.8(c), we dismiss the petition for mandamus relief as moot.

OPINION DELIVERED: August 31, 2012