Opinions of the Supreme Court of Texas

Fiscal Year 2013

(September 1, 2012 – August 31, 2013)

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FISCAL YEAR 2013 OPINIONS

(SEPTEMBER 1, 2012 – AUGUST 31, 2013)

IN THE SUPREME COURT OF TEXAS

NO. 09-0495

TEXAS MUTUAL INSURANCE COMPANY, PETITIONER,

v.

P. LANCE MORRIS, RESPONDENT

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

PER CURIAM

Lance Morris injured his back while working and his employer's workers' compensation insurer, Texas Mutual Insurance Company (TMIC), accepted the injury as compensable. Three years later when it was discovered that Morris had herniated lumbar intervertebral discs, TMIC disputed whether they were causally related to the original injury. The Texas Department of Insurance Division of Workers' Compensation (the division) determined that the disc herniations were related to the original injury and ordered TMIC to pay medical benefits, which it did. Morris later sued TMIC for damages caused by its delay in paying benefits. The trial court rendered judgment for Morris, and the court of appeals affirmed. Based on our recent decision in *Texas Mutual Insurance Co. v. Ruttiger*, ___ S.W.3d ___ (Tex. 2012), we reverse and render judgment for TMIC.

On June 12, 2000, Morris injured his back while working for the Justin Community Volunteer Fire Department. The Fire Department reported to TMIC that Morris had strained his

back while working. TMIC accepted the injury as compensable and paid benefits. In March of 2003, Morris went to a hospital emergency room with severe back pain and was diagnosed as having herniated lumbar discs. On April 1, 2003, Dr. Charles Neblett requested TMIC to preauthorize lumbar laminectomy surgery to treat the herniated discs. TMIC approved the surgery as medically necessary, *see* 28 TEX. ADMIN. CODE § 134.600, but later disputed its compensability on the basis that the herniated discs were not causally related to the March 2000 injury.

Morris eventually requested, and the division held, two benefit review conferences to attempt to resolve the compensability dispute. *See* TEX. LAB. CODE § 410.021. The dispute was not resolved so a contested case hearing was held. *See id.* § 410.025. The hearing officer concluded that Morris's original injury caused or aggravated the lumbar disc herniations, they were compensable, and TMIC was liable for compensation. The division specifically ordered TMIC to pay medical benefits. TMIC then paid Morris both medical and income benefits relating to the disc problems.

Morris sued TMIC for violating article 21.21 of the Insurance Code,[1] breaching its common law duty of good faith and fair dealing, and violating the Deceptive Trade Practices Act (DTPA), TEX. BUS. & COM. CODE §§ 17.41–.63. His suit was based on TMIC's denial of compensability and delay in paying benefits until ordered to do so by the division. A jury found for Morris and awarded damages for past mental anguish, damage to his credit reputation, additional damages because TMIC acted knowingly, and attorney's fees. The trial court rendered judgment that Morris recover under

[1] The Legislature has re-codified Insurance Code article 21.21 and placed the relevant provisions in Insurance Code Chapter 541. References to Insurance Code provisions will be to the re-codified sections.

his Insurance Code claim. The judgment also provided that if the Insurance Code claim failed on appeal, he could elect to recover under the common law claim or the DTPA claim.

The court of appeals concluded that there was no evidence to support the damages awarded for loss of credit reputation. It reversed the trial court's judgment in part and remanded for further proceedings. 287 S.W.3d 401, 434-35.

In this Court TMIC seeks reversal of that part of the court of appeals' judgment favorable to Morris. It advances multiple reasons, but we address only four of them.

We first consider an argument TMIC did not raise in the courts below: the trial court did not have jurisdiction over Morris's suit because he did not exhaust administrative remedies available to him under the Workers' Compensation Act (Act). TEX. LAB. CODE §§ 410.002–.308; *Am. Motorists Ins. Co. v. Fodge*, 63 S.W.3d 801, 804-05 (Tex. 2001); *see, e.g.*, *Minton v. Gunn*, 355 S.W.3d 634, 639 (Tex. 2011) (recognizing that we must have jurisdiction to consider an appeal before reaching the merits). TMIC asserts that because Morris's claim is for delay damages—damages from TMIC's delay in paying benefits while it was contesting compensability of the lumbar claim—the trial court did not have jurisdiction because Morris did not timely use remedies afforded by the Act for obtaining benefits. TMIC says the evidence is undisputed that Morris (1) delayed in requesting a first benefit review conference for more than six months after TMIC contested compensability; (2) did not request the division to enter an interlocutory order directing TMIC to pay benefits; (3) failed in his request for a benefit review conference to explain why an expedited setting was needed, thus causing the division to not set an expedited conference; (4) agreed to two non-expedited benefit review conferences; and (5) agreed to a non-expedited contested case hearing. Morris responds, in

part, that (1) the division procedures which TMIC claims he did not timely use cannot be jurisdictional because they are permissive, not mandatory; (2) he obtained a division finding that his back surgery and subsequent medical treatment were compensable so he complied with the exhaustion requirements set out in *Fodge*, 63 S.W.3d 801; and (3) his actions and inactions of which TMIC complains are not jurisdictional matters, but rather go to the question of whether he mitigated his damages and TMIC waived that issue by not raising it in the lower courts.

We held in *Fodge* that a trial court does not have jurisdiction over a claim for delay in providing compensation benefits if the division has not made a determination that the benefits were due. *Id.* at 802, 804-05. There, workers' compensation claimant Anne Fodge claimed she was injured on the job and American Motorists, her employer's compensation insurer, denied the claim. *Id.* at 802. The division determined at a contested case hearing that she had been injured on the job and was entitled to temporary income benefits, but it did not determine whether she was entitled to any medical benefits. *Id.* Fodge then sued American Motorists. Part of her claims were that American Motorists' delay in paying income and medical benefits until after the division ordered it to do so violated the DTPA and Insurance Code and breached its common law duty of good faith and fair dealing. *Id.* at 802-03. We noted that the division had exclusive jurisdiction to determine whether benefits were due to Fodge and it had not yet determined whether she was entitled to medical benefits, although it had determined she was entitled to income benefits. *Id.* at 804-05. We held that the trial court had jurisdiction over Fodge's claim for delayed payment of income benefits, but because the division had not determined that she was entitled to medical benefits the trial court did not have jurisdiction over her claim for delayed medical benefits. *Id.* at 804. But we did not

address whether the timing of a claimant's utilization of the Act's procedures is an issue that must be determined by the division before a trial court has jurisdiction over a claim for delay damages.

The Act contains certain deadlines that must be met. It specifies that an injured employee must give notice of injury to the employer not later than the thirtieth day after the injury occurs. TEX. LAB. CODE § 409.001(a). An employee's failure to timely give notice of injury can relieve the insurer of its obligation to pay compensation. *Id.* § 409.002. The Act also specifies that an injured employee must file a claim for compensation not later than one year after the injury occurs, or, if the injury is an occupational disease, not later than one year after the employee knew or should have known that the injury may be related to the employment. *Id.* § 409.003. An employee's failure to timely file a claim for compensation can also relieve the insurer of its obligation to pay compensation. *Id.* § 409.004. But TMIC points to no provision in the Act that specifies time limits for claimants to request benefit review conferences, penalizes claimants if they delay in requesting them, or requires the division to determine whether employees' benefit review conference requests are timely. The section of the Act addressing requests for benefit review conferences provides only that the division may "[o]n receipt of a request from a party or on its own motion" direct the parties to meet in a benefit review conference. *Id.* § 410.023(a). Given the silence of the Act as to time constraints for claimants to request a benefit review conference or the effect of delay in filing one, we conclude that Morris is correct. The same goes for interlocutory orders and delays in connection with contested case hearings.

We conclude that under this record, Morris's delays in requesting division action were not jurisdictional in nature, but rather were matters of whether he mitigated his damages. Thus his

delays in seeking relief from the division did not deprive the trial court of jurisdiction. Because of our disposition of the appeal we do not further address the timeliness of Morris's seeking relief from the division.

Next we consider TMIC's argument that causes of action for unfair claims settlement practices under Insurance Code section 541.060 and breach of the common law duty of good faith and fair dealing do not apply in the workers' compensation context.[2] After the parties filed their briefs, we held in *Ruttiger* that a claimant cannot recover damages under section 541.060 from a workers' compensation insurer for unfair claims settlement practices. ___ S.W.3d at ___. We also held that amendments to the Act eliminated the need for a cause of action for breach of the common law duty of good faith and fair dealing against workers' compensation insurers. *Id.* at __ (overruling *Aranda v. Ins. Co. of N. Am.*, 748 S.W.2d 210, 212-13 (Tex. 1988)). In accord with our decision in *Ruttiger* we agree with TMIC that Morris cannot recover on either of these claims.

Finally, we address whether Morris can recover under Insurance Code section 541.061. We held in *Ruttiger* that a cause of action under section 541.061 for misrepresentation of an insurance policy is not necessarily incompatible with the workers' compensation system. *Id.* at ___. TMIC argues that the basis of Morris's claim for misrepresentation is TMIC's filing of the dispute based on a lack of causal relationship between the 2000 injury and the disc herniations, and that its dispute simply was not a misrepresentation of its policy. Morris does not contest TMIC's position or point to any statements or actions by TMIC that he contends constituted untrue statements about or failure

[2] Morris asserts that TMIC failed to preserve its challenge to his Insurance Code claim. But TMIC objected to that question in the jury charge and challenged the legal sufficiency of the evidence to support that finding in the court of appeals. We conclude that it preserved the challenge.

to disclose something about the insurance policy. TMIC's Notice of Refused or Disputed Claim specified that TMIC disputed whether Morris's compensable June 2000 back strain extended to his lumbar disc herniations and whether he had a disability as a result of the original back strain. The testimony and other evidence bore out that question as being the basis for TMIC's denial of compensability. Thus, the dispute between Morris and TMIC was the extent of Morris's injury, not what the policy said or whether it covered the disc problems if they were related to the back strain. *See Ruttiger*, ___ S.W.3d at ___. We agree with TMIC that there is no evidence it misrepresented its policy.

Morris's DTPA claim depends on the validity of his Insurance Code claim. Because his claims under the Insurance Code fail, he cannot recover on his DTPA claim. *See id.* at ___.

We grant TMIC's petition for review. Without hearing oral argument, *see* TEX. R. APP. P. 59.1, we reverse the court of appeals' judgment and render judgment that Morris take nothing.

OPINION DELIVERED: October 26, 2012

IN THE SUPREME COURT OF TEXAS

NO. 10-0121

THE FINANCE COMMISSION OF TEXAS,
THE CREDIT UNION COMMISSION OF TEXAS, AND
TEXAS BANKERS ASSOCIATION, PETITIONERS,

v.

VALERIE NORWOOD, ELISE SHOWS, MARYANN ROBLES-VALDEZ,
BOBBY MARTIN, PAMELA COOPER, AND CARLOS RIVAS, RESPONDENTS

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

Argued September 13, 2011

JUSTICE HECHT delivered the opinion of the Court, in which CHIEF JUSTICE JEFFERSON, JUSTICE GREEN, JUSTICE WILLETT, JUSTICE GUZMAN, JUSTICE LEHRMANN, JUSTICE BOYD, and JUSTICE DEVINE joined, and in Parts I and II of which JUSTICE JOHNSON joined.

JUSTICE JOHNSON issued an opinion concurring in part and dissenting in part, and dissenting from the judgment.

The separation of the powers of government into three distinct, rival branches — legislative, executive, and judicial — is "the absolutely central guarantee of a just Government."[1] Checks and balances among the branches protect the individual. It is the separation of powers, for example, that establishes bills of rights as rules of law rather than merely hollow words, which is all they are in

[1] *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

most countries where power is vested in a few.[2] As James Madison famously declared in *Federalist No. 47*: "No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty, than [this:] The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny."[3]

The principle of separation of powers is foundational for federal and state governments in this country and firmly embedded in our nation's history. The Texas Constitution mandates:

> 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.[4]

Exceptions to the constitutionally mandated separation of powers are never to be implied in the least; they must be "expressly permitted" by the Constitution itself.[5]

A 2003 amendment to the Constitution authorized the Legislature to delegate to a state agency the power to interpret certain provisions of the Texas Constitution governing home equity lending, a power that the Constitution's separation-of-powers provision unquestionably allocates to

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[2] *Id.* ("Without a secure structure of separated powers, our Bill of Rights would be worthless, as are the bills of rights of many nations of the world that have adopted, or even improved upon, the mere words of ours.").

[3] THE FEDERALIST NO. 47 (James Madison).

[4] TEX. CONST. art. II, § 1.

[5] *Id.* We do not consider whether exceptions, even expressly permitted by the Constitution, can selectively shift power among the departments of government without infringing on other constitutional guarantees, such as due process, equal protection, and the open courts guarantee of the Texas Constitution.

the Judiciary.[6] We must determine in this case the extent of this exception and specifically, whether agency interpretations made under this authority are beyond judicial review. We conclude they are not.

Of the several agency interpretations challenged in this case, the court of appeals decided that some are valid and others invalid.[7] We agree in part and disagree in part, and render judgment.

I

In the State of Texas, the homestead has always been protected from forced sale, not merely by statute as in most states, but by the Constitution.[8] The 1869 and 1876 Constitutions allowed three exceptions,[9] and others have been added by amendments.[10] Exceptions for certain home equity loans and for reverse mortgages, finally adopted by constitutional amendment in 1997, effective January 1,

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[6] *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)).

[7] 303 S.W.3d 404 (Tex. App.–Austin 2010).

[8] TEX. CONST. art. VII, § 22 (1845); TEX. CONST. art. VII, § 22 (1861); TEX. CONST. art. VII, § 22 (1866); TEX. CONST. art. XII, § 15 (1869); TEX. CONST. art. XVI, § 50 (1876). In the Republic of Texas, homestead protection was secured by statute. Act approved Jan. 26, 1839, 3d Cong., R.S., 1839 Repub. Tex. Laws 125, 125-26, *reprinted in 2 H.P.N. Gammel, The Laws of Texas 1822–1897* at 125, 125-26 (Austin, Gammel Book Co. 1898).

[9] The 1869 Constitution allowed exceptions for purchase money, taxes, and labor and materials expended on the property. TEX. CONST. art. XII, § 15 (1869). The 1876 Constitution recognized the first two exceptions and limited the third. TEX. CONST. art. XVI, § 50 (1876).

[10] A 1995 amendment added two exceptions, one for an owelty of partition imposed against the entirety of the property by agreement or court order (as in divorce), and the other for refinancing a lien on the property. TEX. CONST. art. XVI, § 50(a)(3), (4). A 1997 amendment added exceptions for certain home equity loans and for reverse mortgages. *Id.* § 50(a)(6), (7). A 2001 amendment added an exception for converting or refinancing a lien on a manufactured home. *Id.* § 50(a)(8).

1998,[11] were extremely controversial, in part because of age-old concerns that lenders would be unfair and borrowers unwise, eroding the protection the homestead is intended to afford.[12] So long leery of any impairment to the homestead, Texas was the fiftieth state in the Union to permit home equity lending.[13]

To assure that the compromises finally struck would withstand future political pressures on the Legislature, lengthy, elaborate, detailed provisions, remarkable even for our State's Constitution, were included in Article XVI, Section 50[14] and made nonseverable.[15] A homestead may be subject to forced sale to repay a home equity loan only if the loan meets the requirements of Section 50,

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[11] Tex. H.R.J. Res. 31, 75th Leg., R.S., 1997 Tex. Gen. Laws 6739 (adopted at the general election on Nov. 4, 1997, by a vote of 698,870 to 474,443).

[12] Professor James Paulsen has provided an excellent description of the long history leading up to the amendment. James W. Paulsen, *Introduction: The Texas Home Equity Controversy in Context*, 26 ST. MARY'S L.J. 307 (1995).

[13] *LaSalle Bank Nat'l Ass'n v. White*, 246 S.W.3d 616, 618 (Tex. 2007) (per curiam) ("For over 175 years, Texas has carefully protected the family homestead from foreclosure by limiting the types of liens that can be placed upon homestead property. Texas became the last state in the nation to permit home-equity loans when constitutional amendments voted on by referendum took effect in 1997."); *see also* House Research Org., Bill Analysis, Tex. H.J.R. 31, 76th Leg., R.S., at 5 (1997).

[14] *See* J. Alton Alsup, *Pitfalls (and Pratfalls) of Texas Home Equity Lending*, 52 CONSUMER FIN. L. Q. REP. 437, 437 (1998) ("The new home equity amendment was . . . an emotionally contested and stubbornly compromised bill . . . subject to a maze of 25, or more, exacting conditions regulating the loan amount, recourse and enforceability, fees and charges, permitted loan terms, and the lender's loan origination and closing practices. And it was not happenstance that these exacting conditions . . . were embedded firmly in the constitution itself without the benefit of enabling legislation that usually accompanies a constitutional amendment to provide an interpretative framework for its implementation. Rather, it reportedly was legislative tactics by reluctant proponents to put any future attempt of fellow legislators to moderate these requirements to the rigors of the identical constitutional amendment process (*i.e.,* requiring a super-majority approval of both houses and a successful voter referendum)."). With just under 6,000 words and over 150 sub-parts, Section 50 is by far the longest, most complex section of the Texas Constitution.

[15] TEX. CONST. art. XVI, § 50(j) ("Subsection (a)(6) and Subsections (e)-(i) of this section are not severable, and none of those provisions would have been enacted without the others.").

alterable only by a vote of the people.[16] The constitutional amendment did not provide for implementing legislation or for administrative interpretation or rule-making. Loan terms and conditions, notices to borrowers, and all applicable regulations were set out in Section 50 itself.[17]

But not, of course, with perfect clarity. And for lenders, Section 50 prescribed a Draconian consequence of noncompliance, whether intentional or inadvertent: not merely the loss of the right of forced sale of the homestead, but forfeiture of all principal and interest.[18] On October 7, 1998, several months after the amendment to Section 50 took effect, four state regulatory agencies with authority over lenders jointly issued a *Regulatory Commentary on Equity Lending Procedures*.[19] Noting that the details "[i]nherent in an issue as complex as home equity" lending had not been and could not be "fully addressed within the text of the amendment" to Section 50, the agencies sought to "provide guidance to lenders and consumers concerning the regulatory views of the meaning and

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[16] TEX. CONST. art. XVI, § 1 (proposed constitutional amendments).

[17] Exigency supplanted wisdom. *See M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) ("A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would, probably, never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves."); *Ex parte Davis*, 574 S.W.2d 166, 169 n.4 (Tex. Crim. App. 1978) ("Procedural details should not be written into constitutions, but state constitutions should provide for reasonable procedural regulations by legislative enactment.").

[18] Tex. H.R.J. Res. 31, § 1, 75th Leg., R.S., 1997 Tex. Gen. Laws 6739, 6741 (proposing TEX. CONST. art. XVI, § 50(a)(6)(Q)(x), stating that "the lender . . . shall forfeit all principal and interest . . . if the lender . . . fails to comply with the lender's . . . obligations . . . within a reasonable time after the lender . . . is notified by the borrower of the lender's failure to comply").

[19] OFFICE OF CONSUMER CREDIT COMM'R ET AL., REGULATORY COMMENTARY ON EQUITY LENDING PROCEDURES 1 (Oct. 7, 1998) [hereinafter *Regulatory Commentary*], *available at* http://www.fc.state.tx.us/homeinfo/homeq2.pdf and http://www.occc.state.tx.us/pages/Legal/commentary.htm (last visited June 17, 2013).

effect" of the amendment.[20] But the agencies warned that "a court may or may not defer to this interpretation."[21]

A few weeks later, the Attorney General wrote in an opinion that "the amendment has given rise to numerous questions regarding its construction" and

> does not authorize the legislature to enact general implementing legislation or empower a state agency to adopt interpretive rules. Consequently, the state is faced with an environment of uncertainty as to how lenders, builders, insurers, borrowers, and others may properly negotiate enforceable home equity loans.[22]

Furthermore, the Attorney General continued,

> [t]he Legislature has no authority to interpret or declare a matter of constitutional construction, nor may it delegate such authority to an administrative agency. To do so, absent express constitutional authorization, would be to usurp the powers of the judiciary in violation of the separation of powers principles set out in article II, section 1 of the Texas Constitution. . . . [A]s section 50 now stands, neither the legislature nor any state agency has the power to declare definitively what it means. The ultimate power to construe constitutional provisions lies solely with the courts.[23]

"As a rule, court decisions apply retrospectively,"[24] and thus a lender faced the prospect that its loans could be forfeited long after they were made, based on judicial decisions in cases in which it was not

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[20] *Id.* at 1.

[21] *Id. See Stringer v. Cendant Mortg. Corp.*, 23 S.W.3d 353, 357 (Tex. 2000) (noting that the *Regulatory Commentary* "is advisory and not authoritative").

[22] Tex. Att'y Gen. Op. No. DM-495 (1998).

[23] *Id.* (internal quotation marks and footnotes omitted). *See City of Dallas v. Stewart*, 361 S.W.3d 562, 568 (Tex. 2012) ("Agencies, we have held, lack the ultimate power of constitutional construction.") (citing *Cent. Power & Light Co. v. Sharp*, 960 S.W.2d 617, 618 (Tex. 1997)).

[24] *Centex Homes v. Buecher*, 95 S.W.3d 266, 277 (Tex. 2002).

even involved. The risk was understandably viewed as having a dampening effect on the home equity lending market.

To solve the problem, the Attorney General advised that "the constitution could be amended to give to an executive agency judicial-type interpretive powers with respect to the home equity amendment."[25] Consequently, in 2003 the Legislature proposed, and the people adopted, Section 50(u), which states:

> The legislature may by statute delegate one or more state agencies the power to interpret Subsections (a)(5)-(a)(7), (e)-(p), and (t), of this section. An act or omission does not violate a provision included in those subsections if the act or omission conforms to an interpretation of the provision that is:
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> (1) in effect at the time of the act or omission; and
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> (2) made by a state agency to which the power of interpretation is delegated as provided by this subsection or by an appellate court of this state or the United States.[26]

The referenced subsections which the legislatively designated state agencies are empowered to interpret contain essentially all the provisions governing home equity lending. Thus, the first sentence addresses the perceived need for a less cumbersome interpretative process than that afforded by litigation. The second sentence creates a safe harbor for lenders, relieving them of

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[25] Tex. Att'y Gen. Op. No. DM-495. The Attorney General added: "We do not advise you on the wisdom of this or any other particular action."

[26] Tex. S.J. Res. 42, 78th Leg., R.S., 2003 Tex. Gen. Laws 6219, 6225 (adopted at the general election on Sept. 13, 2003, by a vote of 862,009 to 455,707). The amendment also added Section 50(a)(6)(Q)(x)(a)-(f), 2003 Tex. Gen. Laws at 6222, specifying ways in which lenders can rectify noncompliance after the fact and so avoid forfeiture of principal and interest. Very generally, rectification may require repayment of overcharges, reduction in the amount of the lien, modification of terms, delivery of documents required to be furnished, abatement of interest and other obligations, and a $1,000 credit with an offer to refinance on the same terms at no cost. TEX. CONST. art. XVI, § 50(a)(6)(Q)(x)(a)-(f).

liability for any constitutional violations as long as agency interpretations are followed.[27] But importantly, it does so not merely by excusing a violation; it states that no violation even occurs. A lender's compliance with an agency interpretation of Section 50, even a wrong interpretation, is compliance with Section 50 itself.

In anticipation of the people's adoption of the 2003 amendments, the Legislature delegated interpretative authority under Section 50(u) to the Finance Commission and the Credit Union Commission ("the Commissions"), subject to the Administrative Procedure Act.[28] By statute:

> The finance commission is responsible for overseeing and coordinating the Texas Department of Banking, the Department of Savings and Mortgage Lending, and the Office of Consumer Credit Commissioner and serves as the primary point of accountability for ensuring that state depository and lending institutions function as a system, considering the broad scope of the financial services industry. The finance commission is the policy-making body for those finance agencies and is not a separate state agency. The finance commission shall carry out its functions in a manner that protects consumer interests, maintains a safe and sound banking system, and increases the economic prosperity of the state.[29]

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[27] Following judicial interpretations also insulates lenders from liability, but that aspect of the provision is not at issue in this case.

[28] Act of May 25, 2003, 78th Leg., R.S., ch. 1207, 2003 Tex. Gen. Laws 3427 (effective Sept. 13, 2003), enacting TEX. FIN. CODE §§ 11.308 & 15.413.

Section 11.308 states: "The finance commission may, on request of an interested person or on its own motion, issue interpretations of Sections 50(a)(5)-(7), (e)-(p), (t), and (u), Article XVI, Texas Constitution. An interpretation under this section is subject to Chapter 2001, Government Code [the Administrative Procedure Act], and is applicable to all lenders authorized to make extensions of credit under Section 50(a)(6), Article XVI, Texas Constitution, except lenders regulated by the Credit Union Commission. The finance commission and the Credit Union Commission shall attempt to adopt interpretations that are as consistent as feasible or shall state justification for any inconsistency."

Similarly, Section 15.413 states: "The commission may, on request of an interested person or on its own motion, issue interpretations of Sections 50(a)(5)-(7), (e)-(p), (t), and (u), Article XVI, Texas Constitution. An interpretation under this section is subject to Chapter 2001, Government Code, and is applicable to lenders regulated by the commission. The Finance Commission of Texas and the commission shall attempt to adopt interpretations that are as consistent as feasible or shall state justification for any inconsistency."

[29] TEX. FIN. CODE § 11.002(a).

The Credit Union Commission, together with its Commissioner and the employees of the Credit Union Department, is responsible for "supervis[ing] and regulat[ing] credit unions".[30] The Finance Commission and the Credit Union Commission have eleven and nine members, respectively, all appointed by the Governor with the advice and consent of the Senate, each for a six-year term.[31] Both Commissions have general rule-making power apart from their delegated authority to interpret Section 50.[32]

The Commissions quickly published proposed interpretations generally following the *Regulatory Commentary*, invited public comment, conducted a public hearing, and issued final interpretations effective January 8, 2004.[33] Three weeks later, six homeowners ("the Homeowners")[34] brought this action against the Commissions, challenging several of the interpretations. The Texas Bankers Association (the "TBA") intervened. By final summary

[30] *Id.* §§ 15.101-.102.

[31] *Id.* §§ 11.101(a)-(b), 15.201(a)-(b).

[32] *Id.* §§ 11.301, 11.302, 11.304, 11.306, 11.307, 11.309, 15.402, 15.4022, 15.4024, 15.501.

[33] 7 TEX. ADMIN. CODE §§ 153.1-.96. Interpretations were published November 7, 2003, and adopted December 19, 2003. 28 Tex. Reg. 9656-9653 (2003), 29 Tex. Reg. 84-96 (2004).

[34] The Homeowners are Valerie Norwood, Elise Shows, Maryann Robles-Valdez, Bobby Martin, Pamela Cooper, and Carlos Rivas. The other original plaintiff, Association of Community Organizations for Reform Now, has withdrawn from the case.

judgment, the trial court invalidated many of the interpretations.[35] A divided court of appeals affirmed in part and reversed in part.[36]

As the case comes to us, the substantive disputes over the Commissions' interpretations have been winnowed to three:

First: Section 50(a)(6)(E) caps "fees to any person that are necessary to originate, evaluate, maintain, record, insure, or service the extension of credit" at three percent of principal. Fees do not include "any interest".[37] Did the Commissions correctly give "interest" the same meaning as Section 301.002(a)(4) of the Texas Finance Code,[38] which includes fees paid to the lender, thereby removing lender fees from the cap?[39] The court of appeals held they did not. The statutory definition of

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[35] The court invalidated the interpretation defining "interest" excluded from the fee cap imposed by Section 50(a)(6)(E), 7 TEX. ADMIN. CODE § 153.1(11), and related interpretations, *id.* §§ 153.5(3), (4), (6), (8), (9), and (12). The court denied the Homeowners' challenges to interpretations allowing mailing of consent and closing by a borrower's attorney-in-fact, *id.* §§ 153.15(2)-(3), and allowing a rebuttable presumption of timely disclosure by mail before closing, *id.* §§ 153.51(1), (3). These three rulings remain at issue. Other interpretations invalidated by the trial court — *id.* §§ 153.12(2), 153.13(4), 153.18(3), 153.20, 153.22 and 153.84(1) — have since been amended or repealed by the Commissions and are no longer at issue. 31Tex. Reg. 5080-5085, 9022-9023 (2006); 33 Tex. Reg. 5295-5297, 9074-9078 (2008).

[36] 303 S.W.3d 404 (Tex. App.–Austin 2010).

[37] The excerpted provision is structured as follows. Section 50(a) states that a homestead is protected from forced sale with certain exceptions. One exception is a home equity loan that meets the requirements of Section 50(a)(6). One such requirement, in Section 50(a)(6)(E), is that the loan "does not require the owner or the owner's spouse to pay, in addition to any interest, fees to any person that are necessary to originate, evaluate, maintain, record, insure, or service the extension of credit that exceed, in the aggregate, three percent of the original principal amount of the extension of credit[.]"

[38] Section § 301.002(a)(4) provides: "In this subtitle . . . 'Interest' means compensation for the use, forbearance, or detention of money. The term does not include time price differential, regardless of how it is denominated. The term does not include compensation or other amounts that are determined or stated by this code or other applicable law not to constitute interest or that are permitted to be contracted for, charged, or received in addition to interest in connection with an extension of credit."

[39] 7 TEX. ADMIN. CODE § 153.1 ("These words and terms have the following meanings when used in this section, unless the context indicates otherwise: . . . (11) Interest — interest as defined in the Texas Finance Code § 301.002(4) and as interpreted by the courts."). *See also id.* § 153.5(3) ("Charges that are Interest. Charges an owner or an owner's

interest, the court reasoned, is as broad as it is to protect borrowers from usury.[40] The broader the concept of interest, the greater the protection. But "[i]n the home equity lending context, incorporating the extremely broad usury definition of interest would defeat the purpose of the constitutional provision imposing a fee cap in the first place."[41] Broadening "interest" in Section 50(a)(6)(E) reduces protection. By "exclud[ing] basically all fees charged by the lender from the cap", the court concluded, "[t]he Commissions' interpretation . . . essentially renders [the] cap meaningless . . . contrary to the intent and plain meaning of the constitution."[42]

Second: Section 50(a)(6)(N) provides that a loan may be "closed only at the office of the lender, an attorney at law, or a title company".[43] According to the Commissions:

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spouse is required to pay that constitute interest under the law, for example per diem interest and points, are not fees subject to the three percent limitation."); *id.* § 153.5(4) ("Charges that are not Interest. Charges an owner or an owner's spouse is required to pay that are not interest are fees subject to the three percent limitation."); *id.* § 153.5(6) ("Charges to Originate. Charges an owner or an owner's spouse is required to pay to originate an equity loan that are not interest are fees subject to the three percent limitation."); *id.* § 153.5(8) ("Charges to Evaluate. Charges an owner or an owner's spouse is required to pay to evaluate the credit decision for an equity loan, that are not interest, are fees subject to the three percent limitation. Examples of these charges include fees collected to cover the expenses of a credit report, survey, flood zone determination, tax certificate, title report, inspection, or appraisal."); *id.* § 153.5(9) ("Charges to Maintain. Charges paid by an owner or an owner's spouse at the inception of an equity loan to maintain the loan that are not interest are fees subject to the three percent limitation. Charges that are not interest that an owner pays at the inception of an equity loan to maintain the equity loan, or that are customarily paid at the inception of an equity loan to maintain the equity loan, but are deferred for later payment after closing, are fees subject to the three percent limitation."); *id.* § 153.5(12) ("Charges to Service. Charges paid by an owner or an owner's spouse at the inception of an equity loan for a party to service the loan that are not interest are fees subject to the three percent limitation. Charges that are not interest that an owner pays at the inception of an equity loan to service the equity loan, or that are customarily paid at the inception of an equity loan to service the equity loan, but are deferred for later payment after closing, are fees subject to the three percent limitation."). The *Regulatory Commentary* had stated: "The word 'interest' means interest as defined in the *Texas Credit Title* and as interpreted by the courts of the state of Texas." *Supra* note 19, at 3.

[40] 303 S.W.3d at 410, 412.

[41] *Id.* at 411.

[42] *Id.* at 412.

[43] This is required for a home equity loan to fall within the Section 50(a)(6) exception.

> This provision was intended to prohibit the coercive closing of an equity loan at the home of the owner. The requirement that the closing occur at the physical address of the lender, attorney, or title company eliminates the possibility of the closing occurring at the residence of the owner, and also eliminates confusion on the part of the owner who wishes to rescind an equity loan.[44]

Nevertheless, the Commissions interpreted this provision to allow a borrower to mail a lender the required consent to having a lien placed on his homestead[45] and to attend closing through his attorney-in-fact.[46] Was this correct?[47] The court of appeals held it was, reasoning that when Section 50 prohibits the use of a power of attorney, it does so expressly — as in Section 50(a)(6)(Q)(iv), to facilitate obtaining a judgment against a debtor.[48]

> The use of powers of attorney to designate an attorney-in-fact to act on the designor's behalf is a recognized principle of Texas law. As a result, it is neither inconsistent with the constitution nor impermissible rulemaking for the Commissions to clarify that this principle continues to apply in the context of home equity loan closings, particularly where the drafters expressly prohibited the use of powers of attorney in other home equity lending contexts, but not with regard to closing the loan.[49]

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[44] 29 Tex. Reg. 84, 90 (2004).

[45] 7 TEX. ADMIN. CODE § 153.15(3) ("A lender may receive consent required under Section 50(a)(6)(A) by mail or other delivery of the party's signature to an authorized physical location and not the homestead."). The Constitution, at art. XVI, Section 50(a)(6)(A), provides that a valid voluntary lien securing a home equity loan can be created only "under a written agreement with the consent of each owner and each owner's spouse".

[46] 7 TEX. ADMIN. CODE § 153.15(2) ("A lender may accept a properly executed power of attorney allowing the attorney-in-fact to execute closing documents on behalf of the owner.").

[47] The *Regulatory Commentary* had stated: "If the transaction is closed at one of [the offices specified in Section 50], but lacks the consent of a spouse or other party, it is permissible to obtain that individual's consent by mail. A properly executed power of attorney is acceptable for designating an individual to close the loan on behalf of the owner." *Supra* note 19, at 7.

[48] Another requirement a home equity loan must satisfy to come within the Section 50(a)(6) exception is that "the owner of the homestead not sign a confession of judgment or power of attorney to the lender or to a third person to confess judgment or to appear for the owner in a judicial proceeding". TEX. CONST. art. XVI, § 50(a)(6)(Q)(iv).

[49] 303 S.W.3d at 417 (citations omitted).

Further, the court concluded, allowing a borrower to mail documents to a lender was not unreasonable.[50]

Third: Section 50(g) requires that a loan not be closed before the 12th day after the lender "provides" the borrower the prescribed notice.[51] Did the Commissions correctly interpret Section 50(g) to permit a rebuttable presumption that notice is received, and therefore provided, three days after it is mailed?[52] The court of appeals concluded that "[t]he Commissions' regulations merely interpret the appropriate way to determine whether [provision of notice] has occurred and to establish compliance with the notice requirement. It is for precisely that type of guidance that the Commissions were authorized to issue interpretations in the first place."[53]

At the outset, we must decide two jurisdictional issues. First is whether Section 50(u) deprives the Judiciary of the power to review the Commissions' interpretations. Concluding that it does not, we then determine whether, as the dissent argues, the Homeowners lack standing to assert

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[50] *Id*.

[51] The provision reads in relevant part: "An extension of credit described by Subsection (a)(6) of this section may be secured by a valid lien against homestead property if the extension of credit is not closed before the 12th day after the lender provides the owner with the following written notice on a separate instrument . . . ."

[52] 7 TEX. ADMIN. CODE § 153.51(1), (3) ("(1) If a lender mails the consumer disclosure to the owner, the lender shall allow a reasonable period of time for delivery. A period of three calendar days, not including Sundays and federal legal public holidays, constitutes a rebuttable presumption for sufficient mailing and delivery. . . . (3) A lender may rely on an established system of verifiable procedures to evidence compliance with this section."). The *Regulatory Commentary* had stated: "A lender should establish verifiable procedures to ensure that an owner receives the required notice within the specified time frame. If a lender mails the notice to the owner, the lender shall allow a reasonable period of time for delivery. A three day period not including Sundays and legal holidays, constitutes a rebuttable presumption for sufficient mailing and delivery." *Supra* note 19, at 11.

[53] 303 S.W.3d at 418 (footnote omitted).

their claims. Finding that the Homeowners have standing, we at last turn to each of the three substantive challenges to the Commissions' interpretations.

II

The Commissions' position on the effect of Section 50(u) is not entirely clear. They contend in their merits brief that Section 50(u) "alter[s] basic separation-of-powers principles by empowering the Commissions with definitive interpretative authority over the meaning of the home equity lending provisions."[54] Consequently — they argue later in their brief — "judicial review *of the substance of* [their] *interpretations* ought to be exceptionally limited, if not wholly prohibited."[55] In the same paragraph, however, they assert that Section 50(u) "places the Commissions' interpretations on equal footing with those issued by courts of appeals",[56] which, of course, are subject to non-deferential, *de novo* judicial review — by the Supreme Court of Texas. In the next paragraph, the Commissions acknowledge that their authority is not exclusive and that courts can interpret Section 50, too, and can construe the meaning of the Commissions' interpretations.[57] The next sentence states: "Moreover, courts would still serve the meaningful function of ensuring that any interpretation promulgated by the Commissions actually 'interprets' the Constitution."[58] If the sentence means that a court can determine that an interpretation actually misinterprets Section 50,

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[54] Brief on the Merits of Petitioners Finance Commission of Texas and Credit Union Commission of Texas [hereinafter "Commissions' Brief"] 7.

[55] *Id.* at 14.

[56] *Id.*

[57] *Id.* at 14-15.

[58] *Id.* at 15.

it is not clear how that differs from judicial review that "ought to be . . . wholly prohibited"; and if the sentence means that courts can do something else that is still meaningful, it is not clear what that is, exactly. Another sentence later, the Commissions acknowledge that their interpretations are subject to the Administrative Procedure Act and "could . . . be challenged for failure to substantially comply with [the Act's] procedural requirements".[59] But the Commissions never explain why another provision of the Act — that "[t]he validity . . . of a rule . . . may be determined in an action for declaratory judgment"[60] — does not equally apply.[61] Finally, at oral argument, counsel for the Commissions stated that "fortunately, it isn't even necessary to reach the question of whether judicial review is totally excluded in this case because the Commissions' challenged interpretations satisfy the ordinary deference standard" of review that should be applied.[62]

On the last point, the law is absolutely clear. If Section 50(u) precludes judicial review, then the courts have no jurisdiction over the Homeowners' challenges, and we must dismiss the case without reaching the merits. "Without jurisdiction the court cannot proceed at all in any cause; it may not assume jurisdiction for the purpose of deciding the merits of the case."[63]

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[59] *Id.*

[60] TEX. GOV'T CODE § 2001.038(a). "Rule" is defined as "a state agency statement of general applicability that (i) implements, interprets, or prescribes law or policy . . . ." *Id.* § 2001.003(6)(A)(i). The parties have not argued that the Commissions' interpretations should not be treated as rules for purposes of Section 2001.038.

[61] The Commissions argue only that the Homeowners lack standing to bring a declaratory judgment action. *See* Commissions' Supplemental Brief Addressing Jurisdiction 4-7; Commissions' Response Brief Addressing Jurisdiction 1.

[62] Transcript of Oral Argument at *2, *Fin. Comm'n of Texas v. Norwood*, No. 10-0121 (Tex. argued Sept. 13, 2011), *available at* http://www.supreme.courts.state.tx.us/oralarguments/transcripts/10-0121.pdf.

[63] *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007) (internal quotation marks omitted) (citing *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 94 (1998)).

> [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 because the assertion of jurisdiction "carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers."[64]

We must determine the effect of Section 50(u).

The purpose of Section 50(u), the Commissions agree, was to remove market uncertainty over the exact meaning of home equity lending provisions.[65] This it did by allowing for administrative interpretations of the provisions and giving those interpretations constitutional authority, equating compliance with them to compliance with the Constitution itself. Judicial review of the Commissions' interpretations does not impair Section 50(u)'s purpose in the least, but rather, assures that the interpretations adhere to the meaning of the constitutional provisions. To read Section 50(u) as giving the Commissions interpretative authority that is absolute and unreviewable — as the Commissions at times seem to read this section — would defeat the purpose of constitutionalizing home equity lending procedures in the first place: to shield them from political pressures in the legislative and executive departments of government. The Executive could influence interpretations through its power to appoint members of the Commissions, and the Legislature could exert similar influence through statutes governing the Commissions' functions. Indeed, as we will see later, the Legislature could directly alter the meaning of constitutional provisions by amending statutes used by the Commissions to define constitutional terms —

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[64] *DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 307 (Tex. 2008) (quoting *Steel Co.*, 523 U.S. at 94).

[65] Commissions' Brief 18 ("Indeed, the entire purpose of § 50(u)'s delegation of interpretive authority to the Commissions was to enable the agencies to clarify the restrictions set forth throughout § 50(a)(6) in order to increase certainty and spur home equity lending.").

"interest", for example. Instead of requiring a constitutional amendment to change home equity lending procedures, a constitutional amendment would be required to change the Commissions' interpretations. Nothing in Section 50(u) or the history of its adoption suggests that the framers and ratifiers of the 2003 amendment to Section 50 intended to upend the fundamental goal of the 1997 amendment.[66]

Moreover, so expansive a reading of Section 50(u) violates the requirement of Article II, Section 1 that exceptions to the separation of powers be expressly stated. Section 50(u) authorizes the Legislature to confer interpretative authority on designated agencies, but nothing more. Indeed, Section 50(u)(2) expressly contemplates that the constitutional provisions will be interpreted not only by the agencies delegated that task but by state and federal courts as well, extending the safe harbor to include all interpretations, administrative and judicial. And as the Commissions argue, Section 50(u) seems to equate administrative interpretations with those of appellate courts, which — except for decisions of the United States Supreme Court — are subject to review. Every implication of Section 50(u) is that judicial review is not foreclosed, and that seems to be the Legislature's understanding in subjecting the Commissions' interpretations to the Administrative Procedure Act, which provides for judicial review.

Accordingly, we conclude that the Commissions' interpretations of Section 50 are subject to judicial review.

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[66] *Sears v. Bayoud*, 786 S.W.2d 248, 251 (Tex. 1990) ("[I]n construing a constitutional provision, this Court has always given effect to the intention of the framers and ratifiers of the provision.").

III

In the trial court and court of appeals, and in the initial briefing and argument in this Court, neither the Commissions nor the TBA suggested that the Homeowners lacked standing to sue, and the lower courts never raised the issue themselves. But after oral argument, the Court directed the parties to brief the subject. Because standing is required for subject-matter jurisdiction, it can be — and if in doubt, must be — raised by a court on its own at any time.[67]

Standing and other concepts of justiciability[68] have been "developed to identify appropriate occasions for judicial action"[69] and thus maintain the proper separation of governmental powers. As Justice Frankfurter observed, "[w]hether 'justiciability' exists . . . has most often turned on evaluating both the appropriateness of the issues for decision by courts and the hardship of denying judicial relief."[70] We have explained the doctrine of standing as follows:

> The requirement in this State that a plaintiff have standing to assert a claim derives from the Texas Constitution's separation of powers among the departments of government, which denies the judiciary authority to decide issues in the abstract, and from the Open Courts provision, which provides court access only to a "person for an injury done him". A court has no jurisdiction over a claim made by a plaintiff without standing to assert it. For standing, a plaintiff must be personally aggrieved; his alleged injury must be concrete and particularized, actual or imminent, not hypothetical.[71]

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[67] *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 445-446 (Tex. 1993).

[68] "The central concepts often are elaborated into more specific categories of justiciability —– advisory opinions, feigned and collusive cases, standing, ripeness, mootness, political questions, and administrative questions." 13 CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 3529 (3d ed. 2008).

[69] *Id.*

[70] *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 156 (1951) (Frankfurter, J., concurring).

[71] *DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 304-305 (Tex. 2008).

"Generally", we recently wrote in *Andrade v. NAACP of Austin*, "a citizen lacks standing to bring a lawsuit challenging the lawfulness of governmental acts."[72] But we added, "[t]he line between a generalized grievance and a particularized harm is difficult to draw, and *it varies with the claims made*."[73] "[T]he proper inquiry", we stated, "is whether the plaintiffs sue solely as citizens who insist that the government follow the law."[74]

Andrade illustrates that whether an injury is sufficiently "concrete", "particularized", "actual or imminent", and "not hypothetical" for standing depends on the context in which the claim is asserted. There, registered voters sued the Secretary of State, asserting that she exceeded her authority in certifying the use of electronic voting machines that do not produce a contemporaneous paper record of each vote.[75] The plaintiffs alleged that the machines were susceptible to being fraudulently manipulated and prone to malfunction, and that the lack of a paper record of each vote, made the moment the vote was cast, prevented a determination whether the votes counted by the machines were actually those that were cast.[76] They complained that because they were forced to use the machines while other voters were not, and their votes were less likely to be counted than others', their statutory right to a recount and their constitutional right to equal protection of the law

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[72] 345 S.W.3d 1, 7 (Tex. 2011).

[73] *Id.* at 8 (emphasis added).

[74] *Id.*

[75] *Id.* at 6.

[76] *Id.* at 6, 10.

was violated.[77] Relying on the United States Supreme Court's seminal decision in *Baker v. Carr*,[78] we concluded:

> If such impairment does produce a legally cognizable injury, [the plaintiffs] are among those who have sustained it. Because they assert a plain, direct and adequate interest in maintaining the effectiveness of their votes, not merely a claim of the right, possessed by every citizen, to require that the Government be administered according to law, the voters have standing to pursue their equal protection claim.[79]

We noted that our analysis could be different for equal-protection complaints unrelated to voting.[80]

In the present case, a unique consideration in determining the Homeowners' standing is the safe-harbor provision in Section 50(u), by which a home equity lender's conduct in compliance with the Commissions' interpretations does not violate Section 50 and therefore cannot injure a borrower. For example, a lender may charge fees permitted by the Commissions' interpretation of the constitutional cap, even if the interpretation is incorrect, and the borrower is not only denied redress, he has not even been overcharged. Even if the Commissions' interpretations are later determined to be wrong, they still, while in effect, substitute for Section 50's provisions.[81] A home equity borrower cannot be injured by a lender's compliance with the Commissions' interpretations because nothing illegal has occurred. To have complied with the interpretations is to have complied with the Constitution itself.

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[77] *Id.*

[78] 369 U.S. 186, 207-208 (1962).

[79] *Andrade v. NAACP of Austin,* 345 S.W.3d 1, 6, 10 (Tex. 2011) (internal quotation marks omitted).

[80] *Id.* (citing *Tex. Dep't. of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 646-647 (Tex. 2004)).

[81] We do not consider the effect of an interpretation adopted in violation of procedural requirements.

Injury lies only in the Commissions' misinterpretation of Section 50, and then only to a person's interest in obtaining a home equity loan in the future. To return to the fee example, once a loan has closed and the fees have been paid according to the Commissions' interpretations, no injury has occurred. Injury can exist only in the prospect of having to pay fees that, though permitted by the interpretations, are excessive under Section 50.

Were this injury insufficient to confer standing to challenge the Commissions' interpretations, their authority to interpret Section 50 would be final and absolute, not merely shared with the Judiciary. But the principle of standing exists to protect the separation of powers, not to defeat it. Standing operates to prevent the Judiciary from exercising authority that belongs to other departments of government, not to deprive the Judiciary of its role in interpreting law, especially constitutional law. The requirement of standing cannot be used to alter the separation of powers. And in any event, we have concluded that the Commissions' authority is not absolute.

It follows that injury to the interest in obtaining a home equity loan resulting from the Commissions' alleged misinterpretations of Section 50 is sufficient for standing. The parties agree (though the Commissions still do not concede that their interpretations are subject to judicial review).[82] They disagree only over whether the Homeowners have sufficiently pleaded the requisite interest. The Homeowners alleged in their pleadings that each "took out a home equity loan" and

[82] The Commissions' Response Brief Addressing Jurisdiction 1 (stating that an "inten[t] to acquire an additional home equity loan . . . is all that is required to establish standing in this case"); Texas Bankers Association's Post-Submission Response Brief 6 ("This Court should hold that, as Texas homeowners eligible to obtain future home equity financing, the Homeowners have standing to challenge the Commissions' interpretative rules."); Homeowners' Response to Supplemental Brief on Jurisdiction 1 ("All parties agree that if [Homeowners] have an interest in obtaining a home equity loan in the future, they have standing . . . .").

that the Commissions "have adopted interpretations and rules in violation of the Texas Constitution which interfere with or impair, or threaten to interfere with or impair, a legal right or privilege of Plaintiffs."[83] The Commissions argue that "[a]dding one simple allegation . . . should suffice to establish jurisdiction: . . . an intent to acquire an additional home equity loan."[84] The Homeowners respond that their prospective interest in home equity loans, sufficient for standing, is implicit in their pleadings,[85] liberally construed as they must be when standing is questioned for the first time by an appellate court.[86] The TBA agrees.[87]

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[83] The Commissions' authority to interpret Section 50 is subject, under TEX. FIN. CODE §§ 11.308 & 15.413, to the Administrative Procedure Act, which permits judicial review of a rule adopted by a state agency "if it is alleged that the rule or its threatened application interferes with or impairs, or threatens to interfere with or impair, a legal right or privilege of the plaintiff." TEX. GOV'T CODE § 2001.038(a). The Homeowners' pleadings track this language and thus allege the injury required by the Act for judicial review. The Act does not purport to set a higher standard than that set by the general doctrine of standing, and it cannot be lower, since courts' constitutional jurisdiction cannot be enlarged by statute. *In re Allcat Claims Serv., L.P.*, 356 S.W.3d 455, 462 (Tex. 2011) ("If the grant of jurisdiction or the relief authorized in the statute exceeds the limits of [the Constitution], then we simply exercise as much jurisdiction over the case as the Constitution allows . . . ."). We treat the Act's requirement as but another expression of the general doctrine of standing.

[84] The Commissions' Supplemental Brief Addressing Jurisdiction 8. The Commissions also argue that the case should not be dismissed but should be remanded to the trial court for the Homeowners to amend their pleadings, and in remanding this Court "should address both the standing requirement and the merits of the [Homeowners'] claims in order to provide guidance for the trial court". *Id. at* 9. This, the Commissions contend, "is the best way to capitalize upon (and avoid squandering) the substantial judicial resources that have already been spent by this Court, the lower courts, and all of the parties in litigating the substantive challenge to the Commissions' interpretations over the past seven years." *Id.*

[85] Homeowners' Response to Supplemental Brief on Jurisdiction 1 ("While the Homeowners' live petition does not expressly state each Homeowner has an interest in obtaining a home equity loan in the future, this is fairly implied if the petition is construed liberally toward the pleader's intent.").

[86] *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993) ("When an appellate court questions jurisdiction on appeal for the first time . . . and reviews the standing of a party sua sponte, it must construe the petition in favor of the party [seeking to invoke the court's jurisdiction], and if necessary, review the entire record to determine if any evidence supports standing.").

[87] Texas Bankers Association's Post-Submission Response Brief 2 ("The Homeowners have alleged they are Texas homeowners. Under the Texas Constitution they are, therefore, the class of people eligible to obtain home equity financing — or refinancing. As a result, they are subject, prospectively, to the Commissions' interpretations of the Texas Constitution's home equity lending provisions. This Court could correctly conclude the Homeowners have standing to

So do we. The Homeowners' allegation that the Commissions' interpretations "threaten to interfere with or impair [their] legal right[s]" cannot be true unless they have a prospective interest in considering home equity loans. And such interest is unquestionably affected by the Commissions' interpretations. The TBA confirms what should come as no surprise: that whenever home equity loans are made, "[b]ecause the banking industry has conformed its practices to the Commissions' interpretative rules to obtain the Texas Constitution's safe harbor protections, there is no doubt Texas homeowners will find the terms of home equity loans still governed by the Commissions' rules."[88] Even if the Homeowners' interest were solely in refinancing existing home equity loans, the refinancing would have to satisfy the requirements of Section 50.[89]

The Homeowners need not allege a more imminent impairment to their rights or allege a threat with more specificity. While the certainty and extent of injury would become clearer as the time for closing a home equity loan approached, the terms were fixed, and the application of the Commissions' interpretations became apparent, to require a homeowner to wait to that point to

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challenge the Commissions' interpretative rules."). Alternatively, the TBA joins the Commissions in urging that the Court allow the Homeowners to cure their pleadings and address the substance of the Homeowners' challenges either in the process of doing so or afterward. *Id.* at 7-8 ("Alternatively, if the Court determines the Homeowners have not established on the trial record that their challenge to the Commissions' interpretative rules is a live controversy that they have standing to litigate, Texas Bankers Association supports the Commissions' request that the Court give the Homeowners the opportunity to do so. If the Court is not inclined, as the Commissions propose, to decide the merits of the Homeowners' constitutional challenges before resolving whether they have standing to litigate those claims, the Court could, alternatively, abate this appeal; remand to the trial court to allow the Homeowners to amend their pleadings or present additional evidence to support standing and a live controversy; and then, once they have established those jurisdictional elements, lift the abatement and decide the merits of their constitutional challenges.").

[88] *Id.* at 6-7.

[89] TEX. CONST. art. XVI, § 50(f) ("A refinance of debt secured by the homestead, any portion of which is an extension of credit described by Subsection (a)(6) of this section, may not be secured by a valid lien against the homestead unless the refinance of the debt is an extension of credit described by Subsection (a)(6) or (a)(7) of this section.").

challenge an interpretation would be to deny review or deny credit, or both. This case was filed more than nine years ago. Changes in values and rates, and in lenders' and borrowers' individual circumstances, ordinarily require that loan closings occur in a matter of weeks, not years. And hard as it may be to foretell obtaining a loan, predicting the terms is completely impossible.

Importantly, impairment of the Homeowners' rights is threatened not only by having to close a home equity loan under misinterpretations of constitutional requirements but also by having to decide whether to seek credit in such a situation. The decision whether to apply for a home equity loan is necessarily influenced by its terms, and to return yet again to the fee cap example, its cost. Knowing that fewer fees are capped obviously discourages borrowers. The homeowner who does not intend to apply for a home equity loan and will probably not obtain one, all because of incorrect interpretations of Section 50, is no less injured than the homeowner whose loan is closed under such misinterpretations. The influence of the Commissions' interpretations on whether even to apply for a home equity loan is injury enough to give the Homeowners standing.

The dissent does not disagree and "recognize[s] that the circumstances before us are unusual",[90] but regards the Homeowners' allegation that the Commissions' interpretations "threaten to interfere with or impair [their] legal right[s]" as insufficiently factual. We think that to insist on greater specificity is unreasonable, as we have explained. How the fee cap will operate for any particular loan cannot be predicted with any accuracy until the underwriting is complete. Nor can a prospective borrower predict how he or she may be impacted by other misinterpretations asserted

[90] *Post* at ___.

by the Homeowners: the requirements that closing occur away from the borrower's home and that the borrower be shown to have the required notice. The dissent suggests that the Homeowners could allege that the asserted misinterpretations adversely affected them when they obtained their home equity loans in the past, if such were the case. But the dissent misunderstands the nature and effect of the safe-harbor provision, characterizing it as "protect[ing] lenders from liability for their lending actions much as statutes of limitations protect parties from liability for stale claims."[91] A lender's compliance with a misinterpretation of Section 50 is not an injury for which a borrower is barred from seeking redress; it is no injury at all. It would certainly be a perverse application of the standing doctrine to require pleading of a non-existent injury.

Section 50(u) creates an exceptional context in which to assess standing. So do voting rights, as we acknowledged in *Andrade*. In that case, there was only a possibility that the plaintiffs would vote in the future, and if they did, there was no proof at all that the machines to which they objected would be used, would be improperly programmed, or would malfunction, or that their votes would be inaccurately counted. Though the standing doctrine would insist on a more substantial injury in other contexts, voting rights present a special situation. The same may be said of this case. Section 50(u) is unique to the Texas Constitution. Its preclusion of the injury typically required for standing requires application of the doctrine in context. The alternative, as we have noted, is to allow the doctrine to be used to alter what it is designed to maintain — the proper separation of powers.

[91] *Post* at ___.

To return to Justice Frankfurter's observation, the substantive issues are certainly appropriate for judicial decision — including whether judicial review of the Commissions' interpretations is permitted — and the hardship of withholding decision is significant, given the parties' unity in urging a resolution on the merits. Having raised the issue of standing at the tail end of eight years of litigation, the Court must construe the record liberally, and in the context of an exceptional constitutional provision. Doing so, we conclude that the Homeowners have standing.

IV

We come at last to the Homeowners' substantive challenges. We begin by determining the appropriate standard of review, then move in turn to each challenge.

A

"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."[92] The Commissions argue that courts must give at least this much deference to their interpretations of Section 50(u). But as the Commissions themselves assert, Section 50(u) puts their interpretations "on equal footing with those issued by courts of appeals".[93] As we have explained, we agree that this reading of Section 50(u) is correct. This Court does not defer to a court of appeals' interpretation of the Constitution but reviews it, as all matters of law, *de novo*.[94] Indeed, the courts of appeals do not even defer to each other's constitutional interpretations.

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[92] *Tarrant Appraisal Dist. v. Moore*, 845 S.W.2d 820, 823 (Tex. 1993).

[93] Commissions' Brief 14.

[94] *E.g.*, *Harris Cnty. Hosp. Dist. v. Tomball Reg'l Hosp.*, 283 S.W.3d 838, 842 (Tex. 2009).

By giving agency interpretations the same stature as those of appellate courts, Section 50(u) requires that courts give the one no more deference than the other.

The Commissions argue that the history of Section 50(u) shows that their interpretative authority was intended to be "definitive", but this is true only in comparison to the *Regulatory Commentary*, which was merely advisory, and issued prior to Section 50(u).[95] Nothing suggests their authority under Section 50(u) is to be more definitive than an appellate court's interpretation.

The Commissions argue that their interpretations are entitled to greater deference because Section 50(u)'s delegation of authority is unique, but it is only the delegation itself that is unique, not the interpretative authority delegated. Nothing suggests that the framers and ratifiers had anything in mind other than ordinary constitutional interpretation, assuming that a more expansive power were even possible under the Constitution. The Commissions argue that they were chosen because of their expertise in lending markets, which should be entitled to deference in any review. But the power to interpret the constitutional text is unrelated to an agency's expertise in an industry, or to its regulatory power, which is ordinarily quite broad. In interpreting Section 50, the Commissions must give effect to the constitutional text, regardless of whether it comports with their expertise or regulatory judgment. The Commissions cannot use their authority under Section 50(u) and the enabling legislation to set policy. They can do no more than interpret the constitutional text, just as a court would.

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[95] *Stringer v. Cendant Mortg. Corp.*, 23 S.W.3d 353, 357 (Tex. 2000) (noting that the Commissions' *Regulatory Commentary* released prior to Section 50(u)'s enactment "is advisory and not authoritative").

The Commissions contend that *de novo* review of their interpretations "undermines the entire purpose of [Section 50(u)], as Texans could not rely upon the Commissions' interpretations with any confidence that they were valid, and that compliance therewith would protect the enforceablilty of their loan transactions."[96] But this is simply not true. Under Section 50(u), compliance with any interpretation or judicial decision, even one later overturned, is compliance with the Constitution itself. Review of the Commissions' interpretations may alter what lenders must do going forward, but it does not expose them to liability for past conduct.

In essence, the Commissions argue for interpretative authority that is not only unreviewable but greater than that exercised by the Judiciary. Such a grant of power cannot be found in Section 50(u). Rather, the Commissions' interpretative authority is the same as the Judiciary's, which we have described as follows:

> In construing the Constitution, as in construing statutes, the fundamental guiding rule is to give effect to the intent of the makers and adopters of the provision in question. We presume the language of the Constitution was carefully selected, and we interpret words as they are generally understood. We rely heavily on the literal text. However, we may consider such matters as the history of the legislation, the conditions and spirit of the times, the prevailing sentiments of the people, the evils intended to be remedied, and the good to be accomplished.[97]

And their interpretations are to be reviewed as judicial decisions are.

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[96] The Commissions' Brief 19.

[97] *Harris Cnty. Hosp. Dist. v. Tomball Reg'l Hosp.*, 283 S.W.3d at 842 (citations and internal quotation marks omitted).

B

Section 50(a)(6)(E) provides that a home equity borrower may not be required to pay, "in addition to any interest, fees to any person that are necessary to originate, evaluate, maintain, record, insure, or service the extension of credit that exceed, in the aggregate, three percent of the original principal amount of the extension of credit". According to the Commissions, the meaning of "interest" is "as defined in the Texas Finance Code § 301.002(4) and as interpreted by the courts."[98]

The fatal difficulty with the Commissions' interpretation is that it does not merely adopt the substance of the statute at the time the interpretation became effective; it adopts whatever definition of "interest" the Legislature may enact from time to time by amending Section 301.002(4). The Commissions acknowledge that the Legislature can change the effect of their interpretation and the meaning of Section 50(A)(6)(E) simply by amending the statute,[99] and this in fact is what has happened. When the interpretation became effective in January 2004, Section 301.002(4) stated: "In this subtitle . . . 'Interest' means compensation for the use, forbearance, or detention of money. The term does not include time price differential, regardless of how it is denominated."[100] The following year, the Legislature amended the provision to add a third sentence: "The term does not include compensation or other amounts that are determined or stated by this code or other applicable law not to constitute interest or that are permitted to be contracted for, charged, or received in addition to

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[98] 7 TEX. ADMIN. CODE § 153.1(11).

[99] The Commissions' Brief 22. The TBA agrees. Brief on the Merits of Texas Bankers Ass'n 13.

[100] Act of April 23, 1999, 76th Leg., R.S., ch. 62, § 7.18, 1999 Tex. Gen. Laws 127, 222.

interest in connection with an extension of credit."[101] In effect, the Commissions, creatures of the Legislative Department appointed by the Executive, have used their interpretative power under Section 50(u) to give the Legislature the unfettered authority to alter as it chooses the constitutional fee cap, a critical part of the protections built into Section 50. In the Commissions' view, they are empowered not only to interpret Section 50(a)(6)(E) but, in so doing, to authorize the Legislature to redefine the provision's terms. The Commissions' interpretation of the fee cap, tying its meaning to a statute, utterly defeats the clear purpose of constitutionalizing it, which was to place the limitation beyond the Legislature's power to change without ratification by the voters. For this reason alone, the Commissions' interpretation is invalid.

The Commissions nevertheless insist that "interest" in Section 50(a)(6)(E) should mean "compensation for the use, forbearance, or detention of money", as defined in Section 301.002(4) at the time the constitutional provision was adopted, and as understood under Texas law since at least 1879.[102] But that broad definition has generally been used in the context of prohibiting usury. Thus, for example, the 2005 amendment to Section 301.002(a)(4) excepts from the definition for the first time certain lender-charged fees allowed by law.[103] The ostensible purpose of that legislation was to relax restrictions on usury, but if "interest" in Section 50(a)(6)(E) has the same meaning, the

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[101] Act of May 29, 2005, 79th Leg., R.S., ch. 1018, § 2.01, 2005 Tex. Gen. Laws 3438, 3439-3440.

[102] TEX. REV. CIV. STAT. ANN. art. 2972 (1879) ("'Interest' is the compensation allowed by law or fixed by the parties to a contract for the use or forbearance or detention of money."); *see also Battaglia v. Alexander*, 177 S.W.3d 893, 907 (Tex. 2005) ("'Interest' has long been defined by the Legislature as 'compensation for the use, forbearance, or detention of money.'" (citations omitted)); *Galveston & Hous. Inv. Co. v. Grymes*, 63 S.W. 860, 861 (Tex. 1901) (citing the same text in TEX. REV. CIV. STAT. ANN. art. 3097 (1895)).

[103] Act of May 29, 2005, 79th Leg., R.S., ch. 1018, § 2.01, 2005 Tex. Gen. Laws 3438, 3439-3440.

exception for such fees places them back under the three-percent cap. Nothing suggests that the Legislature intended the 2005 amendment to do both.

The functions of "interest" in applying the constitutional fee cap for home equity loans and in prohibiting usury are inversely related. If the word is given the same meaning in both contexts, then including lender-charged fees in "interest" strengthens usury laws and weakens the fee cap, though both are designed to protect consumers. That this was the intent of the framers and ratifiers of Section 50(a)(6)(E) is simply implausible.

The Commissions point out that Section 50(u), giving them interpretative authority, was adopted after they had already suggested in their *Regulatory Commentary* that "interest" in Section 50(a)(6)(E) should have the same meaning as in Section 301.002(a)(4) of the Finance Code, indicating that the Legislature acquiesced in that view, as confirmed by the Legislature's later refusal to enact bills that would have narrowed their interpretation. But as we have seen, the Legislature quickly amended Section 301.002(a)(4). The Legislature cannot be said to have acquiesced in anything other than the Commissions' view that it should be authorized to alter the constitutional provision by statute.

The Commissions' position is that in capping "fees to any person that are necessary to originate, evaluate, maintain, record, insure, or service" a home equity loan, the framers and ratifiers intended to cap only fees to any person *other than the lender*. But had that been their intent, surely the simplest and clearest way to express it would have been to use those four words, rather than the oblique phrase, "in addition to any interest". This is especially true because there is another, well-

understood meaning of "interest": the amount equal to the loan principal multiplied by the interest rate. Applied to Section 50(a)(6)(E), that definition allows "any person" to mean just that.

We conclude that consistent with the history, purpose, and text of Section 50(a)(6)(E), "interest" as used in that provision means the amount determined by multiplying the loan principal by the interest rate.[104]

C

Section 50(a)(6)(N) provides that a loan may be "closed only at the office of the lender, an attorney at law, or a title company". The Commissions acknowledge, and the Homeowners agree, that "[t]his provision was intended to prohibit the coercive closing of an equity loan at the home of the owner."[105] Nevertheless, the Commissions' interpretations allow a borrower to mail the required signed consent to the lender[106] and to close through an attorney-in-fact.[107] Both these interpretations permit coercion in obtaining the required consent and a power of attorney at the borrower's home, allowing the final closing to occur later at one of the prescribed locations, thereby defeating the purpose of the provision.

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[104] This narrower definition of interest does not limit the amount a lender can charge for a loan; it limits only what part of the total charge can be paid in front-end fees rather than interest paid over time. In so doing, it incentivizes lenders to determine borrowers' creditworthiness more carefully and helps borrowers better assess the costs of credit.

[105] 29 Tex. Reg. 84, 90 (2004).

[106] 7 TEX. ADMIN. CODE § 153.15(3) ("A lender may receive consent required under Section 50(a)(6)(A) by mail or other delivery of the party's signature to an authorized physical location and not the homestead.").

[107] *Id.* § 153.15(2) ("A lender may accept a properly executed power of attorney allowing the attorney-in-fact to execute closing documents on behalf of the owner.").

Closing a loan is a process. It would clearly be unreasonable to interpret Section 50(a)(6)(N) to allow all the loan papers to be signed at the borrower's house and then taken to the lender's office, where funding was finally authorized. Closing is not merely the final action, and in this context, to afford the intended protection, it must include the initial action. Executing the required consent or a power of attorney are part of the closing process and must occur only at one of the locations allowed by the constitutional provision.

Whether so stringent a restriction is good policy is not an issue for the Commissions or this Court to consider. That the issue should arise counsels against constitutionalizing minutiae, placing them beyond regulatory or legislative adjustment. But the purpose of the provision is indisputable, and the Commissions' interpretations in derogation of that purpose can be justified only by reading "closing" to mean some aspect of the closing process. The court of appeals concluded that the use of the mail to transmit documents and of a power of attorney to facilitate execution are so commonplace that had the framers and ratifiers of Section 50 intended to preclude these practices, they would have said so with more specificity.[108] The court pointed to Section 50(a)(6)(Q)(iv), which prohibits using a borrower's power of attorney to facilitate obtaining a judgment against a debtor, should he default. But it is precisely the common use of the mail and powers of attorney in closing transactions that gives rise to the danger of coercion Section 50(a)(6)(N) was intended to prevent.

[108] 303 S.W.3d at 417 (citations omitted).

We conclude that the Commissions' interpretations of Section 50(a)(6)(N) contradict the purpose and text of the provision and are therefore invalid.

D

Finally, Section 50(g) requires that a loan not be closed before the 12th day after the lender provides the borrower the prescribed notice.[109] In giving meaning to "provides", the Commissions have determined there is a rebuttable presumption that notice is received three days after it is mailed.[110] The Homeowners insist that a lender must establish actual receipt of notice in each case. But the Commissions' interpretation does not impair the constitutional requirement; it merely relieves a lender of proving receipt unless receipt is challenged. We agree with the court of appeals that the interpretation is but a reasonable procedure for establishing compliance with Section 50(g).

* * *

The judgment of the court of appeals is affirmed in part and reversed in part, and judgment is rendered .

Nathan L. Hecht
Justice

Opinion delivered: June 21, 2013

[109] TEX. CONST. art. XVI, § 50(f).

[110] 7 TEX. ADMIN. CODE § 153.51(1), (3) ("(1) If a lender mails the consumer disclosure to the owner, the lender shall allow a reasonable period of time for delivery. A period of three calendar days, not including Sundays and federal legal public holidays, constitutes a rebuttable presumption for sufficient mailing and delivery. . . . (3) A lender may rely on an established system of verifiable procedures to evidence compliance with this section.").

IN THE SUPREME COURT OF TEXAS

NO. 10-0121

THE FINANCE COMMISSION OF TEXAS, THE CREDIT UNION COMMISSION OF TEXAS, AND TEXAS BANKERS ASSOCIATION, PETITIONERS,

v.

VALERIE NORWOOD, ELISE SHOWS, MARYANN ROBLES-VALDEZ, BOBBY MARTIN, PAMELA COOPER, AND CARLOS RIVAS, RESPONDENTS

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

Argued September 13, 2011

JUSTICE JOHNSON, concurring in part and dissenting in part, and dissenting from the judgment.

I dissent from parts III and IV of the Court's opinion and from its judgment.

Six homeowners filed suit in this case three weeks after the Finance and Credit Union Commissions' interpretations of the home equity lending provisions in Section 50 became effective. The Homeowners challenged seventeen of the interpretations, but did not allege that any of the interpretations impacted a loan they applied for or considered applying for, or that they had been discouraged from applying for a loan by the interpretations. Nor does the record contain facts showing how any one, much less all, of the interpretations caused the Homeowners an actual, imminent, potential, or even hypothetical particularized injury.

In post-submission briefing the Commissions argue that the matter should be remanded to the trial court to give the Homeowners the opportunity to replead so they can show jurisdictional facts. Instead of giving them that opportunity, the Court concludes the Homeowners have standing to challenge all the interpretations because their pleadings implicitly allege injury to their "prospective interest" in home equity loans. It then addresses the merits in what I view as an advisory opinion. For the reasons expressed below, I would remand the case to the trial court to allow the Homeowners to replead or otherwise attempt to show jurisdiction.

The Commissions' interpretations of the lending provisions became effective on January 8, 2004. *See* 7 TEX. ADMIN. CODE §§ 153.1–.96. Approximately three weeks later the Homeowners sued the Commissions under provisions of the Administrative Procedures Act (APA), TEX. GOV'T CODE § 2001.038, and the Declaratory Judgments Act (DJA), TEX. CIV. PRAC. & REM. CODE §§ 37.001–.011, seeking a declaratory judgment invalidating seventeen interpretations that addressed nine substantive provisions of section 50. The Homeowners alleged they were Texas homeowners who had each taken out a home equity loan. They asserted that the substance of the challenged interpretations either contradicted the plain meaning and intent of the Constitution or amounted to rules the Commissions had no authority to enact and referenced home equity lending practices outside of Texas that led to alleged adverse experiences for borrowers. The Homeowners' petition set out in a brief and conclusory nature their relationship to the interpretations they challenged:

VI. CAUSES OF ACTION

> [The Commissions] have adopted interpretations and rules in violation of the Texas Constitution which interfere with or impair, or threaten to interfere with or impair, a legal right or privilege of Plaintiffs. Pursuant to Section 2001.038 of the Texas

> Government Code, and Chapter 37 of the Texas Civil Practice & Remedies Code, Plaintiffs seek a declaratory judgment to invalidate the following rules and interpretations: Rules 153.1(11); 153.5(3),(4),(6),(8),(9),(12); 153.12(2); 153.13(4); 153.15(2),(3); 153.18(3); 153.20; 153.22; 153.51(1),(3); and 153.84(l).

In none of their four amended pleadings filed over the next year and a half did the Homeowners explain or allege facts showing (1) how any one—much less all—of the challenged interpretations affected any of them in the past, (2) how any of the interpretations probably would affect any of them in the future, (3) that any of them were considering obtaining a home equity loan to which any of the interpretations would apply, or (4) that one or more of the challenged interpretations caused any of them to be discouraged from considering seeking a home equity loan. *See Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993) (explaining that to show subject-matter jurisdiction the pleader must "allege facts that affirmatively demonstrate the court's jurisdiction to hear the cause").

The Texas Banker's Association (TBA) intervened in support of the Commissions and the parties filed cross-motions for summary judgment. The trial court signed a final judgment on April 29, 2006—over two years after the plaintiffs filed suit. The judgment invalidated all or parts of thirteen rules interpreting seven constitutional provisions and upheld four rules interpreting two.[1] The Commissions repealed the invalidated interpretations as to three constitutional provisions, but appealed, along with the TBA, as to rules interpreting four provisions. The Homeowners appealed

[1] The trial court invalidated the following Rules: 153.1(11); 153.5(3), (4), (6), (8), (9), and (12); 153.12(2) as to orally submitted loan applications; 153.13(4); 153.18(3), 153.20; 153.22; and 153.84(1). It denied the plaintiffs' challenge to the following Rules: 153.15(2) and (3); and 153.51(1) and (3).

as to two interpretations the trial court upheld. The court of appeals addressed the merits of the appeal. It affirmed in part and reversed and rendered in part. 303 S.W.3d 404, 418.

Neither the parties nor the lower courts addressed jurisdiction. But courts must have jurisdiction in order to address the merits of a cause, and this Court requested post-submission briefing on the question. *See, e.g.*, *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 553-54 (Tex. 2000) (noting that a court must not act unless it has subject-matter jurisdiction).

One component of subject-matter jurisdiction is standing, which stems from constitutional separation of powers and open courts provisions. *See Tex. Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 646 (Tex. 2004); *Patterson v. Planned Parenthood of Hous. & Se. Tex., Inc.*, 971 S.W.2d 439, 442-43 (Tex. 1998); *Tex. Ass'n of Bus.*, 852 S.W.2d at 443. The separation of powers provision in the Texas Constitution specifies that the powers of government are divided into three parts—the legislative, the executive, and the judicial. TEX. CONST. art. II, § 1. It also specifies that persons of one branch shall not exercise any power properly attached to either of the others except as the Constitution expressly permits. *Id.* The Constitution does not afford courts jurisdiction to issue advisory opinions; those are a function of the executive department. TEX. CONST. art. IV, §§ 1, 22 (specifying that the attorney general is part of the executive department and empowering the attorney general to issue advisory opinions to the governor and other officials); *e.g.*, *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 Patterson*, 971 S.W.2d at 442 ("The constitutional roots of justiciability doctrines such as ripeness, as well as standing . . . , lie in the prohibition on advisory opinions, which in turn stems from the separation

of powers doctrine."). And the open courts provision contemplates access to courts only for persons who have suffered an injury. TEX. CONST. art. I, § 13 ("All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law."); *see Tex. Ass'n of Bus.*, 852 S.W.2d at 444. Thus, standing requires a justiciable injury that gives rise to a real controversy which judicial action can resolve. *Tex. Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 517-18 (Tex. 1995); *see Tex. Ass'n of Bus.*, 852 S.W.2d at 444 (recognizing Texas courts have no jurisdiction to render opinions that, rather than remedying an actual or imminent harm, decide abstract questions of law without binding the parties).

If the record presents a standing issue the parties have failed to raise, courts must do so *sua sponte*. *See Garcia*, 893 S.W.2d at 517 n.15; *Tex. Ass'n of Bus.*, 852 S.W.2d at 445-46. However, when the issue is addressed for the first time on appeal, plaintiffs do not have the same opportunity to replead and attempt to demonstrate jurisdiction or direct discovery to the jurisdictional issue as they have when standing is addressed in the trial court. So, when an appellate court is the first to consider jurisdictional issues, it construes the pleadings in favor of the plaintiff and, if necessary, reviews the record for evidence supporting jurisdiction. *Tex. Ass'n of Bus.*, 852 S.W.2d at 446. If the appellate court determines that standing has not been alleged or shown but the pleadings and record do not demonstrate an incurable jurisdictional defect, the case is remanded to the trial court where the plaintiff is entitled to a fair opportunity to develop the record relating to jurisdiction and to replead. *See Westbrook v. Penley*, 231 S.W.3d 389, 395 (Tex. 2007).

The APA authorizes declaratory judgment actions challenging agency rules or threatened applications of them. TEX. GOV'T CODE § 2001.038. The statute requires allegations that the "rule

or its threatened application interferes with or impairs, or threatens to interfere with or impair, a legal right or privilege of the plaintiff." *Id.* The Court concludes that the Homeowners satisfied this requirement. ___ S.W.3d ___, ___. But persons seeking relief under section 2001.038 of the APA and the DJA must still meet constitutional requirements of a justiciable injury, and the Homeowners did not. *See Lopez v. Pub. Util. Comm'n of Tex.*, 816 S.W.2d 776, 782 (Tex. App.—Austin 1991, writ denied).

The separation of powers issue as to the APA and the DJA was directly addressed in *Lopez*. *Id.* There, the court of appeals considered whether former section 12 of the Texas Administrative Procedure and Texas Register Act (APTRA)—the predecessor to section 2001.038—was subject to constitutional provisions precluding courts from making advisory decisions. *See id.* (analyzing TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 12).

The court held that neither the DJA nor the APTRA could constitutionally authorize courts to decide cases when no justiciable injury existed:

> The scope of APTRA § 12 is limited in all events by the separation-of-powers doctrine, a part of the checks-and-balances system of the State constitution. Under that doctrine, the Legislature may not confer upon the district courts a power that lies outside the "judicial power," such as a power belonging to the legislative or executive (administrative) departments. Thus, the remedy afforded by the Uniform Declaratory Judgments Act cannot require the district courts to render advisory opinions. The same constitutional doctrine also curtails the permissible scope of APTRA § 12.

Id. (citations omitted).

Of course, a plaintiff without an existing actual injury caused by a rule may demonstrate a justiciable injury sufficient for jurisdiction by showing that the rule in reasonable probability will

be applied to him in the future and its application will impair a particular, specific right. For example, in *State Board of Insurance v. Deffebach*, the court had jurisdiction because the plaintiff showed that an agency's enforcement of a rule would adversely affect him. *See* 631 S.W.2d 794, 797 (Tex. App.—Austin 1982, writ ref'd n.r.e.). Deffebach, a credit life insurance agent, filed suit under APTRA section 12 seeking a declaratory judgment invalidating a Board of Insurance order. *Id.* at 796. The trial court found the Board's order would reduce premiums paid for credit life insurance and it would reduce Deffebach's income from commissions, then declared part of the order invalid. *Id.* On appeal, the Board argued that Deffebach lacked standing to sue. *Id.* The court of appeals disagreed, noting that under section 12, "one is not required to wait until the rule is attempted to be enforced against him before he may resort to declaratory relief." *Id.* at 797. The court held that because implementation of the order would clearly affect Deffebach's future commissions as a credit life insurance agent, he had standing under section 12. *Id.*

The analyses of the courts in *Lopez* and *Deffebach* exemplify the axiom that statutes are subject to constitutional provisions. *See Cramer v. Sheppard*, 167 S.W.2d 147, 155 (Tex. 1942) ("Certainly a statute cannot override the Constitution."). When a litigant claims a hypothetical or possible impairment of rights because of a rule or its possible application—as opposed to claiming an existing or reasonably probable application that will cause particularized, specific injury—the claim calls for an advisory opinion. Thus, to have standing under section 2001.038, plaintiffs' pleadings must contain more than conclusory statements that their rights have been or probably will be impaired. The pleadings must allege, or the record must demonstrate, facts showing how a particular rule has already interfered with the plaintiffs' rights or how that rule in reasonable

probability will interfere with the plaintiffs' rights in the future. *See Tex. Ass'n of Bus.*, 852 S.W.2d at 446.

As noted above, the court of appeals addressed the issue of standing based on a potential injury in *Deffebach*. This Court also recently did so in *Andrade v. NAACP of Austin*, 345 S.W.3d 1, 18 (Tex. 2011). There the jurisdictional question was whether registered voters had standing to challenge the use of electronic voting machines that did not produce a contemporaneous paper record of each vote. *Id.* at 4. The basis for the plaintiffs' claims was that the lack of such a record made it less likely their votes would be counted. *Id.* at 10. As the Court notes, our reasoning for concluding the plaintiffs had standing was that if use of the electronic machines produced a legally cognizable injury, the registered voter plaintiffs "are among those who have sustained it." *Id.* Here, although the Homeowners challenged seventeen rules interpreting nine different constitutional provisions, they did not allege, nor does the record demonstrate, how any of the interpretations, even if invalid, has impaired, or probably will later impair, their individualized, particularized interests. In other words, they have not demonstrated even the type of situation this Court found sufficient for standing in *Andrade* where no existing injury was shown: the Homeowners have not actually or implicitly alleged or shown that if any of the Commissions' interpretations are invalid and applied then they are among those whose individual interests will be affected by that interpretation.

The Court concludes that "injury to the interest in obtaining a home equity loan resulting from the Commissions' alleged misinterpretations" is sufficient for standing. ___ S.W.3d at ___. It then concludes that a "prospective interest" in home equity loans is implicit in the Homeowners' pleadings because otherwise their allegation that the Commissions' interpretations threaten to

interfere with or impair their legal rights cannot be true. But even if the Homeowners' pleadings are liberally read to include their having a prospective interest in a loan, such a reading necessarily concedes that the pleadings do not actually or implicitly allege an existing interest in a loan that will be impaired by any of the interpretations—only a hypothetical, potential one in the future. And because the Homeowners have home equity loans now does not mean that if the alleged interpretations are invalid, the Homeowners are among those who will have sustained injury from them. Having a potential or prospective future interest in a home equity loan simply is not the same as having an existing interest. A speculative injury by the interpretations to a possible or prospective interest is not sufficient for standing, even under the Court's conclusion that injury to an "interest in obtaining a home equity loan" is sufficient.

The Court asserts that section 50(u)—the "safe harbor" provision—"creates an exceptional context in which to assess standing." ___ S.W.3d at ___. I recognize that the circumstances before us are unusual. Ordinarily, if a lender's actions do not conform to constitutional or statutory provisions and a borrower suffers detriment as a result, a controversy will exist between the borrower and lender for which the borrower can seek judicial redress. Here, the Constitution prevents that so long as the lender complies with the Commissions' interpretations of the provisions. TEX. CONST. art. XVI, § 50(u). The Court asserts that under the safe harbor provision a lender's compliance with a misinterpretation can be no injury at all to a borrower. ___ S.W.3d at ___. But because a lender cannot be liable if it complies with the interpretations does not mean that a borrower is not in worse position than had the lender complied with the constitutional provisions. The safe harbor provision protects lenders from liability for their lending actions much as statutes of limitations protect parties

from liability for stale claims. But because a defendant cannot be held liable for a claim barred by limitations, or because a lender cannot be liable for a claim covered by the safe harbor provision, that does not mean the injured party was not injured—it just means that the injuring party does not suffer legal consequences for its actions. But the Commissions are another matter; they do not claim to enjoy a safe harbor as to their interpretations.

I see no standing barrier to a homeowner seeking a declaratory judgment if the homeowner alleges or shows that a lender's actions conformed to an invalid interpretation and the homeowner is in a worse position than it would have been if the lender had complied with the applicable constitutional lending provisions. For example, if the Homeowners here had pleaded[2] facts showing that a Commission interpretation of the constitutional provision capping fees at three percent of the principal amount of a home equity loan (1) existed when they took out home equity loans or when they sought home equity loans and was incorporated into the lending process, or would in reasonable probability be incorporated into a new home equity loan they will seek, and (2) loans conforming to the interpretation resulted, or probably will result, in fees exceeding the constitutional limitations, then in my view they would have standing to sue the Commissions for a declaratory judgment that the interpretation is invalid. The same goes for a homeowner who would have applied for and obtained a home equity loan but for one of the other interpretations the plaintiffs challenged, or considered applying for one and was discouraged from doing so by one of the Commissions' interpretations. The problem is these Homeowners did not even allege that because of one or more

[2] Of course, the plaintiffs' pleadings would be subject to TEX. R. CIV. P. 13 that precludes fictitious suits to get an opinion of the court.

of the alleged misinterpretations they decided not to apply for a home equity loan or that they probably will not apply for or obtain one in the future. If they had done so, then they reasonably would have pointed out one or two particular interpretations and specific facts and reasons underlying their claims. Then the courts could address a concrete, particularized injury and controversy.

TBA candidly argues in its briefing that this Court should decide this case because "[i]t is important to the banking industry to have the questions regarding the constitutionality of the Commissions' home equity lending interpretations decided in this litigation." There is no doubt that the questions presented are important. But the parties' desire for clarity cannot override constitutional mandates precluding courts from issuing advisory opinions. *See* TEX. CONST. art. I, § 13; *id.* art. II, § 1; *see also Andrade*, 345 S.W.3d at 18 (recognizing that "[a] desire to have the government act in conformance to the law is not enough" for standing to bring suit); *Gen. Land Office v. OXY U.S.A., Inc.*, 789 S.W.2d 569, 572 (Tex. 1990) ("[T]he fact that an important question of administrative law is involved, the resolution of which would aid the agency, is not sufficient impetus for this court to render an advisory opinion.").

The Court acknowledges standing principles, then disregards them in determining these plaintiffs have sufficient "prospective interest" to confer standing despite their unquestioned failure to show a concrete, actual or imminent particularized injury, which is traceable to a particular interpretation, and that will be redressed by our decision. *See DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 304-05 (Tex. 2008) (explaining that the standing doctrine has constitutional roots and requires that a plaintiff must be "personally aggrieved; his alleged injury must be concrete and

particularized, actual or imminent, not hypothetical") (citations omitted); *Brown v. Todd*, 53 S.W.3d 297, 305 (Tex. 2001) (citing with approval federal requirements that to have standing the claimant must have an injury fairly traceable to the defendant's allegedly unlawful conduct, the injury must be concrete and particularized, and the injury is likely to be redressed by the requested relief).

I would hold that the Homeowners have not established standing to bring their claims. As a result, the trial court lacked jurisdiction to address the merits of the suit. *See Inman*, 252 S.W.3d at 304; *State Bar of Tex. v. Gomez*, 891 S.W.2d 243, 245 (Tex. 1994); *Tex. Ass'n of Bus.*, 852 S.W.2d at 443-44. Because the trial court lacked jurisdiction to decide the merits, the court of appeals likewise lacked it and so does this Court.

The Commissions suggest that if the Court were to determine the Homeowners do not have standing, the case should be abated and remanded to the trial court rather than dismissed because the Homeowners' pleadings did not affirmatively negate jurisdiction. *See Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226-27 (Tex. 2004). I agree in part. I would not abate the case, but would remand it to the trial court. The defect in the record is one of omission. The Homeowners failed to allege or demonstrate how any of the Commissions' interpretations interfered with or in reasonable probability will interfere with their rights, privileges, or interests. *See* TEX. GOV'T CODE § 2001.038; *Tex. Ass'n of Bus.*, 852 S.W.2d at 446 (stating that a pleader must allege facts that affirmatively demonstrate a court's jurisdiction). The Homeowners do not affirmatively negate jurisdiction. Their pleadings do not disclaim intent to seek or acquire additional home equity loans, nor disclaim that they have been discouraged from seeking a home equity loan because of the interpretations. And the Homeowners have not otherwise precluded themselves from alleging facts

to show that the interpretations discourage them from seeking a loan, or if they attempt to or actually do take out loans, the Commissions' interpretations in reasonable probability will cause interference with their rights or privileges. If the Court were to remand to the trial court, the Homeowners could attempt to show jurisdiction. Then the trial court would have specific facts to consider in determining if the plaintiffs indeed have demonstrated standing to challenge the interpretations, and if they have, to decide the merits of those challenges. *See Penley*, 231 S.W.3d at 395; *Cnty. of Cameron v. Brown*, 80 S.W.3d 549, 559 (Tex. 2002).

_____

Phil Johnson
Justice

OPINION DELIVERED: June 21, 2013

IN THE SUPREME COURT OF TEXAS

NO. 10-0142

ANGELA MAE BRANNAN, INDIVIDUALLY AND AS INDEPENDENT EXECUTRIX OF THE ESTATE OF BOB ALBERT BRANNAN, DECEASED, ET AL., PETITIONERS,

v.

STATE OF TEXAS, ET AL., RESPONDENTS

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

PER CURIAM

CHIEF JUSTICE JEFFERSON, JUSTICE LEHRMANN, AND JUSTICE BOYD did not participate in the decision.

Storms on Surfside Beach on the Gulf of Mexico have moved the vegetation line landward of petitioners' houses.[1] When the Village of Surfside Beach refused to allow the houses to be repaired or to have access to utilities, and the State asserted that the houses encroach on a public access easement and must be removed, petitioners sued, contending among other things that the

[1] Petitioners are Angela Mae Brannan, individually and as Independent Executrix of the Estate of Bob Albert Brannan, deceased, Brooks and Mary Porter, Russell and Judy Clinton, Russell Clinton as Independent Executor of the Estate of Elizabeth Clinton, deceased, Reg and Beaver Aplin, Partners d/b/a Benchmark Developing, Louise Bullard, Diane Loggins Clark, Joseph Cornell Dewitt, Lisa Marie Dewitt Fuka, Macario Ramirez, Chrissie Dickerson, Jeffrey Dyment, the Marvin Jacobson Family Holding Company, Cathy T. Charles, James and Patricia Meek, Mark Palmer, James C. and Patricia Pursley, Kenneth C. and Andrea Reutzel, S & S Holdings, LLC, and Rogers Thompson, Executor of the Estate of P.E. Kintz, deceased.

State's assertion amounts to a constitutionally compensable taking of their property. The court of appeals rejected petitioners' claims, 365 S.W.3d 1 (Tex. App.–Houston [1st Dist.] 2010), and petitioners sought review in this Court.

While their petition has been pending, we have issued our opinion in *Severance v. Patterson*, 370 S.W.3d 705, 725 (Tex. 2012), concluding that "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". We now conclude that this case should be remanded to the court of appeals for further consideration in light of *Severance*.

Accordingly, we grant the petition for review and without hearing oral argument, vacate the judgment of the court of appeals and remand the case to that court for further proceedings. TEX. R. APP. P. 59.1, 60.2(f).

Opinion delivered: January 25, 2013

IN THE SUPREME COURT OF TEXAS

NO. 10-0319

SEVERIANO DELEON, PETITIONER,

v.

ROYAL INDEMNITY COMPANY, RESPONDENT

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

PER CURIAM

In this case, the trial court determined that an injured worker had been assigned no valid impairment rating upon which to base impairment income benefits under the Texas Workers' Compensation Act, TEX. LAB. CODE §§ 401.001–506.002. The court of appeals affirmed. ___ S.W.3d ____. In doing so, the court noted that "no mechanism exists in the [Workers' Compensation] Act to remand matters back to [the Department of Insurance's Workers' Compensation Division]." ___ S.W.3d at___. We reverse and remand to the trial court with instructions to remand to the Division.

Severiano DeLeon suffered a back injury while in the course and scope of his employment. More than a year later, he had spinal fusion surgery. DeLeon's employer's workers' compensation insurance carrier, Royal Indemnity Co., paid medical benefits, but contested the extent of his entitlement to impairment income benefits. Section 408.123 of the Labor Code requires that an

impairment rating be based upon the Guides to the Evaluation of Permanent Impairment published by the American Medical Association. TEX. LAB. CODE § 408.123. The designated doctor appointed by the Division determined that DeLeon had an impairment rating of twenty percent. The doctor based that decision on two Advisories issued by the Division to guide the calculation of impairment ratings for workers who had undergone spinal surgery and who had not had pre-operative spinal flexion x-rays. The hearing officer accepted the designated doctor's rating and the Division's appeals panel upheld the examiner's decision.

Royal Indemnity appealed the Division's decision to the trial court. While the appeal was pending, the court of appeals for the Third District decided *Texas Department of Insurance Division of Workers' Compensation v. Lumbermens Mutual Casualty Co.*, 212 S.W.3d 870 (Tex. App.—Austin 2006, pet. denied). In that case, the court held that the Division acted ultra vires in issuing the Advisories, which provided for the calculation of impairment ratings not based on the Guides, *id.* at 876–77, and the Division later repealed them, Tex. Dep't of Ins. Commissioner's Bull. No. 3–0033–07 (July 18, 2007). Based on *Lumbermens*, the trial court reversed the agency's decision and ruled that DeLeon had no valid impairment rating. The court of appeals affirmed. ___ S.W.3d at ___.

While DeLeon's appeal to this Court was pending, we handed down our decision in *American Zurich Insurance Co. v. Samudio*, ___ S.W.3d ____ (Tex. 2012). In *Samudio*, we held that the absence of a valid impairment rating that had been submitted to the agency did not deprive a reviewing court of subject matter jurisdiction. ___ S.W.3d at ___. We also held that the Workers' Compensation Act permits a court to remand to the Division if it decides that the worker has no valid

impairment rating. ___S.W.3d at ___. In light of our decision in *Samudio*, and pursuant to Texas Rule of Appellate Procedure 59.1, without hearing oral argument, we reverse the court of appeals' judgment and remand to the trial court with instructions that the court remand the case to the Division in light of its determination that DeLeon has no valid impairment rating.

OPINION DELIVERED: November 16, 2012

IN THE SUPREME COURT OF TEXAS

NO. 10-0451

NATURAL GAS PIPELINE COMPANY OF AMERICA, PETITIONER,

v.

WILLIAM JUSTISS, DARLENE JUSTISS, JOSEPH JUSTISS, TOMMY ALSPAUGH, JUDY ALSPAUGH, JOE DENTON MASHBURN, CHRISTINE MASHBURN, JOE DONALD MASHBURN, AND JUDY MASHBURN, RESPONDENTS

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

Argued October 5, 2011

CHIEF JUSTICE JEFFERSON delivered the opinion of the Court.

Several homeowners alleged that noise and odor emanating from a gas company's compressor station caused a permanent nuisance. The company countered that because the homeowners' complaints predated their lawsuit by six years, limitations barred their action. A jury found that a permanent nuisance, which began just before the lawsuit was filed, diminished property values. The court of appeals affirmed the trial court's judgment for the homeowners. We agree with the court of appeals that some evidence supports the jury's finding on the accrual date.

We reach a different conclusion on damages, however. The homeowners testified that the nuisance decreased their property values, but none explained the factual basis for that conclusion.

While a nuisance undoubtedly can diminish values, the conclusory and speculative testimony here does not support such a finding. Accordingly, we reverse the court of appeals' judgment and remand the case to the trial court for a new trial.

I. Background

In 1992, the Natural Gas Pipeline Company of America built a compressor station in Lamar County. Soon thereafter, area residents complained to the Company and to state regulators that the station's noise, odor, and lights interfered with the enjoyment of their homes. Between 1992 and 1998, William Justiss repeatedly called the Company and voiced his displeasure. In 1994, 1995, and 1996, he notified the Texas Natural Resources Conservation Commission (now known as the Texas Commission on Environmental Quality) about the noise and odor. Two years after the plant opened, Justiss's lawyer wrote to the Company, claiming that the station was causing the Justisses "total frustration and torment." The Company responded, through its lawyer, and stated that "the actual impact of the station on the Justiss' [sic] property [was] significantly less than described in [the] letter." A lawyer representing other residents also notified the Company that "the noise, vibration, lights, and related stimuli" were affecting the residents' "peaceful use of their homes and property."

The Company took minor remedial measures but consistently asserted that the plant complied with government permits. In June 1998, however, the TCEQ cited the station for a Category 5 odor violation—the most severe possible, indicating overpowering, highly objectionable, and nausea-inducing odors. The Company responded by changing the oil for the station's engines and raising the exhaust stacks.

Two months after the citation, twelve residents[1] sued the Company, alleging that the station's noise and odor constituted either a temporary or permanent nuisance. The Company moved for summary judgment, arguing that the permanent nuisance claim was time-barred because it accrued more than two years before the lawsuit. The trial court denied the motion, and the case proceeded to trial. The jury found that (1) the noise and odor from the station created a permanent nuisance, and (2) those conditions "first created a nuisance" on June 12, 1998, the date of the TCEQ citation. The jury determined that the nuisance affected only nine of the twelve plaintiffs and awarded $1,242,500 for their lost property value.[2] The trial court rendered judgment on the verdict.

The Company appealed, arguing that (1) limitations barred the permanent nuisance claim; (2) insufficient evidence supported the jury's permanent nuisance and damage findings; and (3) the trial court improperly awarded prejudgment interest because the plaintiffs failed to segregate past and future damages. ___ S.W.3d ___, ___. The court of appeals affirmed, *id.*, and we granted the Company's petition for review.[3] 54 Tex. Sup. Ct. J. 1156 (June 17, 2011).

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[1] The twelve residents were William Justiss, Darlene Justiss, Joseph Justiss, Richard Rast, Tommy Alspaugh, Judy Alspaugh, Barry Cope, Tina Cope, Joe Denton Mashburn, Christine Mashburn, Joe Donald Mashburn, and Judy Mashburn.

[2] The awards for the nine plaintiffs were as follows:

[William] and Darlene Justiss:	$540,000
Joseph Justiss:	$175,000
Tommy and Judy Alspaugh:	$270,000
Joe Donald and Judy Mashburn:	$200,000
Joe Denton and Christine Mashburn:	$57,500

[3] Crosstex Energy Services, L.P., LaSalle Pipeline, LP, and the Texas Pipeline Association submitted briefs as amici curiae in support of the petition for review.

The Company's arguments here generally mirror those it made in the court of appeals. We turn first to the limitations argument.

II. Limitations

A permanent nuisance claim accrues when the condition first "substantially interferes with the use and enjoyment of land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities." *Schneider Nat'l Carriers, Inc. v. Bates*, 147 S.W.3d 264, 269–70 (Tex. 2004). To establish a limitations defense, the defendant must prove that a permanent nuisance occurred, if at all, more than two years before the landowner's lawsuit. *City of Abilene v. Downs*, 367 S.W.2d 153, 159–60 (Tex. 1963). Because the jury found that the Company first created a nuisance in 1998, the Company can prevail only if it has established, conclusively, that the claim accrued more than two years before then. *See Barnes v. Mathis*, 353 S.W.3d 760, 762 (Tex. 2011) (per curiam) ("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.").

The Company argues that the residents' pre-1996 complaints conclusively prove that the landowners' claims accrued more than two years before suit was filed. According to the Company, the court of appeals erred in relying on three categories of evidence to conclude otherwise: (1) the Company's unequivocal denial of a nuisance, (2) the Category 5 citation, and (3) testimony that odors got worse in 1997 and 1998. The Company argues that this evidence cannot refute the plaintiffs' early characterization of "total frustration and torment."

We disagree. First, the Company's plant manager, Kevin Brown, disputed that characterization. Brown testified that he "never" noticed an odor that could give rise to a nuisance claim. That testimony supports the jury's determination that no nuisance existed before 1998—"never" encompasses pre-1998. In fact, the Company's lawyer had written to some of the landowners and stated that the noise and odor were not nearly as bad as the landowners claimed. The Company argues that we must disregard this evidence because considering it would deter a defendant from presenting alternative arguments. Defense strategy is not our concern. We are asked only to consider whether the evidence supports or rebuts the jury's verdict. A jury may consider evidence whether presented as part of the main defense or part of an alternative argument. Thus, the jury was free to accept the plant manager's and the lawyer's characterizations of conditions as they existed before 1998.

Even if the plaintiffs' pre-1998 complaints were undisputed, that would not conclusively decide this case. Evidence that no one disputes does not necessarily establish a fact as a matter of law. *See City of Keller v. Wilson*, 168 S.W.3d 802, 816 (Tex. 2005) ("Undisputed evidence and conclusive evidence are not the same—undisputed evidence may or may not be conclusive, and conclusive evidence may or may not be undisputed."). Undisputed evidence can be susceptible to competing interpretations. *See id.* at 815 ("Undisputed evidence that reasonable jurors could disbelieve has two [logical inferences]: (1) it is true, or (2) it is not."). Conclusive evidence cannot.

Conclusive evidence often "concerns physical facts that cannot be denied." *Id.* We have held that a paternity test "conclusively proved" nonpaternity, *Murdock v. Murdock*, 811 S.W.2d 557, 560 (Tex. 1991), that documents that detailed a leaseholder's wrongful acts and were sent and received

by royalty owners "conclusively establish[ed]" that the royalty owners had knowledge of such wrongdoing, *Exxon Corp. v. Emerald Oil & Gas Co.*, 348 S.W.3d 194, 203–09 (Tex. 2011), and that "readily accessible, publicly available documents" conclusively established that a leaseholder's alleged fraud could have been discovered through the exercise of reasonable diligence. *Shell Oil Co. v. Ross*, 356 S.W.3d 924, 929–30 (Tex. 2011). In each of these situations, the evidence pointed to only one conclusion. Here, nothing about the plaintiffs' original complaints would require a finding of a pre-1996 nuisance.

The Company cites William Justiss's many phone calls objecting to the noise and odor, but the phone records show only that calls were made, not the substance of the actual complaints. Next, the Company notes that Justiss, in addition to complaining about noise, told plant workers that he and his wife could hardly breathe because of the fumes, and that the smell was making them sick. This incident, however, was memorialized only in an internal Company memorandum, which Justiss disputed, testifying that "[t]hat was their word . . . and they stretched it." Finally, the Company relies heavily on letters the residents sent: one indicating "total frustration and torment" and the other claiming that the noise disrupted the peaceful use and enjoyment of their property. But the jury could have viewed the correspondence and Justiss's numerous complaints as hyperbole, intended to force the Company to act. Or the jury could have determined the plaintiffs were overly sensitive—that a reasonable person would not have judged the odors intolerable at the time. *See City of Keller*, 168 S.W.3d at 814–15.

The jury heard more than the early complaints. Plant operations began in 1992. The plaintiffs testified that the plant's noise and odor escalated in 1997 and 1998. This account was

corroborated by Tommy Rutledge, a postal worker whose route took him through Justiss's neighborhood. Rutledge testified that the plant's odor became unbearable in the late 1990s. For that reason, Rutledge asked his supervisors if he could discontinue his route to that location. TCEQ issued the citation in 1998. The jury found that substantial interference did not occur until June 12, 1998, a date that corresponds with the postal worker's testimony, the TCEQ citation, and the plaintiffs' accounts. Some evidence supports this finding.

The Company argues that there would be no statute of limitations for permanent nuisance if a claim could be "revived" by evidence that conditions worsened. But we are dealing here with gradations. On one end of the scale, a nuisance can be established by a physical fact that is beyond dispute. If the nuisance consists of hazardous chemicals in the ground, the nuisance begins when the landowner knows or should have known that the chemicals were there. *See Tenn. Gas Transmission Co. v. Fromme*, 269 S.W.2d 336, 338 (Tex. 1954) (holding that limitations began to run when the defendant began wrongfully discharging water containing harmful chemicals on the plaintiff's land, and "not on the date when the extent of the damages to the land were fully ascertainable"). The result does not necessarily vary with the amount of chemicals. If the nuisance involves largely subjective criteria like smell and sound, however, the analysis is necessarily more fact dependent. *See City of Abilene*, 367 S.W.2d at 160 (distinguishing a nuisance claim based on noxious fumes and odors from the water-based claim in *Fromme* and holding that the nuisance claim did not accrue when a sewage disposal system became operational but instead accrued when "operations of [the] sewage disposal system were such as to constitute a nuisance"). The point at which an odor moves from unpleasant to insufferable or when noise grows from annoying to

intolerable "might be difficult to ascertain, but the practical judgment of an intelligent jury [is] equal to the task." *Merrill v. Taylor*, 10 S.W. 532, 534 (Tex. 1888).

Both parties presented evidence to show when the nuisance began. The jury could have determined that the nuisance began in 1994, 1998, or never at all. The jury weighed the evidence and found that the claim accrued in 1998, and we agree with the court of appeals that legally sufficient evidence supports that finding.

III. Damages

The jury awarded the landowners damages for the decrease in property value the nuisance caused. The Company challenges the evidence supporting those awards.

A. The Property Owner Rule

If a nuisance is permanent, a landowner may recover the property's lost market value. *See Schneider Nat'l Carriers, Inc.*, 147 S.W.3d at 276; *Pickens v. Harrison*, 252 S.W.2d 575, 582 (Tex. 1952) (holding that "[i]f respondents' suit is one for permanent damages to the land, the measure of damages is the decreased value of the land"). This normally requires a comparison of market value with and without the nuisance. *Kraft v. Langford*, 565 S.W.2d 223, 227 (Tex. 1978), *disapproved on other grounds, Schneider Nat'l Carriers, Inc.*, 147 S.W.3d at 281; *Sherman Gas & Elec. Co. v. Belden*, 123 S.W. 119 (Tex. 1909).

A property owner may testify to the value of his property. We explained in *Porras v. Craig*, 675 S.W.2d 503, 504 (Tex. 1984), that "[o]pinion testimony concerning [damages to land] is subject to the same requirements as any other opinion evidence, with one exception: the owner of the property can testify to its market value, even if he could not qualify to testify about the value of like

property belonging to someone else." We noted, however, that a property owner's testimony must be based on market, rather than intrinsic or some other speculative value of the property. *Id*. at 505. We stated that "[t]his requirement is usually met by asking the witness if he is familiar with the market value of his property." *Id*.

In *Porras*, Craig testified that Porras bulldozed Craig's land, decreasing the property's value by $20,000. Craig explained that the property was worth less to him because he had bought the land intending to build a retirement home on it, but he and his wife had become too fearful to do so. He stated that Porras intended to put exotic animals on his adjoining land, patrol the property with armed guards, and place signs warning that trespassers would be shot. Craig described a fire that started on Porras's property and rapidly spread to his own, and he explained that his disabled wife would have been unable to escape the fire had he not been there. *Id*. at 505.

We held that even though Craig was qualified to testify to his property's decreased market value, his testimony provided no evidence of that value. *Id*. Instead, Craig's testimony referred to personal, rather than market, value. Porras's failure to object to the testimony was immaterial, because "[i]rrelevant evidence, even when admitted without objection, will not support a judgment." *Id*.

So while the Property Owner Rule establishes that an owner is *qualified* to testify to property value, we insist that the testimony meet the "same requirements as any other opinion evidence." *Id.* at 504. Since *Porras*, we have further explained when expert testimony will support a judgment. *See Coastal Transp. Co. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227, 231–32 (Tex. 2004). We held that a qualified expert's bare conclusions—even if unchallenged at trial—would not support

a gross negligence finding. *Id*. at 233. We observed that "although expert opinion testimony often provides valuable evidence in a case, 'it is the *basis of the witness's opinion*, and not the witness's qualifications or his bare opinions alone, that can settle an issue as a matter of law; a claim will not stand or fall on the mere *ipse dixit* of a credentialed witness.'" *Id*. at 232 (emphasis added) (quoting *Burrow v. Arce*, 997 S.W.2d 229, 235 (Tex. 1999)).[4] If an expert "br[ings] to court little more than his credentials and a subjective opinion," his testimony will not support a judgment. *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 712 (Tex. 1997) (substitution in original). We later observed that an expert's testimony is conclusory as a matter of law if he "simply state[s] a conclusion without any explanation." *Arkoma Basin Exploration Co. v. FMF Assocs. 1990-A, Ltd.*, 249 S.W.3d 380, 389 (Tex. 2008). And testimony is speculative if it is based on guesswork or conjecture.[5]

Although *Coastal* involved expert testimony, its holding is not necessarily limited to experts. *See Coastal*, 136 S.W.3d at 233 (holding that "bare conclusions—even if unobjected to—cannot constitute probative evidence"). We held that "[o]pinion testimony that is conclusory or speculative is not relevant evidence, because it does not tend to make the existence of a material fact 'more probable or less probable.'" *Id*. at 232 (quoting TEX. R. EVID. 401). *Coastal* relied in part on *Dallas Railway & Terminal Co. v. Gossett*, 294 S.W.2d 377, 380 (Tex. 1956), which held that "the naked

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[4] *See also City of San Antonio v. Pollock*, 284 S.W.3d 809, 816 (Tex. 2009) ("Bare, baseless opinions will not support a judgment even if there is no objection to their admission in evidence.").

[5] *See, e.g.*, BLACK'S LAW DICTIONARY 1529 (9th ed. 2009) (defining "speculation" as "[t]he act or practice of theorizing about matters over which there is no certain knowledge"); *Marathon Corp. v. Pitzner*, 106 S.W.3d 724, 727 (Tex. 2003) (per curiam) (noting that causation finding cannot be supported by "mere conjecture, guess, or speculation").

and unsupported opinion or conclusion of a witness does not constitute evidence of probative force and will not support a jury finding even when admitted without objection." Gossett involved testimony by two drivers and an accident investigator that a street had been designated one-way. We determined that the witnesses' opinions provided no evidence that the street had been so designated, because they were "simply . . . conclusions," lacking probative effect. *Dall. Ry. & Terminal Co.*, 294 S.W.2d at 381.

We have also recognized that a business owner's conclusory or speculative testimony of lost profits will not support a judgment. *See, e.g., Holt Atherton Indus., Inc. v. Heine*, 835 S.W.2d 80, 84 (Tex. 1992) (holding that owner's testimony that he lost $200,200 in income was legally insufficient because it "d[id] not provide any indication of how [the owner] determined what [his] lost profits were"). Thus, we require "reasonably certain evidence of lost profits," which "must be based on objective facts, figures, or data." *Id*.

The Property Owner Rule falls under Texas Rule of Evidence 701, which allows a lay witness to provide opinion testimony if it is (a) rationally based on the witness's perception and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue. TEX. R. EVID. 701; *see also Reid Rd. Mun. Util. Dist. No. 2 v. Speedy Stop Food Stores, Ltd.*, 337 S.W.3d 846, 852 (Tex. 2011). Based on the presumption that an owner is familiar with his property and its value, the Property Owner Rule is an exception to the requirement that a witness must otherwise establish his qualifications to express an opinion on land values.[6] Under the Rule, an

[6] *See Reid Rd. Mun. Util. Dist. No. 2 v. Speedy Stop Food Stores, Ltd.*, 337 S.W.3d 846, 851–52 (Tex. 2011) (holding that "a witness who will be giving opinion evidence about a property's fair market value must be disclosed and designated as an expert pursuant to discovery and other applicable rules"); *see generally* JULIUS L. SACKMAN ET AL., 5

owner's valuation testimony fulfills the same role that expert testimony does.[7] *See, e.g., Harris Cnty. Appraisal Dist. v. Riverway Holdings, L.P.*, No. 14-09-00786-CV, 2011 Tex. App. LEXIS 1047, at *13 (Tex. App.—Houston [14th Dist.] Feb. 15, 2011, pet. denied) (observing that the Property Owner Rule "treats valuation testimony from a property owner as the functional equivalent of expert valuation testimony insofar as the owner's own property is concerned"); *cf.* FED. R. EVID. 702 advisory committee's note (holding that expert testimony rule includes "'skilled' witnesses, such as . . . landowners testifying to land values").[8] Like expert testimony, landowner valuation testimony may be based on hearsay. *Burr's Ferry, B. & C. Ry. Co. v. Allen*, 164 S.W. 878, 880 (Tex. Civ. App.—Galveston 1914, writ ref'd).

Many federal courts recognize that, notwithstanding the Property Owner Rule, an owner's conclusory or speculative testimony will not support a judgment. The United States Court of Appeals for the Fifth Circuit has held that although "[i]n general, 'an owner is competent to give his opinion on the value of his property' . . . such testimony cannot be based on naked conjecture or solely speculative factors." *King v. Ames*, 179 F.3d 370, 376 (5th Cir. 1999) (quoting *Kestenbaum*

NICHOLS ON EMINENT DOMAIN § 23.04 (3d ed. 2012) (discussing nonexpert witnesses qualified to testify to land values); 3 JAMES H. CHADBOURN, WIGMORE ON EVIDENCE § 714 (rev. ed. 1970) (same).

[7] We recently likened an attorney's testimony on the reasonableness of his fees to an owner's testimony about the value of his property, because both are based on personal knowledge rather than merely on expertise. *Garcia v. Gomez*, 319 S.W.3d 638, 641 (Tex. 2010). We held that even conclusory attorney's fee testimony was not objectionable, however, because "the opposing party, or that party's attorney, likewise has some knowledge of the time and effort involved and if the matter is truly in dispute, may effectively question the attorney regarding the reasonableness of his fee." *Id*. But that is not the case with testimony offered under the Property Owner Rule, where the adverse party is less likely to share a corresponding knowledge of the property's market value.

[8] *See also* 2 STEVEN GOODE ET AL., TEXAS PRACTICE SERIES, GUIDE TO THE TEXAS RULES OF EVIDENCE § 701.3, at 11–12 (3d ed. 2002) (noting that "[c]lassifying an opinion as either lay or expert has proved particularly troublesome when the opinion is rooted in 'other specialized knowledge,'" and observing that cases allowing owners to testify to the fair market value of their property "do not fit th[e lay witness opinion] mold as neatly").

v. Falstaff Brewing Corp., 514 F.2d 690, 698–99 (5th Cir. 1975)). If an owner's estimate is speculative, "the owner's testimony may be of such minimal probative force to warrant a judge's refusal even to submit the issue to the jury." *Kestenbaum*, 514 F.2d at 699.[9] The Tenth Circuit has stated "the owner's qualification to testify does not change the 'market value' concept and permit him to substitute a 'value to me' standard for the accepted rule, or to establish a value based entirely upon speculation." *United States v. Sowards*, 370 F.2d 87, 92 (10th Cir. 1966). Thus, "a landowner's testimony as to the value of his property is not always sufficient testimony on which a verdict can be based." *United States v. 10,031.98 Acres of Land*, 850 F.2d 634, 637 (10th Cir. 1988). Instead, "[t]here must be a basis for the landowner's valuation, and when the landowner's own testimony shows that his valuation has no probative value, the district court may determine that the landowner's testimony alone is insufficient to support a jury verdict." *Id.*[10]

Several of our courts of appeals follow the same rule. A landowner who testified that a flood reduced his property's value by $30,000, but conceded that he "pull[ed that figure] out of the air" provided no evidence of damages. *Royce Homes, L.P. v. Humphrey*, 244 S.W.3d 570, 579–80 (Tex. App.—Beaumont 2008, pet. denied). A homeowner's testimony that she lost $60,000 when forced to sell her home to pay creditors, was legally insufficient because she failed to explain how she arrived at that conclusion. *Lefton v. Griffith*, 136 S.W.3d 271, 277 (Tex. App.—San Antonio 2004,

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[9] *Cf. Dietz v. Consol. Oil & Gas, Inc.*, 643 F.2d 1088, 1094 (5th Cir. 1981) (holding that district court properly admitted property owner's opinion testimony that was "based on more than naked conjecture").

[10] *See also Rich v. Eastman Kodak Co.*, 583 F.2d 435, 437 (8th Cir. 1978) (noting that "an owner may testify as to the value of his own property; however, there must be a basis for that valuation," and owner who failed to present factual basis for valuation failed to raise a fact issue on damages).

no pet.) (noting that court had "no way of knowing" the basis of the homeowner's estimate). A trailer-park owner's testimony that he would lose $10,800 in lost leases because of a condemnation was merely a "naked and unsupported . . . conclusion" and provided no evidence of diminished value. *City of Emory v. Lusk*, 278 S.W.3d 77, 88–89 (Tex. App.—Tyler 2009, no pet.) (holding that testimony was both speculative and conclusory). And an owner whose affidavit stated that his property had been damaged "between $1.8 and $2.2 million dollars based upon the reduction in value of the overall site" failed to provide evidence of damages because he did not state the basis for his opinion. *Trinity River Estates, L.P. v. DiFonzo*, No. 2-08-393-CV, 2009 Tex. App. LEXIS 4037, at *14–15 (Tex. App.—Fort Worth May 28, 2009, no pet.) (affirming no-evidence summary judgment); *cf. Stinson v. Cravens, Dargan & Co.*, 579 S.W.2d 298, 299 (Tex. Civ. App.—Dallas 1979, no writ) (holding boat owner's testimony of value was legally insufficient, because he failed to explain the basis for his opinion or the source of his repair estimate: "Where the owner affirmatively demonstrates . . . that his opinion is cast in terms of approximation and estimate unsupported by any relevant facts leading to or supporting such approximation or estimate the opinion testimony is too conjectural.").

The Company and the amici urge us to apply *Coastal*'s rule to the landowners' testimony here, and we agree that *Coastal* provides the appropriate standard for judging the adequacy of testimony offered under the Property Owner Rule. Because property owner testimony is the functional equivalent of expert testimony, it must be judged by the same standards. Thus, as with expert testimony, property valuations may not be based solely on a property owner's *ipse dixit*. An owner may not simply echo the phrase "market value" and state a number to substantiate his

diminished value claim; he must provide the factual basis on which his opinion rests. This burden is not onerous, particularly in light of the resources available today. Evidence of price paid, nearby sales, tax valuations, appraisals, online resources, and any other relevant factors may be offered to support the claim. But the valuation must be substantiated; a naked assertion of "market value" is not enough. Of course, the owner's testimony may be challenged on cross-examination or refuted with independent evidence. But even if unchallenged, the testimony must support a verdict, and conclusory or speculative statements do not. *See Kestenbaum*, 514 F.2d at 699; *Coastal*, 136 S.W.3d at 233.

B. The Evidence

With this in mind, we turn to the landowners' testimony. The most detailed account came from Joe Donald Mashburn, a lifelong resident of Howland and a loan officer for Texas Heritage National Bank. Joe Donald and Judy Mashburn's property includes three houses on 104 acres. Joe Donald testified that his property's value had decreased due to the noise and odor:

> Q. Do you have an opinion as to how much it's decreased in value?
>
> A. Well, if I remember correctly in my deposition that I gave, I—I thought my property was worth $650,000. It's my home and two daughters' homes on 102 acres—104 acres, and I thought the market value of that property based upon sales of property around in the area, and I kind of keep up with that kind of stuff because of my job. And I said, well, I think it's diminished down to 250, maybe 250. So if you take the difference in 650 and 250, that's $400,000.

The Company did not cross-examine Joe Donald on this point, relying instead on its real estate appraiser, who testified that the property would be worth $235,000 if the compressor station was not there. This estimate, however, did not include two of the houses on the Mashburns' property, and the appraiser offered no opinion on diminution in value caused by the nuisance conditions. The jury awarded the Mashburns $200,000, half of what they estimated their damages to be.

At the other end of the spectrum was the evidence from William and Darlene Justiss. The Justisses own 1450 acres, 800 of which are affected by the noise and odor. Although William testified that the noise and odor decreased their property's value, he never referred to market value or explained the basis for his valuation:

Q. And the noise and odors that you've noticed from the pump station from the time this lawsuit was filed or shortly before that, do you have an opinion whether or not it's decreased the value of your place there?

A. Well, I'm sure it has.

Q. What's your opinion as to the amount that it's decreased your acreage there?

A. I don't know. It's a hard thing for me to say because I never ever thought in my mind that it was worth what the price of land is bringing now. And the only thing that sold out that way lately are the sites—

Q. Well, let's just stick to—let's just stick to—

A. I don't know. I don't know. I'm going to say probably across the whole acreage $1250.

Q. Is that a decrease in value—

A. Decrease.

Q. —on the 800 acres? Is that a yes?

A. Yes.

On cross-examination, William admitted that he had not appraised the property in the two years before trial. Darlene deferred to William's opinion, testifying that he knew better about it than she did. The Company's appraiser offered no opinion on the Justiss's property. The jury awarded the Justisses $540,000.

The remaining landowners provided a figure when asked the market value of their property, but none gave any supporting factual basis. Joseph Justiss testified that his property had been in his family for 150 years and that it had "[p]robably more value [to him] than it would be worth to anybody." He then estimated that value: $2500–$2800 per acre without the station, and $1000–$1100 with it. On redirect, he stated, without elaboration, that those figures represented the fair market value of his property.

Tommy Alspaugh testified that the pump station's "actions" lowered the value of his property by 50%, or $1000 per acre. He did not state that he was referring to market value, offering only that their land would be considered "high dollar land" for Lamar County. His wife, Judy, however, testified that she agreed with Tommy's opinion on the diminution in value caused by increased noise and odor, and she answered "yes" when asked whether that valuation represented the market value of their property.

Joe Denton and Christine Mashburn own a house that sits on three acres and a separate forty-acre tract of land. Christine testified that without the compressor station their house and three acres

would be worth around $100,000. With the station, however, she did not think they could sell it for more than $20,000. As for the forty-acre tract, Christine testified that in the past she thought they could get $1000 an acre for the land but that because of the noise and odor she did not think they could get more than half of that now. She also testified that she and Joe Denton had sold some property about a mile north of the station for $600 an acre but could not remember exactly when the sale took place. Christine did not specify that she was referring to the market value of their property. Joe Denton largely agreed with Christine, and provided the following testimony:

> Q. So you think it would be—the fair market value without the compressor station would be about [$]100,000?
>
> A. I think so.
>
> Q. And that's due—and then because of the compressor station being there with the noise and the odors, do you agree with the figures she gave of [$]25,000[11] being the best that y'all might could get?
>
> A. I imagine that would be close to it.

This was the Mashburn's only reference to market value.

We conclude that none of this testimony provides evidence of diminished market value. Even taking into account "East Texas vernacular," as the court of appeals did,[12] William Justiss's testimony is speculative. He never stated his familiarity with market values, and his passing

[11] Christine Mashburn testified that the property was worth $20,000, not $25,000.

[12] ___ S.W.3d at ___.

reference to "what the price of land is bringing" is not enough. His testimony provides only his guess as to his property's diminution in value, and such speculation will not support a judgment.

Similarly, although a landowner need not use the phrase "market value" in describing his valuation, merely invoking that phrase does not make otherwise conclusory or speculative testimony legally sufficient. *Cf. Jelinek v. Casas*, 328 S.W.3d 526, 540 (Tex. 2010) ("While we have said that no 'magical words' need be used to meet the good-faith requirement, mere invocation of the phrase 'medical probability' is likewise no guarantee that the report will be found adequate."). Joseph Justiss, Tommy Alspaugh, and Joe Denton and Christine Mashburn merely answered "yes" when asked whether their numbers were based on market value, but they never explained how they arrived at those figures. Joseph Justiss testified only to what made the property valuable *to him*. *See Porras*, 675 S.W.2d at 505 (holding that there was no evidence of market value where owner's testimony affirmatively showed that it was based on personal value). Although Joe Denton and Christine Mashburn discussed a 2001 sale of nearby property, that reflects only their property's value after the nuisance, not how much the value had changed—a necessary element of permanent nuisance damages. We conclude that the landowners' bare conclusions provide no evidence of the damage caused by the nuisance. *See City of San Antonio v. Pollock*, 284 S.W.3d 809, 816 (Tex. 2009) (holding that "[b]are, baseless opinions will not support a judgment").

Joe Donald Mashburn provided the most detail, but even his testimony was insufficient. Although he demonstrated his familiarity with area market values, he failed to explain the factual basis behind his determination that his property suffered a $400,000 decrease in value. His statement that it was "based on property sales around in the area" provides little more detail than using the

words "market value." *Cf. Arkoma*, 249 S.W.3d at 389 (holding that expert's "cursory" testimony did not make his opinion conclusory, because accompanying exhibit explained the basis for his conclusion). In both cases, the owners stated a conclusion without explanation; the testimony is conclusory and no evidence.

Finally, the Company argues that the landowners' claims fail because several of the property owners complained about damages arising from the station's presence, rather than merely from the station's noise and odor. We disagree. The jury was correctly instructed to limit its nuisance finding to conditions arising from the station's operation, not merely its presence. Although the landowners' complaints sometimes referred to the station itself, there was also evidence that they objected to the noise and odor, and even though we have found no evidence of the amount of damages, a jury could have found that the landowners were harmed by the conditions emanating from the station.

C. Disposition

We must decide whether rendition or remand is appropriate. Generally, when no evidence supports a judgment, we render judgment against the party with the burden of proof. *See, e.g., Volkswagen of Am., Inc. v. Ramirez*, 159 S.W.3d 897, 912 (Tex. 2004). But we have remanded a case to the trial court when we have changed our precedent or when the applicable law has otherwise evolved between the time of trial and the disposition of the appeal. *See, e.g., Tex. Dep't of Pub. Safety v. Cox Tex. Newspapers, L.P.*, 343 S.W.3d 112, 118 (Tex. 2011) (remanding because decision recognized, for the first time, a common law physical safety exception to the PIA); *Twyman v. Twyman*, 855 S.W.2d 619, 626 (Tex. 1993) (remanding in interest of justice because case was tried on legal theory overruled by Court); *Caller-Times Publ'g Co., Inc. v. Triad Commc'ns, Inc.*, 826

S.W.2d 576, 588 (Tex. 1992) (remand in interest of justice because Court announced new liability standard). In *Porras*, we stated that market value could be shown merely "by asking the witness if he is familiar with the market value of his property,"[13] and we have never before explained the interplay between *Porras* and *Coastal*. Because the landowners may have relied on *Porras* in presenting their evidence on their properties' diminution in value, we conclude that a remand is appropriate.[14] *See Scott v. Liebman*, 404 S.W.2d 288, 294 (Tex. 1966) (noting that remand is appropriate where defendant requested jury issues based on precedent that was no longer controlling), *abrogated on other grounds by Parker v. Highland Park, Inc.*, 565 S.W.2d 512, 517 (Tex. 1978).

IV. Conclusion

We reverse the court of appeals' judgment. Because liability is contested, we remand the case to the trial court for a new trial on liability and damages. TEX. R. APP. P. 60.2 (d), 61.2.

_____

Wallace B. Jefferson
Chief Justice

OPINION DELIVERED: December 14, 2012

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[13] *Porras*, 675 S.W.2d at 505; *see also Redman Homes, Inc. v. Ivy*, 920 S.W.2d 664, 669 (Tex. 1996) (applying *Porras* to conclude that owner's estimates provided some evidence of market value of personal property).

[14] In light of our disposition, we do not reach the Company's argument that the trial court's judgment improperly included prejudgment interest.

IN THE SUPREME COURT OF TEXAS

NO. 10-0511

DIEGO RODRIGUEZ-ESCOBAR, M.D., PETITIONER,

v.

MICHAEL ALLEN GOSS, STEVEN GOSS, AND TIMOTHY LEE GOSS, INDIVIDUALLY AND AS REPRESENTATIVES OF THE ESTATE OF BEVERLY GOSS, RESPONDENTS

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

PER CURIAM

In this health care liability case, Dr. Diego Rodriguez-Escobar examined Beverly Goss to determine whether she met the criteria for involuntary hospitalization for psychiatric care. He decided she did not and released her. Three days later she committed suicide, which precipitated this suit based on allegations that Dr. Rodriguez-Escobar's failure to involuntarily hospitalize her was negligence. A jury found against Dr. Rodriguez-Escobar and awarded damages. The trial court rendered judgment on the verdict and the court of appeals affirmed. We reverse and render.

Goss had a history of suicidal behavior. She was depressed because her husband, Danny Goss, left her. On March 17, 2003 she discharged a shotgun inside her bedroom, which resulted in the police coming to her house. She told the officer that she wanted to take her life, so he took her to Texas State Tropical Center (Tropical) for a psychiatric evaluation. *See* TEX. HEALTH & SAFETY

CODE §§ 573.001–.002 (providing that a peace officer may initiate emergency detention proceedings without first obtaining a warrant). Goss received an initial screening at Tropical and was transferred to McAllen Medical Behavioral Health Center (MMBHC), a private hospital. She was admitted to MMBHC on a voluntary basis. *See id.* §§ 572.001–.005 (providing procedures for patients who are voluntarily admitted for inpatient mental health services).

Goss was treated at MMBHC for depression by Dr. Cesar Matos. During her stay she requested to be discharged, but withdrew her request after speaking with Dr. Matos. Her son, Michael, believed that she continued to be at risk of committing suicide and that she would try to leave MMBHC. Because of that belief, he obtained a Mental Health Warrant for Emergency Detention (Detention Warrant) to have her involuntarily admitted to a state mental health facility. *See id.* §§ 572.004 (requiring that a patient, voluntarily admitted, must be discharged within four hours of a written request unless a physician has reasonable cause to believe the patient requires emergency detention); *see also id.* § 573.011–.012 (providing that an adult may obtain a Detention Warrant by filing a proper application). Dr. Matos testified that he discharged Goss to Tropical with the intention that she be transferred to Rio Grande State Center (Rio Grande) for continued treatment, but that he had "no say who gets admitted or not there."

Goss was transferred to Tropical, where she was further referred to Rio Grande. At Rio Grande Dr. Rodriguez-Escobar conducted a preliminary examination which included reviewing the Tropical triage form, Michael's "Application for Emergency Apprehension and Detention," the Detention Warrant, and the medical records from MMBHC. He also interviewed Goss for approximately forty-five minutes. He testified at trial that she participated fully in the interview, was

calm, and was not agitated. After completing the preliminary examination, Dr. Rodriguez-Escobar concluded that Goss did not meet the criteria for involuntary hospitalization. She was released at approximately 10:00 a.m. on March 26, 2003 and Dr. Rodriguez-Escobar recommended out-patient treatment for her depression, including medication and follow-up appointments with Tropical.

The same day she was released, Goss visited Michael at his home. Michael testified that during this visit she seemed better. He also testified that Goss had full custody of his son, J.D., and he let J.D. go home with her.

The next day Goss attended a follow-up appointment with her family doctor, Joseph Montgomery-Davis, M.D. Dr. Montgomery-Davis re-evaluated her for depression and loss of sleep and authorized prescription refills.

Joe Compean, a social service worker at Tropical, visited Goss's home on March 28 to assess her home environment and to inform her of the importance of attending her next appointment. At trial he testified:

> I can say that she presented herself well. I mean, it was normal. I can't remember much, but I remember the conversation was, you know, comfortable. Just talking and telling her the importance of the appointment and her being agreeable.

Compean further testified that Goss did not appear depressed, sad, withdrawn, agitated, or confused, and that he did not observe any crying spells during his visit.

After her release from Rio Grande, Goss had two or three conversations with her neighbor, Sheriff Larry Spence. She had previously asked Spence to locate her husband, Danny. Spence testified that he asked her "[w]hat if [Danny] calls back and says he does not want anything to do with you whatsoever? Can you handle that?" She responded "I can live with that."

Goss called Danny on March 29 and they discussed their financial status and how they were going to "handle the separation." Michael testified that he also spoke with Goss on March 29. In that conversation she confirmed talking with Danny about finances and said that "she had intentions on going after his retirement and alimony." Shortly after 8:00 p.m. that evening Goss purchased a gun. She then dropped J.D. off at her son Timothy's house at approximately 12:30 a.m. on March 30, 2003. Later that day Sheriff Spence noticed a note on Goss's door and called the police. The transcript of his call was read to the jury. Sheriff Spence stated on this call that

> there is a big note taped to the front door of Beverly Goss' house and my wife went over and read it awhile ago and it says something, "I can't live without Danny" or something. . . .
>
> . . . .
>
> I think she made contact with him in Florida last night, is what she told me anyway, to stop looking for him, I found him. And she gave me a phone number where he was at. And maybe he told her something or something might have drove her off the edge.

Goss was later found dead in her home with a gunshot wound to the head.

Goss's sons—Michael, Timothy, and Steven—(collectively, the Gosses) sued Dr. Rodriguez-Escobar for negligence in failing to involuntarily hospitalize her. The jury found against Dr. Rodriguez-Escobar and awarded damages of $200,000. The trial court rendered judgment on the verdict and the court of appeals affirmed. ___ S.W.3d ___.

In this Court Dr. Rodriguez-Escobar does not challenge the jury finding that he was negligent. However, he asserts that (1) he has immunity under section 571.019(b) of the Texas Health and Safety Code which provides that "[a] physician performing a medical examination and

providing information to the court in a court proceeding under [the Mental Health Code] . . . is considered an officer of the court and is not liable for the examination or testimony when acting without malice"; (2) he has official immunity because he was performing a court-ordered examination of a person for involuntary commitment; and (3) the evidence of proximate cause is legally insufficient. The Gosses respond that (1) the issue of immunity under section 571.019(b) has not been preserved, and in any event the evidence and jury verdict do not support the claim; (2) the issue of official immunity has likewise not been preserved; and (3) the evidence is sufficient to support the jury finding that Dr. Rodriguez-Escobar's negligence proximately caused Goss's death. Assuming, without deciding, that the immunity issues were not preserved,[1] we agree that the evidence of causation is legally insufficient to support the verdict.

"The elements of a negligence cause of action are the existence of a legal duty, a breach of that duty, and damages proximately caused by the breach." *IHS Cedars Treatment Ctr. of DeSoto, Tex., Inc. v. Mason*, 143 S.W.3d 794, 798 (Tex. 2004). Proximate cause has two components: (1) foreseeability and (2) cause-in-fact. *Id.* For a negligent act or omission to have been a cause-in-fact of the harm, the act or omission must have been a substantial factor in bringing about the harm, and absent the act or omission—*i.e.*, but for the act or omission—the harm would not have occurred. *See Park Place Hosp. v. Estate of Milo*, 909 S.W.2d 508, 511 (Tex. 1995) (citation omitted). A physician's failure to hospitalize a person who later commits suicide is a proximate cause of the suicide only if the suicide probably would not have occurred if the decedent had been hospitalized.

[1] "Official immunity is an affirmative defense." *City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex. 1994).

See Providence Health Ctr. v. Dowell, 262 S.W.3d 324, 328 (Tex. 2008). In addition, an actor's negligence "may be too attenuated from the resulting injuries to the plaintiff to be a substantial factor in bringing about the harm." *Id.* at 329-30 (citations omitted).

In *Dowell*, we addressed whether a physician's negligence in discharging Lance Dowell proximately caused his post-discharge suicide. *Id.* at 328-29. In that case Dowell was taken to the emergency room (ER) by a deputy sheriff after he attempted to commit suicide because his girlfriend's parents told him to stay away from their daughter. *Id.* at 325-26. By the time he reached the ER he was no longer threatening to commit suicide. *Id.* The ER physician and nurse treated Dowell's wrist lacerations, and the physician agreed to release him if he signed a no-suicide contract, went to the local Mental Health and Mental Retardation center after the long weekend, and promised to stay with his family until he visited the center. *Id.* at 326-27. Dowell killed himself that weekend—approximately thirty-three hours after he was discharged from the ER. *Id.*

Dowell's parents sued the hospital and the attending ER doctor and nurse for negligently discharging him without a comprehensive assessment for his risk for suicide. *Id.* at 327-28. We held that Dowell's discharge from the ER was not a proximate cause of his death for two reasons. First, the plaintiff's expert did not testify that hospitalization more likely than not would have prevented Dowell's suicide, and there was no other evidence it would have. *Id.* at 328. Second, Dowell's discharge from the ER was "too remote from his death in terms of time and circumstances" to be classified as a proximate cause. *Id.* We held that "the defendants' negligence was too attenuated from the suicide to have been a substantial factor in bringing it about" because there was "no evidence that [Dowell] could have been hospitalized involuntarily, that he would have consented to

hospitalization, that a short-term hospitalization would have made his suicide unlikely, that he exhibited any unusual conduct following his discharge, or that any of his family or friends believed further treatment was required." *Id.* at 328-30.

To determine whether the actions of the defendants in *Dowell* proximately caused Dowell's suicide we analyzed both factors of the cause-in-fact element of proximate cause: whether the actions were a substantial factor in bringing about the suicide and whether, but for the actions, the suicide would not have occurred. In this case we need only consider the but-for factor. That is, we consider whether the evidence is legally sufficient to support the finding that absent the negligence of Dr. Rodriguez-Escobar—but for his negligence—Goss would not have committed suicide.[2]

To support their position that hospitalizing Goss probably would have prevented her suicide, the Gosses point to evidence indicating that her depression was treatable, she would not have shot herself in the hospital, and it was foreseeable she might commit suicide if she were not hospitalized. But they reference no evidence that hospitalization would have prevented Goss's suicide except for whatever time period she was hospitalized. The testimony on the issue was to the effect that (1) Goss likely would not have needed hospitalization for the rest of her life; (2) she probably would not have shot herself while hospitalized; and (3) hospitalization could have provided acute, immediate, short-term help, but her long-term status could not be predicted. The Gosses particularly reference

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[2] Referencing *Dowell*, Dr. Rodriguez-Escobar also argues that his release of Goss was too attenuated from her suicide for it to have been a proximate cause of her death. He notes that three days passed from the time she was released from Rio Grande until the time of her suicide. During this time she went about her usual routine and a family member described her as "all right." During this time period Goss met with her family physician, who did not note anything unusual about her behavior, and Compean, the social service worker, who saw no indications of distress.

Because our determination that there is legally insufficient evidence to support proximate cause is dispositive, we address only that issue.

two passages of their expert's testimony that they say support a finding of cause-in-fact. The first is:

> Q: Do you have an opinion as to whether or not had she been hospitalized on March 26th, she would have survived?
>
> A: Well, if she had been in the hospital, I don't think that she would have been able to kill herself, at least not shoot herself. And hopefully if a plan had been in place, then her chances of having a better life would have been there. I don't know long term what her prognosis would have been. It would have depended upon a lot of things.

The second is:

> Q: Let me ask you another question, Doctor. . . . Taking this definition [of proximate cause] into account, Doctor, can you tell me whether you have an opinion as to whether or not Dr. Rodriguez-Escobar's negligence was a proximate cause of Beverly Goss's death?
>
> A: Yes.
>
> Q: And can you explain to us your opinion and the basis for it?
>
> A: You have somebody who is severely depressed with all the things we've discussed, all the risk factors and all the red flags, and release them on their own, that it is a reasonable - - one might reasonably foresee that a suicide would be a result.

The court of appeals concluded that the first passage of the foregoing testimony "demonstrated that hospitalization would have made [Goss's] suicide unlikely." ___ S.W.3d at ___. We disagree.

In *Dowell* we held expert testimony that Dowell "'would have improved' and been at a 'lower risk' of suicide when he left" the hospital was not evidence that hospitalization would have made the suicide unlikely. *Dowell*, 262 S.W.3d at 328 ("No one supposes hospitalization would

have made [it] worse."). Similarly here, evidence that Goss's depression was to some degree treatable or that the expert thought Goss would not have been able to shoot herself while hospitalized is not evidence that hospitalization would have made her suicide unlikely after she was released.[3] *See id.*

The question is not whether Goss was severely depressed or whether treatment would have reduced her depression—the parties do not disagree on these issues.[4] Nor is it whether she met the statutory requirements for involuntary detention under the Health and Safety Code or whether Dr. Rodriguez-Escobar's failure to involuntarily hospitalize her was negligence. Rather, the question is whether Goss's hospitalization on March 26, 2003 would have made her death unlikely. *See id.* Testimony in the first passage quoted above, that the expert did not think she would have been able to shoot herself while hospitalized, is not evidence that hospitalization probably would have prevented her from doing so after she was released. The testimony candidly affirms that view. And in the second passage quoted above, the expert addresses the foreseeability element of proximate cause but does not address the cause-in-fact element. Thus, neither passage is evidence that Dr. Rodriguez-Escobar's failure to hospitalize Goss was a cause-in-fact of her suicide.

Because there is no evidence that Goss's involuntary hospitalization by Dr. Rodriguez-Escobar probably would have prevented her death, the evidence is legally insufficient to support the finding that his negligence proximately caused her death. We grant the petition for review and

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[3] We express no opinion about whether the evidence is sufficient to show that Goss probably would not have committed suicide in the hospital; that question is not before us.

[4] Dr. Rodriguez-Escobar provided Goss with a treatment plan for her depression which included follow-up treatments at Tropical and medication.

without hearing oral argument, TEX. R. APP. P. 59.1, reverse the court of appeals' judgment and render judgment in favor of Dr. Rodriguez-Escobar.

OPINION DELIVERED: February 1, 2013

IN THE SUPREME COURT OF TEXAS

NO. 10-0582

THE UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER AT DALLAS, PETITIONER,

v.

LARRY M. GENTILELLO, M.D., RESPONDENT

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

Argued September 12, 2012

JUSTICE WILLETT delivered the opinion of the Court.

The Texas Whistleblower Act bars retaliation against a public employee who reports his employer's or co-worker's "violation of law" to an "appropriate law enforcement authority"—defined as someone the employee "in good faith believes" can "regulate under or enforce" the law allegedly violated or "investigate or prosecute a violation of criminal law."[1] We consider today whether an employee's report to a supervisor is a report to an appropriate law-enforcement authority under the Act where the employee knows his supervisor's power extends only to ensuring internal compliance with the law purportedly violated. That is, the supervisor, while

[1] TEX.GOV'T CODE § 554.002.

overseeing internal adherence to the law, is empowered only to refer suspected violations elsewhere and lacks free-standing regulatory, enforcement, or crime-fighting authority.

We hold, consistent with our prior cases, that the Act's constricted definition of a law-enforcement authority requires that a plaintiff's belief be objectively reasonable. On that score, purely internal reports untethered to the Act's undeniable focus on law enforcement—those who either make the law or pursue those who break the law—fall short. Other states' whistleblower laws accommodate internal reports to supervisors; Texas law does not. Under our Act, the jurisdictional evidence must show more than a supervisor charged with internal compliance or anti-retaliation language in a policy manual urging employees to report violations internally. For a plaintiff to satisfy the Act's good-faith belief provision, the plaintiff must reasonably believe the reported-to authority possesses what the statute requires: the power to (1) regulate under or enforce the laws purportedly violated, or (2) investigate or prosecute suspected criminal wrongdoing.

As no jurisdictionally sufficient evidence exists here of any objectively reasonable belief in such power, we reverse the court of appeals' judgment and dismiss the case for lack of jurisdiction.

I. Background

Dr. Larry Gentilello, a professor of surgery at The University of Texas Southwestern Medical Center (UTSW), occupied the Chair of the Division of Burn, Trauma and Critical Care and the Distinguished C. James Carrico, M.D. Chair in Trauma. According to Dr. Gentilello's petition, he raised concerns with his supervisor, Dr. Robert Rege, about lax supervision of trauma residents (*i.e.*, doctors-in-training) at Parkland Hospital, a hospital served by UTSW. Specifically, Gentilello complained that trauma residents were treating and operating on patients without the supervision of

an attending physician, "contrary to proper Medicare and Medicaid requirements and procedures." After being stripped of his faculty chair positions, Gentilello filed a whistleblower suit charging that the demotion was in retaliation for reporting UTSW's violations of unspecified federal patient-care and resident-supervision rules.

UTSW contends that Gentilello's whistleblower suit is barred by governmental immunity—that his suit lacks the Act's required jurisdictional elements—and that the lower courts erred in denying UTSW's plea to the jurisdiction.[2] We agree.

II. Discussion

Section 554.002 of the Whistleblower Act provides:

> (a) A state or local governmental entity may not suspend or terminate the employment of, or take other adverse personnel action against, a public employee who in good faith reports a violation of law by the employing governmental entity or another public employee to an appropriate law enforcement authority.
> (b) In this section, a report is made to an appropriate law enforcement authority if the authority is part of a state or local governmental entity or of the federal government that the employee in good faith believes is authorized to:
> (1) regulate under or enforce the law alleged to be violated in the report; or
> (2) investigate or prosecute a violation of criminal law.[3]

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[2] This is our second decision in this long-running dispute. In 2009 we held it was a "jurisdictional question" whether Gentilello's "reporting of violations of Medicare and Medicaid regulations to a supervisor is a good-faith report of a violation of law to an appropriate law-enforcement authority." *Univ. of Tex. Sw. Med. Ctr. at Dallas v. Gentilello*, 300 S.W.3d 753, 754 (Tex. 2009) (per curiam) (citing *State v. Lueck*, 290 S.W.3d 876 (Tex. 2009) (holding that whistleblower suits can be dismissed on the pleadings if the plaintiff fails to satisfy the elements of section 554.002)). We remanded to the court of appeals to determine whether Gentilello's suit was barred by governmental immunity in light of *Lueck*. *Id.* The court of appeals below held there was sufficient evidence that Gentilello had a good-faith belief he had reported to an appropriate law-enforcement authority under the Act. 317 S.W.3d 865, 870–71. UTSW then filed this interlocutory appeal.

[3] TEX.GOV'T CODE § 554.002.

Since the Legislature defined when "a report is made to an appropriate law enforcement authority," we must use that statutory definition.[4]

This case raises the following issue: Did Gentilello make a good-faith report to an appropriate law-enforcement authority under the Act when he reported alleged violations of law to a supervisory faculty member who oversees internal compliance with myriad Medicare/Medicaid requirements at a state medical school?

A. An Employee's Good-Faith Belief that the Entity Is an Appropriate Law-Enforcement Authority Must Be Objectively Reasonable.

We explained in *Texas Department of Transportation v. Needham* that "good faith" in the Whistleblower Act context has both objective and subjective elements. It turns on more than an employee's *personal* belief, however strongly felt or sincerely held. It means:

> (1) the employee believed the governmental entity was authorized to (a) regulate under or enforce the law alleged to be violated in the report, or (b) investigate or prosecute a violation of criminal law; and
> (2) *the employee's belief was reasonable in light of the employee's training and experience.*[5]

In other words, the employee's belief must be objectively reasonable. Even if Gentilello "honestly believed" that Rege was an appropriate authority, that belief can only satisfy the good-faith requirement "if a reasonably prudent employee in similar circumstances" would have thought so.[6]

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[4] *Id*. § 311.011(b).

[5] 82 S.W.3d 314, 321 (Tex. 2002) (emphasis added).

[6] *Id*. at 320.

We have had three occasions to remove the objective element and protect internal reports to workplace supervisors who lacked the Act's specified powers. All three times we have declined, in 2002,[7] 2009,[8] and 2010.[9]

Our 2002 decision in *Needham* was our first to interpret "appropriate law enforcement authority."[10] There, a Texas Department of Transportation (TxDOT) employee reported a co-worker's alleged drunk driving to a supervisor.[11] Stressing the statutory definition's "limiting nature,"[12] we held there was no basis for a good-faith belief that the supervisor was an appropriate authority under the Act because the employee alleged only that TxDOT could internally discipline and externally report drunk driving infractions.[13]

Next came *Lueck* in 2009, also involving TxDOT, where we considered whether an employee's email report to his supervisor sufficed to meet the Act's jurisdictional requirements.[14] We answered no, noting that the email itself belied the employee's good-faith belief by recognizing the supervisor would have to forward the report elsewhere for prosecution.[15]

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[7] *Needham*, 82 S.W.3d 314.

[8] *Lueck*, 290 S.W.3d 876.

[9] *City of Elsa v. Gonzalez*, 325 S.W.3d 622 (Tex. 2010) (per curiam).

[10] 82 S.W.3d at 318.

[11] *Id.* at 316.

[12] *Id.* at 319.

[13] *Id.* at 320–21.

[14] 290 S.W.3d at 878–79.

[15] *Id.* at 886.

Most recently, in 2010, we decided *City of Elsa*, involving a city manager fired after reporting alleged violations of law to the city council.[16] In dismissing the suit, we explained that the employee's belief that "the city council had the authority to postpone the [allegedly unlawful] meeting or otherwise prevent an alleged violation of the Open Meetings Act from occurring does not satisfy either the objective or subjective components of a good-faith belief that the city council was an appropriate law enforcement authority as defined in section 554.002(b)."[17] The fact that the council was "required to comply with the Open Meetings Act does not equate to its having authority to 'regulate under or enforce' those provisions as to itself."[18] The plaintiff fell short because "the Whistleblower Act's limited definition of a law enforcement authority does not include an entity whose power is not shown to extend beyond its ability to comply with a law by acting or refusing to act or by preventing a violation of law by acting or refusing to act."[19]

These cases, taken together, decide today's case. Gentilello fails the objective component of the Act's good-faith test. Given his training and expertise, he should have known that his supervisor's purely internal authority was not law enforcement but law compliance—in other words, Rege was only capable of ensuring that UTSW followed federal directives. The bare power to urge compliance or purge noncompliance does not transform Rege into an "appropriate law enforcement authority" *as defined in the Act*. The term has a specific, legislatively prescribed meaning, and under

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[16] 325 S.W.3d at 627.

[17] *Id.* at 628.

[18] *Id.*

[19] *Id.*

our recent precedents—*Needham*, *Lueck*, and *City of Elsa*—Gentilello simply could not have formed an objectively reasonable belief that Rege possessed any of the special "law enforcement" powers itemized in section 554.002(b).

B. Ensuring Internal Compliance with the Law Is not Synonymous with Regulating Under or Enforcing the Law.

As we have held, an appropriate law-enforcement authority must be actually responsible for regulating under or enforcing the law allegedly violated. It is not simply an entity responsible for ensuring internal compliance with the law allegedly violated.

In *Needham*, where the plaintiff reported to a TxDOT supervisor his co-worker's suspected drunk driving, we held TxDOT was not an appropriate law-enforcement authority under the Act: "TxDOT has no authority to regulate under or enforce the Texas[] driving while intoxicated laws. Nor does it have authority to investigate or prosecute these criminal laws."[20]

The court of appeals tried to distinguish the Medicare/Medicaid rules in this case from the driving while intoxicated (DWI) laws in *Needham*.[21] Noting that UTSW was required to follow certain Medicare/Medicaid requirements to receive federal funding,[22] the court of appeals held there was a fact issue as to Gentilello's good-faith belief that Rege was an appropriate law-enforcement

[20] 82 S.W.3d at 320 (internal citation omitted).

[21] 317 S.W.3d at 870.

[22] *Id.* (citing 42 C.F.R. §§ 415.172, 482.11, 482.12(a), and 482.55, and 42 U.S.C. § 1320a-7b(a)).

authority because, "unlike the DWI statute at issue in *Needham*, the statutes at issue here specifically charge [UTSW] and its physicians with implementing the laws at the hospital level."[23] We disagree.

In *City of Elsa*, the plaintiff reported to the city council alleged violations of the Open Meetings Act, which plainly imposes on cities a duty of compliance and implementation. We deemed the plaintiff's report jurisdictionally insufficient because the city council's obligation to follow the Act "does not equate to its having authority to 'regulate under or enforce' those provisions as to itself."[24] Similarly, UTSW had a legal duty to follow various Medicare/Medicaid requirements, and Rege oversaw that internal compliance, but his power reached no further. As the supervisory Clinical Department Chair who made sure UTSW followed the law correctly, Rege was undoubtedly a law-*compliance* authority, but he was not a law-*enforcement* authority as our cases define that statutory term. As a legal matter, only the United States Secretary of Health and Human Services (HHS Secretary) can "regulate under" or "enforce" Medicare/Medicaid rules. Gentilello asserted no specific rules in his pleadings, but 42 U.S.C. § 1395hh(a) vests sole power in the HHS Secretary to promulgate and enforce the Medicare/Medicaid rules.[25]

Dr. Rege oversees compliance within UTSW, but complying does not equal compelling. Put another way, UTSW is itself subject to regulation but does not subject others to regulation; being regulated is not the same as being the regulator. Indeed, *all* governmental bodies must themselves

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[23] *Id.*

[24] 325 S.W.3d at 628.

[25] 42 U.S.C. § 1395hh(a) (2011); *see also id.* § 1301(a)(6) (defining "Secretary" as the Secretary of Health and Human Services).

adhere to various statutes and regulations, but such compliance does not equate to the authority to "regulate under or enforce" those provisions. The Whistleblower Act speaks to an authority statutorily empowered to regulate under or enforce the actual law allegedly violated—"the particular law the public employee reported violated is critical to the determination"[26]—or to investigate or prosecute a criminal violation. The upshot of our prior decisions is that for an entity to constitute an appropriate law-enforcement authority under the Act, it must have authority to enforce, investigate, or prosecute violations of law against third parties outside of the entity itself, or it must have authority to promulgate regulations governing the conduct of such third parties. Authority of the entity to enforce legal requirements or regulate conduct within the entity itself is insufficient to confer law-enforcement authority status. Indeed, holding otherwise would transform every governmental entity that is subject to any regulation or that conducts internal investigations or imposes internal discipline into law-enforcement authorities under the Act. Such a result would collide head-on with the Act's limited definition and our cases interpreting that definition.

We do not hold that a Whistleblower Act report can *never* be made internally. A police department employee could retain the protections of the Whistleblower Act if she reported that her partner is dealing narcotics to her supervisor in the narcotics or internal affairs division. In such a situation, the employee works for an entity with authority to investigate violations of drug laws committed by the citizenry at large. UTSW concedes in its briefing that "some Whistleblower Act reports may be made internally—for instance, a report of a violation of the Texas Penal Code to a

[26] *Needham*, 82 S.W.3d at 320.

supervisor who is also a policeman and, as such, is authorized to investigate violations of criminal law." But here, as in *Needham* and *Lueck*, the supervisor lacked any such power to enforce the law allegedly violated or to investigate or prosecute criminal violations against third parties generally.

On this point our jurisprudence is clear: the Act protects those who report to authorities that issue legal directives, not authorities that follow them. Federal[27] and other state[28] whistleblower laws explicitly protect purely internal reports to supervisors; Texas law does not. Accordingly, a department chair's ability to oversee internal compliance only with Medicare/Medicaid requirements—not enforce them, not regulate under them, not investigate or prosecute purported criminal violations of them, not perform *any* of the functions listed in section 554.002(b)—dictates the answer in this case. Reporting to Rege was not protected by the Act.

C. It Is Likewise Insufficient that an Employer Takes Internal Investigative or Disciplinary Action.

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[27] *See* Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112-199, § 1(C), 126 Stat. 1465, 1466 (to be codified at 5 U.S.C. § 2302(f)(1)) ("A disclosure shall not be excluded from . . . [the whistleblower protections of 5 U.S.C. § 2302(b)(8)] because—(A) the disclosure was made to a supervisor.").

[28] *See, e.g.*, N.J. STAT. ANN. § 34:19-3 (West 2011) ("An employer shall not take any retaliatory action against an employee because the employee . . . [d]iscloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer . . . that the employee reasonably believes: (1) is in violation of a law, or a rule or regulation promulgated pursuant to law . . . or (2) is fraudulent or criminal . . . ."); N.Y. LAB. LAW § 740(2) (McKinney Supp. 2012) ("An employer shall not take any retaliatory personnel action against an employee because such employee . . . discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer that is in violation of law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety, or which constitutes health care fraud . . . ."); OHIO REV. CODE ANN. § 4113.52 (LexisNexis 2007) ("(A)(1)(a) If an employee becomes aware in the course of the employee's employment of a violation of any state or federal statute . . . the employee orally shall notify the employee's supervisor or other responsible officer of the employee's employer of the violation and subsequently shall file with that supervisor or officer a written report . . . . (B) Except as otherwise provided in division (C) of this section, no employer shall take any disciplinary or retaliatory action against an employee for making any report authorized by division (A)(1) . . . . (C) An employee shall make a reasonable and good faith effort to determine the accuracy of any information reported under division (A)(1) . . . . If the employee who makes a report . . . fails to make such an effort, the employee may be subject to disciplinary action by the employee's employer, including suspension or removal . . . .").

We have made this point clearly, and repeatedly: an entity capable only of disciplining its employees internally is not an "appropriate law enforcement authority" under the Act. As we explained in *Needham* a decade ago, "the statutory definition's limiting language—regulate under, enforce, investigate, and prosecute—does not include an employer's power to internally discipline its own employees for an alleged violation."[29] It is not enough that an employer "has authority to regulate and investigate its employees' conduct only to carry out its internal disciplinary process procedures."[30]

We reaffirmed this view recently in *Lueck*. Looking at the pleadings alone, we held that a TxDOT whistleblower could not have believed in good faith that his supervisor was an appropriate law-enforcement authority because the whistleblower indicated he knew the supervisor possessed no stand-alone authority and would have to refer the report elsewhere.[31] Explaining our opinion in *Needham*, we added: "an employer's power to conduct internal investigative or disciplinary procedures does not satisfy [the] standard for appropriate law enforcement authority under the Act."[32] A supervisor looking into and addressing possible noncompliance in-house bears little resemblance to a law-enforcement official formally investigating or prosecuting that noncompliance on behalf of

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[29] 82 S.W.3d at 321.

[30] *Id*. at 320.

[31] *Lueck*, 290 S.W.3d at 885–86.

[32] *Id.* at 886 (citing *Needham*, 82 S.W.3d at 320–21).

the public, or a regulatory authority charged with promulgating or enforcing regulations applicable to third parties generally.

Gentilello argues, contrary to our precedent, most recently *City of Elsa*,[33] that Rege's authority to ensure UTSW's own compliance at the hospital level, including meting out discipline, made Rege an appropriate law-enforcement authority. Our cases hold the opposite, and we reaffirm today what we have said repeatedly: lodging an internal complaint to an authority whom one understands to be only charged with internal compliance, even including investigating and punishing noncompliance, is jurisdictionally insufficient under the Whistleblower Act.[34] The Act's language is restrictive, and what matters is that the reported-to authority is reasonably believed to be empowered either to regulate under or enforce the law allegedly violated, or to investigate or prosecute criminal offenses.

In this case, Gentilello and his colleagues acknowledged that, while Rege oversaw compliance within UTSW, Rege would have to report any violations to external law-enforcement authorities. Gentilello conceded in his hearing testimony that Rege's authority was purely inward-looking, overseeing internal adherence and disciplining those who went astray, while referring suspected illegality "to who[m]ever is in charge of enforcing the law"—official authorities like the Center for Medicare and Medicaid Services that are actually empowered to do what the Act contemplates. Gentilello and Rege likewise testified that Rege had no authority to write rules and regulations under the Medicare/Medicaid statutes.

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[33] 325 S.W.3d at 628.

[34] *Id.*; *Lueck*, 290 S.W.3d at 885–86; *Needham*, 82 S.W.3d at 319–21.

UTSW's Clinical Department Chair is not a police officer or prosecutor. And conducting private oversight and discipline is not official action taken to combat violations of public law. The Medicare/Medicaid laws do not endow medical-school faculty supervisors or hospital department chairs with any special regulatory, enforcement, investigative or prosecutorial authority. It was reasonable for Gentilello to raise concerns about improper billing or patient-care practices with Rege, but it is objectively unreasonable for Gentilello, given his experience, expertise and training, to equate his supervisor with an "appropriate law enforcement authority." Rege was charged with complying and implementing, not with regulating or enforcing, much less with investigating and prosecuting criminal activity. As we stressed in *Needham*, broadening the Act to include an employer's internal disciplinary process "would mean all public employers with a disciplinary policy for handling employees' alleged illegal conduct" are captured by the Act, not just those with actual regulatory, enforcement, or criminal investigatory or prosecutorial authority.[35]

D. An Entity's Stock Anti-Retaliation Policies are Insufficient to Expand Coverage of the Whistleblower Act.

According to the court of appeals, Gentilello's good-faith belief that Rege was an appropriate law-enforcement authority was rooted in UTSW's billing compliance program,[36] which lays out UTSW's internal guidelines regarding Medicare/Medicaid compliance and states:

- "The Clinical Department Chair [i.e., Rege] shall have the responsibility for ensuring the goals of [Medicare/Medicaid] billing compliance are met"; and

[35] 82 S.W.3d at 320.

[36] 317 S.W.3d at 870–71.

- "Employees who report, in good faith, possible compliance problems shall be protected from retaliation or harassment, as established by law."

Gentilello contends this language suffices to defeat UTSW's sovereign immunity. We disagree that this language vests Rege with any law-enforcement powers or satisfies our previous good-faith belief decisions. Holding otherwise would enable easy circumvention of our on-point precedent.

On its face, this document simply reflects UTSW's commitment to internal compliance; it cannot be interpreted to relax the Whistleblower Act's requirements. It is UTSW's declaration that it will abide by all directives from the federal government concerning Medicare/Medicaid laws, nothing more. It does not empower Rege to regulate under or enforce Medicare/Medicaid laws, or to investigate and prosecute criminal violations.

Gentilello concedes that Rege had no authority to jail wayward employees, but instead urges that Rege's general supervision of internal compliance and UTSW's anti-retaliation pledge defeats UTSW's immunity. However, as explained above, the Act and our cases plainly require an objectively reasonable belief that Rege was an appropriate law-enforcement authority. It is not enough that Rege exhorted internal UTSW compliance with federal health-care provisions. Nor is it enough that UTSW recited anti-retaliation principles in an internal policy manual. Neither supports a good-faith belief that Rege exercised the law-enforcement powers specified in section 554.002(b). In sum, a whistleblower plaintiff who reports only to an internal supervisor who lacks section 554.002(b) powers cannot survive a jurisdictional challenge under the Act's good-faith belief provision merely by pointing to anti-retaliation language in a workplace policy manual.

III. Conclusion

Gentilello's Whistleblower Act claim cannot be squared with our precedent construing section 554.002(b)'s limited definition of appropriate law-enforcement authority. The Act, by its text and structure, restricts "law enforcement authority" to its commonly understood meaning. That is, it protects employees who report to authorities that actually promulgate regulations or enforce the laws, or to authorities that pursue criminal violations. The specific powers listed in section 554.002(b) are outward-looking. They do not encompass internal supervisors charged with in-house compliance and who must refer suspected illegality to external entities. Our cases are consistent on this point, and we reaffirm them today. Such internal complaints do not satisfy the requirement that the "report [be] made to an appropriate law enforcement authority" under section 554.002 of the Whistleblower Act.

It may well be reasonable for a government employee to report suspected violations of law to a supervisor, but that does not mean every supervisor meets the Whistleblower Act's definition of an "appropriate law enforcement authority." This is a legislatively-mandated legal classification, one tightly drawn, and we cannot judicially loosen it. Other states protect purely internal whistleblowing, but under our Legislature's narrower view, a whistleblower cannot reasonably believe his supervisor is an appropriate law-enforcement authority if the supervisor's power extends no further than ensuring the governmental body *itself* complies with the law. Merely overseeing adherence, including urging employees to report violations internally, is insufficient under the Texas Whistleblower Act.

Accordingly, as UTSW's immunity remains intact, we reverse the judgment of the court of appeals and dismiss the case for lack of jurisdiction.

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Don R. Willett
Justice

OPINION DELIVERED: February 22, 2013

IN THE SUPREME COURT OF TEXAS

NO. 10-0648

EL PASO FIELD SERVICES, L.P. AND GULFTERRA SOUTH TEXAS, L.P. F/K/A/ EL PASO SOUTH TEXAS, L.P.,
PETITIONERS,

v.

MASTEC NORTH AMERICA, INC. AND MASTEC, INC.,
RESPONDENTS

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

Argued January 11, 2012

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

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

In this case, we are asked to harmonize provisions in a pipeline construction contract to determine who bears the risk of obstacles in the pipeline's path. Specifically, we must examine the effect of the contract's risk-allocation provisions in light of due diligence specifications under which

the pipeline owner was purportedly required, but failed, to provide accurate and complete information to the contractor regarding the location of "foreign crossings." We conclude that the contract allocated all risk to the contractor for unknown obstacles discovered during the construction process. Accordingly, we reverse the court of appeals' judgment and reinstate the trial court's judgment.

I. Factual Background

El Paso Field Services, L.P. purchased an eight-inch propane pipeline from Coastal Corporation. The pipeline was approximately sixty-eight miles long, and was constructed in the 1940s as an emergency war pipeline to transport petroleum from Corpus Christi to inland U.S. Air Force bases. After determining that the pipeline was too shallow to be safe, El Paso made plans to remove the old pipeline and construct a new one that would carry butane, a byproduct of natural gas. El Paso invited MasTec, Inc., a company looking to expand its business to include energy pipelines, as well as other contractors to bid on a project to replace the section of the pipeline from Victoria to Nueces Bay. MasTec had never installed a pipeline, and its primary business usually entailed installing underground fiber-optic cables and telephone lines.

Before soliciting bids for the project, El Paso hired Gullett & Associates, Inc., a survey mapping company out of Houston, to survey the pipeline route. This survey was compiled in the form of "alignment sheets," which showed the locations of 280 "foreign crossings" along the pipeline's right-of-way, including other pipelines, utilities, roads, rivers, canals, fences, wells, cables, and concrete structures. The alignment sheets were included in a bid package, which was distributed to the contractors at a pre-bid meeting to help them estimate the cost of constructing the pipeline.

To bid the project, MasTec hired as its general manager Bill White, who had forty-one years of experience in the pipeline construction business and had a team of construction personnel, including many who had worked with him for almost thirty years. White attended the pre-bid meeting on MasTec's behalf and received a copy of the alignment sheets, El Paso's contract, and other pertinent information for estimating the cost of the project. At the meeting, El Paso encouraged each potential bidder to perform an aerial inspection of the pipeline route. Subsequently, White and his son flew by helicopter over the route to assess its general topography, landing occasionally to assess the soil conditions. White testified that bidders were prohibited from entering certain private properties along the route, but El Paso later claimed that the contractors were able to enter those areas if they were escorted by an El Paso representative.

Shortly thereafter, White submitted, on MasTec's behalf, a completed contract and a bid on the project for $3,690,960, which was substantially lower than the other bids. The average bid for the project was $8.1 million.[1] El Paso narrowed its choices to two contractors, then met with White to ensure that MasTec would be able to complete the project according to El Paso's time frame. El Paso asserts that, at that meeting, its representatives discussed MasTec's low bid with White, and then offered White the opportunity to withdraw the bid. White disputes being told that the bid was low and denies being offered the chance to withdraw the bid. Nevertheless, El Paso subsequently awarded MasTec the contract, which the parties entered into on June 10, 2003.

[1] MasTec's bid of more than $3.69 million, combined with its damage award of more than $4.69 million, approximately equals the average bid amount submitted by other contractors.

MasTec's work on the project commenced later that month. Although the alignment sheets showed 280 foreign crossings, MasTec discovered far more foreign crossings by the end of the project.[2] Many of the undiscovered foreign crossings required a special weld, called a "tie-in" weld, and about ten hours of labor, which substantially increased the cost of the work. In a letter to El Paso dated September 8, 2003, White raised the issue of extra costs associated with foreign crossings, though he did not make a demand for payment. El Paso responded by letter on September 26, 2003, reciting contractual provisions and asserting that the undiscovered foreign crossings were within MasTec's scope of work.

II. Procedural Background

In 2004, MasTec filed suit against El Paso for breach of contract and fraud, based on El Paso's failure to locate 794 unknown foreign crossings and its subsequent refusal to compensate MasTec for its additional expenses resulting from the crossings. In the alternative, MasTec sought to recover under the theories of quantum meruit and quantum valebant. At trial, the jury was asked whether El Paso failed to comply with the contract.[3] To answer that question, the jury was instructed

[2] The record contains conflicting accounts of the actual number of foreign crossings. Steve Edwards, who MasTec hired to locate foreign crossings, testified that he found over a thousand foreign crossings. Greg Perkins, a mechanical engineer who testified as an expert for MasTec, testified that MasTec located 794 foreign crossings and that more than 200 were metal pipelines that had not been identified on El Paso's alignment sheets. Gullett's survey supervisor, Richard Schubert, who El Paso sent out at the close of the project to confirm the number and location of additional foreign crossings, testified that there were 274 additional foreign crossings and 126 additional tie-in welds. Schubert also testified, however, that the as-built drawings Gullett prepared after MasTec completed the project showed 343 additional foreign crossings, including 208 that were metal. In this proceeding, MasTec alleges that there were 794 foreign crossings that required 217 additional tie-in welds.

[3] It appears from the record that MasTec did not pursue fraud or misrepresentation claims, nor were any tort theories submitted to the jury. Incidentally, MasTec had indicated in a letter to El Paso during the construction process that it did not believe the omissions from the alignment sheets were intentional or that El Paso withheld information from them. The letter stated, "We merely feel that circumstances beyond your control, and ours, has [sic] had a cost impact to MasTec worth reviewing." The letter then stated, in regard to the additional foreign crossings: "These were mostly

to consider "whether El Paso exercised due diligence in locating foreign pipelines and/or utility line crossings." The jury answered that El Paso failed to comply with the contract and awarded MasTec $4,763,890 in damages. Additionally, the jury found that MasTec failed to comply with the contract by not completing the work required in the contract and awarded El Paso $104,687.09 in damages.

El Paso moved to disregard the jury's findings and for judgment notwithstanding the verdict. El Paso urged that the "due diligence" provisions in the contract "did not involve any future performance but at best constituted a warranty." El Paso further asserted that, regardless of the due diligence provisions in the contract, MasTec disclaimed reliance on any warranty by El Paso regarding foreign pipeline and utility crossings. The trial court granted the motion and entered a take-nothing judgment in favor of El Paso, finding that the contract was clear and unambiguous and "allocates the risk of any additional cost incurred because of foreign pipeline crossings to MasTec." In response, MasTec filed a motion to vacate the judgment, which the trial court denied.

MasTec appealed, and the court of appeals reversed the trial court's judgment. 317 S.W.3d 431, 434 (Tex. App.—Houston [1st Dist.] 2010). On rehearing, the court of appeals issued a new opinion, though it did not change its disposition or judgment. *Id.* The court of appeals held that MasTec's commitments and representations under the contract did not preclude its recovery based on the jury's finding that El Paso failed to exercise due diligence in locating the foreign crossings. *Id.* at 456. The court of appeals denied El Paso's motion for rehearing en banc. *Id.* at 431. We granted El Paso's petition for review. 55 Tex. Sup. Ct. J. 29 (Oct. 21, 2011).

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all fiberglass lines that no one had any knowledge of."

III. Standard of Review

In construing a contract, we must ascertain and give effect to the parties' intentions as expressed in the writing itself. *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 333 (Tex. 2011). In discerning the parties' intent, "we must examine and consider the entire writing in an effort to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless." *Id.* (quoting *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 229 (Tex. 2003)) (internal quotation marks omitted). We begin our analysis with the contract's express language. *Id.* If we determine that the contract's language can be given a certain or definite legal meaning or interpretation, then the contract is not ambiguous and we will construe it as a matter of law. *Id.* But, "if the contract is subject to two or more reasonable interpretations after applying the pertinent rules of construction, the contract is ambiguous, creating a fact issue on the parties' intent." *J.M. Davidson*, 128 S.W.3d at 229.

IV. Contract Interpretation

El Paso relies on the following risk-allocation provisions in the lump-sum contract:

> 7.1 REPRESENTATIONS AND WARRANTIES
>
> [MasTec] represents and warrants to [El Paso]:
>
> (e) That its duly authorized representative has visited the site of the Work, is familiar with the local and special conditions under which the Work is to be performed and has correlated the on site observations with the requirements of the Contract and has fully acquainted itself with the site, including without limitation, the general topography, accessibility, soil structure, subsurface conditions, obstructions and all other conditions pertaining to the Work and has made all investigations essential to a full understanding of the difficulties which may be encountered in performing the Work, and that anything in this Contract or in any representations, statements or information made or furnished by [El Paso] or any of

its representatives notwithstanding, [MasTec] assumes full and complete responsibility for any such conditions pertaining to the Work, the site of the Work or its surroundings and all risks in connection therewith;

. . . .

(g) That the Contract is sufficiently complete and detailed for [MasTec] to perform the Work required to produce the results intended by the Contract and comply with all the requirements of the Contract; . . .

. . . .

8.1 CONTRACTOR'S CONTROL OF THE WORK

(a)(7) [MasTec] represents that it has had an opportunity to examine, and has carefully examined, all of the Contract documents and has fully acquainted itself with the Scope of Work, design, availability of materials, existing facilities, the general topography, soil structure, substructure conditions, obstructions, and all other conditions pertaining to the Work, the site of the Work and its surrounding; that it has made all investigations essential to a full understanding of the difficulties which may be encountered in performing the Work; and that anything in any of the Contract documents or in any representations, statements or information made or furnished by [El Paso] or its representatives notwithstanding, [MasTec] will regardless of any such conditions pertaining to the Work, the site of the Work or its surrounding, complete the Work for the compensation stated in this Contract, and pursuant to the extent of [MasTec's] liability under this Contract, assume full and complete responsibility for any such conditions pertaining to the Work, the site of the Work or its surroundings, and all risks in connection therewith. In addition thereto, [MasTec] represents that it is fully qualified to do the Work in accordance with the terms of this Contract within the time specified.

Exhibits B and C to the contract place additional requirements on both parties.[4] Under Exhibit B-1, titled "Contractor's Proposal," MasTec agreed to perform "everything necessary to complete, satisfy, and discharge all Work and obligations imposed on [MasTec] connected with the performance of the Work." This included "[f]urnish[ing] all labor, equipment and materials as

[4] Article 24.1 of the contract expressly includes the exhibits as "part of this Contract for all purposes."

described in the Specifications for all Work necessary to perform the following applicable Work as shown on the Drawings, including, but not limited to: . . . welding (including tie-in and transition welds, if required)." Exhibit B-1 further describes the scope of MasTec's work:

> Any Work required to complete installation of the new pipeline but not shown as a pay item is no less included in the scope of work for installation of the new 8-inch Butane Shuttle pipeline and is included in [MasTec's] lump sum proposal. Just because an item of Work is not specifically identified, does not mean such Work is not included in [MasTec's] scope of Work. Any item of Work [MasTec] knows is required for completion of the installation but not specifically identified is to be included in [MasTec's] Lump Sum Proposal.

Exhibit C to the contract contains a lengthy collection of "Construction Specifications" for the project, which include the due diligence language on which MasTec relies. Specification LP-5, titled "Ditching," states under the heading "Company Foreign Line and Utility Crossings" that "[El Paso] will have exercised due diligence in locating foreign pipelines and utility line crossings. However, [MasTec] shall confirm the location of all such crossings and notify the owner prior to any ditching activity in the vicinity of the crossings." Near the end of Exhibit C, Specification LP-17, titled "Horizontal Directional Drilling," states under the heading "Foreign Line and Utility Crossings" that "[El Paso] will have exercised due diligence in locating foreign pipelines and/or utility line crossings. However, [MasTec] shall confirm the location of all such crossings and notify the owner prior to any [horizontal directional drilling] activity in the vicinity of the crossings."

Here, neither party contends that the terms of the contract are ambiguous. Indeed, the contract's plain terms are clear. MasTec agreed that it had "fully acquainted itself with the site, including without limitation . . . subsurface conditions, obstructions and all other conditions pertaining to the Work." It also agreed that it had "made all investigations essential to a full

understanding of the difficulties which may be encountered in performing the Work." In regard to potential work site conditions, MasTec "assume[d] full and complete responsibility for any such conditions pertaining to the Work, the site of the Work or its surroundings and all risks in connection therewith." All of this was agreed to "notwithstanding" "anything in any of the Contract documents or in any representations, statements or information made or furnished by [El Paso] or its representatives." These terms, in both Article 7.1(e) and Article 8.1(a)(7), clearly place the risk of undiscovered foreign crossings on MasTec. And they expressly resolve any tension between the due diligence specifications and the risk allocation provisions.[5] Because MasTec abandoned its fraud claim, MasTec is bound by the terms of this contract, regardless of whether it thought it contained different terms. *See In re Palm Harbor Homes, Inc.*, 195 S.W.3d 672, 676 (Tex. 2006) (holding that absent fraud, deceit, or misrepresentation in the signing of an agreement, the parties are bound by the agreement); *see also Lonergan v. San Antonio Loan & Trust Co.*, 104 S.W. 1061, 1066 (Tex. 1907) ("[I]n the absence of fraud or other improper influence, competent persons may make their own contracts for lawful purposes and will be required to perform them.").

MasTec argues that the contract's broad "all risks" provisions are limited by the specific exception in the due diligence specifications in Exhibit C. Under MasTec's reading of the contract, the "all risks" provisions set out the scope of MasTec's general responsibility, but the construction specifications remove from MasTec's responsibility the location of foreign crossings through the

[5] Although not raised by the parties, we note that Article 25 of the contract contains an order-of-precedence provision, which states: "Should any conflict exist or appear to exist between any parts or Exhibits of this Contract, such conflict shall be brought to the attention of [El Paso] and [El Paso] shall notify [MasTec] which Part or Exhibit shall have precedence." The very next provision, however, states that "Conflicts between the Drawings and the Specifications shall be interpreted in favor of the Drawings."

exercise of due diligence, a responsibility that was allocated to El Paso. That reading, however, ignores the plain language of the agreement: MasTec assumes "all risks in connection with" "soil structure, subsurface conditions, obstructions and all other conditions pertaining to the Work," "notwithstanding" anything else in the contract. The specified conditions relate to the physical environment of the pipeline's path, precisely the risk involved with unknown underground foreign crossings. MasTec seems to have understood as much; its senior vice president testified at trial that foreign crossings were included in the risks covered by Article 7.1(e). Just as we have held in the insurance policy context that "'all losses' means *all* losses," "all risks" in connection with the physical conditions of the pipeline's path must mean *all* risks. *See Enter. Leasing Co. v. Barrios*, 156 S.W.3d 547, 549 (Tex. 2004) (per curiam).

MasTec argues that our reading of the contract renders meaningless the two due diligence specifications. Indeed, when construing a contract, we strive to "give effect to all the provisions of the contract so that none will be rendered meaningless." *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983). While we have had occasion to give meaning to the phrase "due diligence" in other contexts, we must construe it here in conjunction with the specific rights and obligations contained in this contract. *See, e.g.*, *Via Net v. TIG Ins. Co.*, 211 S.W.3d 310, 314 (Tex. 2006) (discussing due diligence in the context of the relationship between royalty owners and lessees in oil and gas contracts); *cf. Strickland v. Lake*, 357 S.W.2d 383, 384 (Tex. 1962) ("The term 'diligence' is relative and incapable of exact definition. Its meaning must be determined by the circumstances of each case. Reasonable diligence has been defined as such diligence that an ordinarily prudent and diligent person would exercise under similar circumstances. It is usually a question of fact." (citations

omitted)). Because there is no indication that the parties intended to give "due diligence" any technical or special meaning, we give the phrase its "plain, ordinary, and generally accepted meaning." *See Heritage Res., Inc. v. NationsBank*, 939 S.W.2d 118, 121 (Tex. 1996). According to Black's Law Dictionary, "due diligence" is "[t]he diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation." BLACK'S LAW DICTIONARY (9th ed. 2009). With that in mind, we must harmonize the due diligence specifications with the other contractual provisions to ascertain the true intentions of the parties. *See Coker*, 650 S.W.2d at 393.

The contract contemplates a joint effort by the parties. The due diligence specifications, which are contained in guidelines for the performance of ditching and horizontal directional drilling, state: "[El Paso] *will have exercised* due diligence in locating foreign pipelines and/or utility line crossings. However, [MasTec] shall confirm the location of all such crossings and notify the owner prior to any [ditching or horizontal directional drilling] activity in the vicinity of the crossings." Because of the joint nature of these obligations, our construction of this contract does not render these provisions meaningless; rather, our construction gives effect to the parties' intent that the parties agreed El Paso had already exercised due diligence to locate foreign crossings, but ultimately the risk of omissions and inaccuracies, including the obligation to investigate and protect against additional foreign crossings, falls on MasTec. Greg Floerke, MasTec's vice president of communications, which included the pipeline unit, explained: "Due diligence in my experience typically meant other than taking existing maps and lines—crossings and lines that are shown on

those maps, to take the extra step to go out [and] do something, additional due diligence to locate any foreign pipelines that might exist."

Before soliciting bids, El Paso took steps to locate foreign crossings. El Paso had only preliminary alignment sheets from the 1940s for the pipeline at issue, and no as-built alignment sheets. Knowing that those alignment sheets were "very poor" and "inadequate," and would not have shown any crossings installed after the pipeline was constructed, El Paso hired Gullett to survey the pipeline's right of way. El Paso instructed Gullett to locate as many foreign crossings as it could using metal detection and visual inspection, and to compile the findings into a map (the alignment sheets) that could be distributed to potential bidders. Using four crews, Gullett's surveyors walked the pipeline's entire right-of-way, using an M-Scope, an advanced pipeline-locating device to find metal pipelines, as well as PVC and fiberglass pipelines with metal tracers.[6] Although El Paso did not instruct Gullett to use other methods to locate PVC or fiberglass crossings that an M-scope and visual inspection would not detect, the record indicates that locating those lines would be very labor-intensive, often requiring digging by hand or using a vactron, a hydraulic vacuum cleaner that pressure washes holes. Moreover, although El Paso did have parallel pipelines in the same right-of-way, the alignment sheets for those lines were also from the 1940s and would not have shown foreign crossings built since then. Similarly, although Valero had a pipeline in the same right-of-way, that pipeline was decades old, and testimony indicated that it was not customary for pipeline

[6] Mike White, who assisted his father, Bill White, on the El Paso project, testified that PVC piping is required by law to contain metal stripping so that it can be located by surveying crews. Some of the undiscovered PVC pipeline in this case did not contain metal stripping, as it was placed before the enactment of the law, making it nearly impossible for an above-ground surveying crew to detect it.

companies to share their survey data. El Paso provided Gullett's full survey to potential bidders, and there is nothing to suggest that bidders were confused about the extent of El Paso's due diligence, which consisted of hiring Gullett to map the pipeline route using an M-scope and visual inspection to locate foreign crossings. Nor is there anything in the contract to indicate that the parties intended El Paso to have any additional due diligence obligation.

The dissent argues that El Paso's due diligence did not meet the industry standard because El Paso did not locate and disclose 85-90% of foreign crossings. As the dissent notes, we have discussed due diligence in terms of industry practice. ___ S.W.3d at ___ (citing *Exxon Corp. v. Emerald Oil & Gas Co., L.C.*, 348 S.W.3d 194, 206 (Tex. 2006)). But the dissent essentially ignores the industry practice for locating foreign crossings on pipelines more than fifty years old, focusing on a numerical standard that is not supported by the record, which it believes should apply in every case. Moreover, the dissent disregards the parties' agreement that MasTec, which was given the complete alignment sheets and blank contract before it submitted a bid, acknowledged and assumed the risk of unknown foreign crossings, "notwithstanding" any other provision in the contract or any information furnished by El Paso. MasTec agreed that the work to be performed under the contract, including "all . . . procedures and techniques necessary to perform the Work," which required MasTec to "fully acquaint[] itself with the site . . . accessibility, soil structure, subsurface conditions, obstruction and all other conditions pertaining to the Work," was consistent with "accepted industry standards." Were we to hold, as the dissent would have us do, that locating less than 85-90% of foreign crossings is evidence of failure to exercise due diligence, we would disallow parties to define by contract what sort of diligence is due or to allocate by agreement the risk of additional unknown

foreign crossings, a result that runs counter to the freedom to contract. *See Gym-N-1 Playgrounds, Inc. v. Snider*, 220 S.W.3d 905, 912 (Tex. 2007). We refuse to amend the contract judicially to substitute an unsupported standard for the contracted-for requirement that El Paso "*will have* exercised due diligence."

El Paso's initial obligation to have exercised due diligence does not limit the risk allocated to MasTec for omissions and inaccuracies in El Paso's foreign crossings information. In fact, the record indicates that MasTec understood the joint obligation contemplated by the contract. MasTec's comptroller for the project testified that "[i]t's standard procedure in every job" for the contractor to survey a pipeline's right-of-way to identify foreign crossings and their exact location. He further testified that such work was within MasTec's scope of work under this contract, and that MasTec's bid included the cost of hiring a surveying crew to locate foreign crossings. MasTec included a 15% markup in the bid as a contingency for undiscovered foreign crossings, higher than the 10% usually included for similar projects. Additionally, MasTec's senior vice president acknowledged that, under Article 7.1(e) of the contract ("anything in this Contract . . . notwithstanding"), MasTec assumed the risk of unknown foreign crossings. In its response to El Paso's motion for judgment notwithstanding the verdict, MasTec even admitted that if El Paso exercised due diligence in identifying foreign crossings, "MasTec would be responsible for the costs associated with those crossings unidentified on the Drawings." The problem arises in this case because although MasTec understood the risk of underground surprises and knew it assumed the risk for such surprises, even including a contingency markup in its bid, MasTec, which was new to pipeline construction, underestimated the amount of that risk and submitted a very low bid. The role

of the courts is not to protect parties from their own agreements, but to enforce contracts that parties enter into freely and voluntarily. *See Wood Motor Co. v. Nebel*, 238 S.W.2d 181, 185 (Tex. 1951).

MasTec argues that our construction of the contract renders meaningless other provisions, such as those relating to weather conditions, acts of God, and bodily injury. But those conditions and circumstances do not arise in the context of the physical environment of the pipeline's path, and thus do not fall within the plain language of the "all risks" provision at issue here, which limits the risks MasTec assumed to "conditions pertaining to the Work." The fact that those other risks are expressly addressed elsewhere in the contract does not affect the meaning of the "all risks" provisions in 7.1(e) and 8.1(a)(7). In fact, those other contract provisions support our reading of the contract because they show that the parties knew how to state clearly when some risks were not to be assumed by MasTec.

Our jurisprudence supports this construction of the contract. In *Lonergan v. San Antonio Loan & Trust Co.*, we held that for an owner to be liable to a contractor for a breach of contract based on faulty construction specifications, the contract must contain terms that could fairly imply the owner's "guaranty of the sufficiency of the specifications," which were provided to the owner by an architect. 104 S.W. at 1066. Here, as in *Lonergan*, El Paso did not guarantee the accuracy of Gullett's alignment sheets. El Paso and MasTec both relied on what Gullett's surveyors were able to locate, with the negotiated provision that MasTec would confirm the surveyor's work and assume the risks of "subsurface conditions, obstructions, and other conditions pertaining to the Work." We adhere to the "practically . . . universal rule" that "where one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation,

because unforeseen difficulties are encountered." *City of Dallas v. Shortall*, 114 S.W.2d 536, 540 (Tex. 1938) (internal quotation marks omitted).

Someone has to bear the loss of the additional costs of constructing the pipeline around the undiscovered foreign crossings. As in *Lonergan*, "the parties were each competent to contract, and there is no circumstance indicating the slightest unfairness in the transaction." 104 S.W. at 1065. While MasTec was new to this type of construction project, it is a sophisticated party and presumably had experienced attorneys review the contract. *See Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 179 (Tex. 1997) (allowing sophisticated parties to contractually preclude a claim for fraudulent inducement); *see also Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 350 (Tex. 2011). And there is nothing to suggest that the contractual provisions at issue here are unique or novel. Sophisticated parties, like all parties to a contract, have "an obligation to protect themselves by reading what they sign." *Thigpen v. Locke*, 363 S.W.2d 247, 253 (Tex. 1962). Ultimately, this contract "constitute[s] the allocation by market participants of risks and benefits" regarding the pipeline's construction. *Provident Life Ins. & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 220 (Tex. 2003). "The Court's role is not to redistribute these risks and benefits but to enforce the allocation that the parties previously agreed upon." *Id.* (citing 11 RICHARD A. LORD, WILLISTON ON CONTRACTS § 31.5 (4th ed. 2003)).

We have an obligation to construe a contract by the language contained in the document. We have "long recognized Texas' strong public policy in favor of preserving the freedom of contract." *Fairfield Ins. Co. v. Stephens Martin Paving, L.P.*, 246 S.W.3d 653, 664 (Tex. 2008); *see also Wood Motor Co. v. Nebel*, 238 S.W.3d 181, 185 (Tex. 1951). "Freedom of contract allows parties to . . .

allocate risk as they see fit." *Gym-N-I Playgrounds, Inc.*, 220 S.W.3d at 912. Contract enforcement is an "indispensable partner" to the freedom of contract. *Fairfield*, 246 S.W.3d at 664. Were we to hold in MasTec's favor, and conclude that El Paso must bear the risk of unknown underground obstacles under this contract, we would render meaningless the parties' risk-allocation agreement and ultimately prohibit sophisticated parties from agreeing to allocate risk in construction contracts. *See Gyn-N-I Playgrounds, Inc.*, 220 S.W.3d at 912; *Italian Cowboy Partners*, 341 S.W.3d at 333 (instructing that we examine the entire writing and harmonize all provisions, rendering none meaningless). That result would undermine the longstanding policy of this state.

V. Conclusion

For the reasons expressed above, we hold that the contract allocated risk for undiscovered foreign crossings to MasTec, and MasTec therefore must bear the loss of additional costs associated with the unknown foreign crossings. Because MasTec was contractually obligated to bear this loss, we agree with the trial court that the jury's answers to questions about MasTec's recovery for breach of contract based on due diligence are immaterial. Accordingly, we reverse the court of appeals' judgment and reinstate the judgment of the trial court.

Paul W. Green
Justice

OPINION DELIVERED: December 21, 2012

IN THE SUPREME COURT OF TEXAS

NO. 10-0648

EL PASO FIELD SERVICES, L.P. AND
GULFTERRA SOUTH TEXAS, L.P. F/K/A/
EL PASO SOUTH TEXAS, L.P.,
PETITIONERS,

v.

MASTEC NORTH AMERICA, INC.
AND MASTEC, INC.,
RESPONDENTS

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

JUSTICE GUZMAN, joined by JUSTICE MEDINA and JUSTICE LEHRMANN, dissenting.

Since early in Texas's statehood, this Court has recognized that specific laws prevail over conflicting general laws.[1] For over eight decades, we have applied the same principle when construing contracts.[2] In this contract dispute over a due diligence obligation, two clauses required El Paso to perform due diligence in locating foreign crossings while another clause stated that MasTec assumed all risk pertaining to the work, notwithstanding other provisions in the contract. Our time-honored rules of construction require us to interpret the specific due diligence provisions

[1] *Story v. Runkle*, 32 Tex. 398, 400 (1869).

[2] *Kuntz v. Spence*, 67 S.W.2d 254, 257 (Tex. 1934); *Great S. Life Ins. Co. v. Cherry*, 24 S.W.2d 512, 513 (Tex. Civ. App.—Eastland 1930, writ ref'd).

as an exception to the general all risk provision, thereby giving both meaning. But today, the Court departs from that time-honored tradition and negates the due diligence provisions in their entirety. Whatever method an owner chooses to locate foreign crossings, the industry standard is to disclose 85–90% of them. El Paso disclosed only 35%. The jury was entitled to—and did—find that El Paso did not exercise due diligence. Because I cannot agree with the Court's significant departure from our long line of precedents governing our approach to contract construction, I respectfully dissent.

I. Factual Background

This case involves the replacement of a metal pipeline. When a pipeline crosses a foreign object (such as other pipelines, roads, rivers, fences, and other structures), that object is referred to as a foreign crossing. Replacing the portion of a pipeline at a foreign crossing often requires the investment of a significant amount of resources, most notably manpower. It is customary for pipeline owners to compile information on foreign crossings (known as alignment sheets) as the foreign crossings to their pipelines are built or modified. As a matter of due course, at the time a pipeline is going to be replaced, owners make their alignment sheets available to bidding contractors so they evaluate the potential need for additional time or resources and factor that additional criteria into the bid. In some cases, a contractor will be able to inspect the pipeline easement before bidding the job, but such an inspection will not always detect fiberglass or plastic pipelines. Metal detectors cannot detect such lines if they have no metal tracers, and pipelines are not always marked on the surface. The most accurate pre-bid method of identifying foreign crossings is from the owner's alignment sheets.

Here, El Paso purchased a 68-mile pipeline built during World War II. El Paso decided to replace the line because it was too shallow. El Paso had received the preliminary alignment sheets dating to before the pipeline was built. It had no alignments sheets showing foreign crossings built since 1940. An El Paso representative described its alignment sheets as "very inadequate, but it is all we had to work with."

Accordingly, El Paso hired a surveying company to assess the route and identify foreign crossings. The surveyor testified that El Paso did not ask him to detect lines with no metal. The surveyor walked the line using metal detectors and noting physical markings of lines. At a pre-bid meeting, El Paso disclosed to pipeline contractors the surveyor's alignment sheets—which showed 280 foreign crossings. The industry practice for contractors is to allocate a 10–15% contingency in a bid to account for, among other things, unexpected and unidentified foreign crossings.

El Paso owned another pipeline of the same size in the same right of way. El Paso had a survey for that adjacent pipeline that showed significantly more foreign crossings than the survey of the pipeline at issue here.[3]

After soliciting bids, El Paso selected MasTec, which submitted the lowest bid. Importantly, the contract they agreed to twice specified that "[El Paso] will have exercised due diligence in locating foreign pipelines and utility line crossings." The contract also provided "that anything in this Contract or in any representations, statements or information made or furnished by [El Paso] or any of its representatives notwithstanding, [MasTec] assumes full and complete responsibility for

[3] Valero also owned a pipeline in the same right of way. A Valero representative was on site while MasTec was replacing El Paso's pipeline, and Valero's alignment sheets showed significantly more foreign crossings than El Paso disclosed. El Paso never contacted Valero regarding this information.

any such conditions pertaining to the Work, the site of the Work or its surroundings and all risks in connection therewith."

Once the pipeline replacement construction commenced, MasTec hired Steve Edwards, who specialized in detecting foreign crossings, to work ahead of the construction crew to confirm the location of foreign crossings. Edwards used a metal detector, referred to as an M-scope, to locate metal lines as well as fiberglass and PVC lines with metal tracers. But the device could not detect lines containing no metal. Edwards testified that the only method to identify such lines is to speak with landowners to generally determine where pipelines are situated and then pressure wash and remove the soil to locate the lines.

In a typical job, Edwards testified he would discover 5–10% more foreign crossings than an owner had disclosed. Here, Edwards located approximately 794 total foreign crossings[4]—284% more than El Paso disclosed. The jury found that El Paso failed to comply with the contract. At trial, the jury was asked whether El Paso exercised due diligence in locating foreign crossings. The jury found that El Paso breached the contract.

II. Discussion

The primary goal when construing a written contract is to ascertain the true intent of the parties as expressed in the writing. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 662 (Tex. 2005). We accomplish this by examining the entire writing so as to harmonize all provisions and render none meaningless. *Id.*; *King v. Dallas Fire Ins. Co.*, 85 S.W.3d 185, 193 (Tex. 2002). "No

[4] As the Court notes, other evidence in the record indicates there could have been even more than 794 foreign crossings, but MasTec only claims there were 794 foreign crossings in this appeal. __ S.W.3d at __, n.2.

single provision taken alone will be given controlling effect; rather, all the provisions must be considered with reference to the whole instrument." *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983). To harmonize conflicting provisions, we treat narrow provisions as exceptions to general provisions. *Forbau v. Aetna Life Ins. Co.*, 876 S.W.2d 132, 133–34 (Tex. 1994); *see also Jackson v. State Office of Admin. Hearings*, 351 S.W.3d 290, 297 (Tex. 2011); *Kuntz v. Spence*, 67 S.W.2d 254, 257 (Tex. 1934); *Great S. Life Ins. Co. v. Cherry*, 24 S.W.2d 512, 513 (Tex. Civ. App.—Eastland 1930, writ ref'd).

Construing the contract here requires that we examine the term due diligence. Because the contract did not define due diligence, we must ascribe the term its ordinary meaning. *Heritage Res., Inc. v. NationsBank*, 939 S.W.2d 118, 121 (Tex. 1996). As the Court notes, Black's Law Dictionary defines due diligence as "[t]he diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation." BLACK'S LAW DICTIONARY 523 (9th ed. 2009). We have stated that "'diligence' is relative and incapable of exact definition. Its meaning must be determined by the circumstances of each case. Reasonable diligence has been defined as such diligence that an ordinarily prudent and diligent person would exercise under similar circumstances." *Strickland v. Lake*, 357 S.W.2d 383, 384 (Tex. 1962). Due diligence "is usually a question of fact." *Id*.

In construing the term as requiring MasTec to shoulder the risk for El Paso's lack of diligence, the Court ignores well settled rules of construction that no clause should be rendered meaningless and that a narrow provision is construed as an exception to a conflicting general

provision. And because there was some evidence that El Paso failed to use due diligence, we should not disturb the jury's finding.

A. The Court Negates the Due Diligence Requirements

The Court maintains that its reading of the contract does not negate the due diligence requirements but instead contemplates a joint effort with El Paso conducting a survey and MasTec assuming the risk for the inaccuracies in the survey. But substantively, this reading negates the due diligence clauses. What if El Paso hired a surveyor that found zero foreign crossings? Is it plausible that the parties would intend that such a finding constitutes due diligence? Under the Court's rationale, such an illogical approach would have been the intended outcome merely because El Paso hired a surveyor. The Court is in effect rewriting the contract to negate the due diligence requirements and, in so doing, violates our long-standing rules of interpretation.

We determine the intent of the parties by assessing the entire writing and giving effect to all provisions. *Valence Operating*, 164 S.W.3d at 662. In order to assure that no one provision controls all others, we have long treated specific provisions as exceptions to general provisions. *Forbau*, 876 S.W.2d at 133–34; *Kuntz*, 67 S.W.2d at 257; *Cherry*, 24 S.W.2d at 513. The clause the Court relies on is unquestionably general (that MasTec assumes all risk, notwithstanding other provisions). The clauses stating that El Paso must use due diligence in locating foreign crossings are specific. But rather than giving both provisions meaning (as we must) by treating the diligence provisions as a limited exception to the risk provision, the Court negates the diligence provisions in their entirety. To do so forces MasTec to shoulder the due diligence burden the contract squarely places on El Paso. Here, the contract requires that we give meaning to both provisions and allow the jury to decide

whether El Paso's disclosure satisfied its due diligence obligation. The Court ignores well settled rules and, in error, disregards the jury's verdict.

To illustrate the importance of ascribing some meaning to a due diligence clause, an example is helpful. The parties' contract contains a force majeure clause that relieves each party of liability for failure to perform due to a force majeure event. This force majeure clause would presumably include hurricanes. Hurricanes are risk. Under the Court's view, MasTec would assume the risk of a hurricane in the all risk clause, despite the fact that it specifically bargained to not assume the risk of a hurricane in the force majeure clause.[5] But such an interpretation renders the force majeure clause meaningless—an outcome we seek to avoid. *Valence Operating*, 164 S.W.3d at 662; *Coker*, 650 S.W.2d at 393. The rules of construction are in place to determine the intent of the parties when harmonizing conflicting provisions. *Valence Operating*, 164 S.W.3d at 662. They do precisely that here by specifically allocating narrow risks (such as force majeure events and due diligence for locating foreign crossings) and then shouldering MasTec with all other risk.

There are circumstances in which an all risk provision may trump a due diligence provision. For example, the due diligence clause could: (1) state the information provided was a courtesy but due diligence was within the contractor's scope of work;[6] (2) disclaim any accuracy of the due

[5] Granted, the all risk clause relates to "conditions pertaining to the Work." But MasTec encountered one hurricane and two tropical storms during the work, which dropped 66" of rain on the work site. No one disputes that this rain had a significant impact on the work site.

[6] *See, e.g.*, *Geodyne Energy Income Prod. P'ship I-E v. Newton Corp.*, 161 S.W.3d 482, 488 (Tex. 2005).

diligence; or (3) have the other party disclaim any reliance on the due diligence.[7] This contract contained no such disclaimers.

The description of El Paso's alignment sheets as due diligence along with the lack of disclaimers brings this case outside the ambit of our holdings in *Lonergan v. San Antonio Loan & Trust Co.*, 104 S.W. 1061 (Tex. 1907), and *City of Dallas v. Shortall*, 114 S.W.2d 536 (Tex. 1938). *Lonergan* involved an owner supplying an architect's defective specifications to a contractor. *Lonergan*, 104 S.W. at 1065. We based our holding that the owner was not liable to the contractor for the defective specifications on two principles. *Id*. First, the contractor in all probability knew better than the owner that the architect's specifications were defective. *Id*. Here, El Paso had superior knowledge of the foreign crossings as it owned the pipeline and owned another pipeline in the same easement with alignment sheets showing significantly more foreign crossings. Second, in *Lonergan*, the contract in no way made the owner the guarantor of the accuracy of the specifications. *Id*. at 1066. Here, the contract stated that the owner's investigation and disclosure of the foreign crossings was "due diligence." *Lonergan* does not support El Paso.

Likewise, *Shortall* does not support El Paso. There, the owner stated: "In case these specifications or plans are not thoroughly understood, parties making bids shall apply to the Engineer for further information before bids are submitted, as no claims on any such grounds will be entertained . . . ." 114 S.W.2d at 538. El Paso made no such disclaimer advising that the foreign crossings "are not thoroughly understood" but instead stated that its alignment sheets constituted due

[7] *See, e.g.*, *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 331 (Tex. 2011) (discussing the effect of disclaimers of reliance on fraudulent inducement claims).

diligence. El Paso's use of the term due diligence and the lack of any disclaimers effectively vitiate its reliance on *Lonergan* or *Shorthall*.

B. There Is Some Evidence El Paso Did Not Use Due Diligence

Construing the contract to mean that the due diligence clauses required El Paso to use due diligence (as they must), we must determine if there is some evidence supporting the jury's finding that El Paso breached its obligation. We have defined due diligence as what an ordinarily prudent and diligent person would do in similar circumstances. *Strickland*, 357 S.W.2d at 384. We have also discussed due diligence in the oil and gas context in terms of industry practice. *See Exxon Corp. v. Emerald Oil & Gas Co., L.C.*, 348 S.W.3d 194, 206 (Tex. 2011).

Here, the testimony indicates that the industry standard is for contractors to allot a 10–15% contingency for such things as foreign crossings an owner did not disclose. In other words, the industry standard is for owners to disclose 85–90% of foreign crossings. El Paso disclosed 35% of the foreign crossings. The gross disparity between the industry standard and El Paso's disclosure evinces that El Paso failed to use due diligence and the jury's finding must not be disturbed.

The Court attempts to distinguish this undisputed testimony in two ways: (1) that industry standards are not necessarily synonymous with industry practices; and (2) that the standard for due diligence for older pipelines is the same as for newer pipelines. The record is devoid of support for either position. First, the Court is unable to cite any authority for treating industry standards and practices differently in the due diligence context. If an owner used a novel method of locating pipelines and found 100% of them, it would be difficult to claim that it failed to use due diligence.

Regardless of the practice El Paso employed (hiring a surveyor and not instructing it to locate non-metal lines), it grossly failed to meet the industry standard (identifying 85–90% of pipelines). The failure in the Court's interpretation is that El Paso warranted the work in locating foreign crossings as due diligence: "[El Paso] will have exercised due diligence in locating foreign pipelines and utility line crossings." Under the guise of industry practice, the Court changes the focus of due diligence to the hiring of a surveyor—not the locating of foreign crossings.

Neither is there support for the Court's assertion that the standard for older pipelines is the same. The Court again conflates categories to rewrite the contract. Due diligence looks at similar situations. *Strickland*, 357 S.W.2d at 384. Older pipelines can have non-metal foreign crossings that were placed before laws required metal tracers in non-metal lines. El Paso's method of using a metal detector and visual inspection may well be suitable for locating foreign crossings for a newer pipeline (which involves few unidentified, non-metal foreign crossings). But El Paso's method was unsuitable for an older pipeline with a significant number of non-metal lines, as evinced by El Paso's 1940s survey of an adjacent pipeline identifying significantly more foreign crossings than the recent survey of the pipeline at issue. Due diligence, as it is commonly understood, requires that El Paso use greater efforts in locating foreign crossings in an older pipeline, such as instructing the surveyor to locate non-metal lines. El Paso could have avoided its obligation, assuming it considered it onerous, by simply disclaiming due diligence. It did not do so here.

In any event, El Paso's methodology was so deficient that it identified only 35% of foreign crossings, far less than the industry standard of 85–90% and even less than El Paso's survey from

its adjacent pipeline in the 1940s. There is some evidence to support the jury's finding that El Paso breached its obligation.

III. Conclusion

Well settled rules of contract construction require us to construe the due diligence clauses in this contract as a limited exception to the all risk clause. Ignoring these well settled rules, the Court renders meaningless a more specific provision. The industry standard is for owners to disclose 85–90% of foreign crossings. Here, El Paso disclosed a mere 35%. In sum, the jury was entitled to find that El Paso breached its due diligence obligation, and we should not set aside its finding. I respectfully dissent.

_____
Eva M. Guzman
Justice

OPINION DELIVERED: December 21, 2012

IN THE SUPREME COURT OF TEXAS

NO. 10-0666

THE CITY OF ROUND ROCK, TEXAS AND
ROUND ROCK FIRE CHIEF LARRY HODGE, PETITIONERS,

v.

JAIME RODRIGUEZ AND ROUND ROCK
FIRE FIGHTERS ASSOCIATION, RESPONDENTS

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

Argued December 8, 2011

JUSTICE GREEN delivered the opinion of the Court, in which JUSTICE JOHNSON, JUSTICE WILLETT, JUSTICE GUZMAN, JUSTICE BOYD, and JUSTICE DEVINE joined.

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

In this statutory construction case, we are asked to decide whether section 101.001 of the Texas Labor Code grants unionized public-sector employees in Texas the right to, upon request, have union representation during an internal investigatory interview when the employee reasonably believes the interview may result in disciplinary action. The court of appeals held that section 101.001 confers such a right. 317 S.W.3d 871, 875 (Tex. App.—Austin 2010, pet. granted). Although private-sector employees and federal public-sector employees both possess such a

representation right, we hold that the Texas Legislature has not granted that right to public-sector employees in Texas. *Cf.* 5 U.S.C. § 7101(b); *NLRB v. Weingarten, Inc.*, 420 U.S. 251, 260 (1975) (interpreting 29 U.S.C. § 157). We reverse the judgment of the court of appeals and render judgment that section 101.001 of the Labor Code does not confer on public-sector employees in Texas the right to union representation at an investigatory interview that the employee reasonably believes might result in disciplinary action.

I. Factual Background

In July 2008, Round Rock Fire Chief Larry Hodge called fire fighter Jaime Rodriguez into a meeting in Chief Hodge's office. In the room, Chief Hodge was joined by the assistant fire chief and Rodriguez's battalion chief. Chief Hodge told Rodriguez that the purpose of the meeting was to conduct an internal interview of Rodriguez regarding a personnel complaint that Chief Hodge had filed against him. Chief Hodge alleged that Rodriguez had misused his sick leave earlier that month to get a physical examination to pursue employment with the Austin Fire Department. The complaint stated, "Since this is an Internal Interview you may not be represented during our meeting; however, if a pre-disciplinary meeting is set following our meeting you would be eligible for representation at that time." The complaint also prohibited Rodriguez from discussing the complaint with anyone other than Rodriguez's attorney, including union leadership and other union members.

Before the interview began, Rodriguez asserted the right to union representation, requesting to have a representative from the Round Rock Fire Fighters Association (the Association) present during the interview. Chief Hodge denied Rodriguez's request and interviewed him without Association representation. In October 2008, Chief Hodge again met with Rodriguez to discuss

potential discipline for the conduct alleged in the personnel complaint. Rodriguez did not ask for a union representative at that meeting. Chief Hodge allowed Rodriguez to choose between being discharged and accepting a five-day suspension without right of appeal. A few days later, Rodriguez executed an agreement that opted for the five-day suspension.

Three months later, Rodriguez and the Association filed a declaratory judgment action, alleging that Chief Hodge and the City of Round Rock violated Rodriguez's right to union representation, and asserting that such a right is conferred by section 101.001 of the Texas Labor Code. Rodriguez and the Association also sought to enjoin Chief Hodge and the City from denying Rodriguez and other fire fighters their right to representation at future investigatory interviews. The trial court denied a motion for summary judgment filed by Chief Hodge and the City, and granted a motion for summary judgment filed by Rodriguez and the Association. In its final judgment, the trial court declared that Rodriguez was denied his right to union representation under section 101.001 of the Labor Code, and enjoined Chief Hodge and the City from further denying fire fighters the right to, upon request, be represented by the Association at investigatory interviews they reasonably believe might result in discipline. The court of appeals affirmed the decision. 317 S.W.3d at 875.

II. The *Weingarten* Decision

The right to union representation in an investigatory interview derives from the United States Supreme Court's decision in *NLRB v. Weingarten*, 420 U.S. 251 (1975), the seminal case regarding private-sector employee representation rights. In that case, an employer challenged the National

Labor Relations Board's (NLRB) determination that Section 7 of the National Labor Relations Act (NLRA) granted private-sector employees the right to have a union representative present at an investigatory interview when the employee reasonably believes that the interview could result in disciplinary action. *Id.* at 260. The NLRB determined that this right inhered in Section 7's guarantee of the right of employees to engage in "concerted activities for . . . mutual aid or protection." *Id*. at 252; *see* 29 U.S.C. § 157. The Supreme Court held that the NLRB permissibly construed Section 7 to confer the representation right, noting that the NLRB's construction may not be required by the statute's text. *Weingarten*, 420 U.S. at 266–67. In doing so, the Supreme Court explained that the NLRB's decisions are "subject to limited judicial review" because of the NLRB's "special function" in interpreting Section 7 and its "special competence" in the field of labor-management relations. *Id.* at 267. Following *Weingarten*, Congress extended the representation right to federal public-sector employees. 5 U.S.C. § 7101(b). Thus, the right to union representation during investigatory interviews currently applies nationally to all private-sector employees and federal public-sector employees.

III. Statutory Construction

Statutory construction is a question of law, and review is conducted de novo. *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437 (Tex. 2009). Our ultimate purpose when construing a statute is to discover the Legislature's intent. *Id*. We examine the statute's text, as it provides the best indication of legislative intent. *Id.*

A. The Plain Language of Section 101.001 Does Not Confer the Representation Right Asserted by Rodriguez

Section 101.001, captioned "Right to Organize," provides: "All persons engaged in any kind of labor may associate and form trade unions and other organizations to protect themselves in their personal labor in their respective employment." TEX. LAB. CODE § 101.001; *see also Waffle House, Inc. v. Williams*, 313 S.W.3d 796, 809 (Tex. 2010) ("[T]he title of [a statute] carries no weight, as a heading does not limit or expand the meaning of a statute." (internal quotation marks omitted)). While the statute is broad, we do not read it as conferring, by its plain language, the specific right to have a union representative present at an investigatory interview that an employee reasonably believes might result in disciplinary action. In fact, on its face, the statute confers only one explicit right: the right to organize into a trade union or other organization. By its plain terms, the statute makes it lawful for employees to form labor unions or other organizations, and specifically, those organizations created to protect them in their employment. It says nothing about any rights that may attach once such unions are formed.

Indeed, this Court has previously recognized this construction of section 101.001 when discussing the joint purpose of a former codification of section 101.001 and section 101.002 of the Labor Code, which addresses the rights of individuals to influence others in employment matters. *See Best Motor Lines v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., Local No. 745*, 237 S.W.2d 589, 598 (Tex. 1951). We stated that these statutes are "the very statutes which give the unions life" and that, "[u]nder these statutes, labor unions are permitted to organize and work for the betterment of their members." *Id.* We clearly delineated the specific roles of each

statute: Section 101.001 confers the right to organize into a union, and section 101.002 then provides substance to that right by allowing employees to influence other employees to enter, refuse, or quit employment. *Id.*; *see also* TEX. LAB. CODE §§ 101.001, .002; *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 636 n.18 (1975) (noting that a former codification of sections 101.001 and 101.002 "declare that it is lawful for workers to associate in unions and to induce other persons to accept or reject employment"); *United Mine Workers of Am. v. Coronado Coal Co.*, 259 U.S. 344, 386 n.1 (1922) (describing a former codification of section 101.001 as being enacted for the purpose of "[l]egalization of labor unions and labor combinations"); *Webb v. Cooks', Waiters' & Waitresses' Union, No. 748*, 205 S.W. 465, 469 (Tex. Civ. App.—Fort Worth 1918, writ ref'd) (stating that a former codification of section 101.001 "provid[es] that it shall be lawful for persons engaged in any kind of labor to associate themselves together and form unions" and that a former codification of section 101.002 then makes a "declaration relating to the rights and privileges of such associations"). Our sister court, the Court of Criminal Appeals, has also recognized the limited scope of a former codification of section 101.001, stating that it "grants the right to a person to organize or become a member of a labor union." *Ex parte Waltrip*, 207 S.W.2d 872, 874 (Tex. Crim. App. 1948).

This reading of section 101.001 comports with other labor-related provisions in the Texas statutes, which are premised on section 101.001's right to form unions. While section 101.001 protects the right of employees to organize into labor unions, section 101.052 of the Labor Code protects the "right to work." *See* TEX. LAB. CODE § 101.052; *see also Lunsford v. City of Bryan*, 297 S.W.2d 115, 117 (Tex. 1957) (describing a former codification of section 101.052 as our "right-to-

work" statute). This Court has recognized that the "intent [of the right-to-work statute] seems obvious to protect *employees in the exercise of the right* of free choice of joining or not joining a union." *Lunsford*, 297 S.W.2d at 117 (emphasis added); *see also McNatt v. Lawther*, 223 S.W. 504, 505 (Tex. Civ. App.—Amarillo 1920, no writ) (holding that, prior to enactment of the right-to-work statute, a previous codification of section 101.001 protected only the right of employees to organize, and thus it allowed employers to fire employees for joining a union).

Similarly, our construction of section 101.001—as conferring the right to organize into unions— is in accord with Chapter 617 of the Texas Government Code, which defines specific rights of Texas public-sector labor unions. *See* TEX. GOV'T CODE §§ 617.001–.003 (expressly disarming public-sector unions of rights usually enjoyed in the private sector, such as striking and collective bargaining); *id.* § 617.005 (granting public-sector unionized employees the limited right "to present grievances concerning their wages, hours of employment, or conditions of work either individually or through a representative that does not claim the right to strike"); *see also* Tex. Att'y Gen. Op. No. H-422 (1974) (determining that implicit in section 617.005 "is the notion that public officials should meet with public employees or their representatives at reasonable times and places to hear their grievances concerning wages, hours of work, and conditions of work"). Chapter 617, while conferring the right to present grievances, does not confer the right to union representation during investigatory interviews.

B. Section 7 of the NLRA Differs Significantly from Section 101.001

Although we look to federal statutes and case law when a Texas statute and federal statute are "animated in their common history, language, and purpose," *see Barr v. City of Sinton*, 295

S.W.3d 287, 296 & n.42 (Tex. 2009), key differences between the NLRA and the state statutes here compel a different result from that reached by the United States Supreme Court in *Weingarten*. *See Weingarten*, 420 U.S. at 260.

Section 7 of the NLRA states, in relevant part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .

29 U.S.C. § 157. In contrast, section 101.001 provides:

> All persons engaged in any kind of labor may associate and form trade unions and other organizations to protect themselves in their personal labor in their respective employment.

TEX. LAB. CODE § 101.001. Although Rodriguez and the dissent argue that the language is "substantially similar," ___ S.W.3d at ___, we read the statutes as substantially dissimilar.

Section 7 confers four rights that union members can invoke for their protection: (1) "self-organization"; (2) "form, join, or assist labor organizations"; (3) "bargain collectively through representatives of their own choosing"; and (4) "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. The *Weingarten* right recognized by the Supreme Court is rooted in that fourth right—"the individual right of the employee, protected by [Section] 7 of the Act, 'to engage in . . . concerted activities for . . . mutual aid or protection.'" *Weingarten*, 420 U.S. at 252 (omissions in original). Because Section 7 guarantees private-sector employees the specific right to collective bargaining and the more general right to engage in other concerted activity toward collective bargaining or some other sort of aid or

protection—rights that attach once unions are formed—the Supreme Court concluded that the language of Section 7 could include the *Weingarten* right. *See id* at 260–61. While section 101.001 mirrors Section 7 in conferring the first right—a right to organize—and part of the second—a right to form unions and other organizations—granted to private-sector employees, nothing in section 101.001 allows us to reach the same conclusion. *See* TEX. LAB. CODE § 101.001. Just as the Fifth Circuit declined to find a representation right for railway employees because the Railway Labor Act lacks the "concerted activities" language found in the NLRA, *see Johnson v. Express One Int'l Inc.*, 944 F.2d 247, 251 (5th Cir. 1991), we cannot find a representation right in section 101.001 without similar "concerted activities" language. *See id.* (warning against applying NLRA case law to statutes with language that "differs substantially" from the NLRA). *Cf. N.Y.C. Transit Auth. v. N.Y. State Pub. Emp't Relations Bd.*, 864 N.E.2d 56, 56 (N.Y. 2007) (holding that a state statute that differed materially from the text of NLRA Section 7 and lacked "concerted activities for . . . mutual aid or protection" language did not give a representation right to public-sector employees).

The dissent suggests that the mere inclusion of the word "protect" in the statute indicates the Legislature's intent to grant unionized public-sector employees specific rights to enable them to seek protection in their employment, including the right to union representation during investigatory interviews.[1] ___ S.W.3d at ___. But, as explained above, there is nothing in the statute to indicate

[1] To reach this conclusion, the dissent's construction impliedly requires "associate" to mean "to join together for the purpose of *representing* each other." In other words, the dissent's construction of section 101.001 would read that employees may "join together for the purpose of *representing* each other . . . to protect themselves." However, "associate" means "to come together as partners, fellow workers, colleagues, friends, companions, or allies" and does not include a right of representation. *See, e.g.*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (2002). It is unclear what limits, if any, the dissent believes the statute imposes on that right to representation, or whether the dissent would somehow judicially impose limits on the statutory language to recognize only the narrow representation right at issue in this case. The plain language of section 101.001 supports our holding in this case, negating the necessity to impose

such an intent. We read "protect" as describing the purpose around which individuals would organize and form unions, pursuant to the right conferred under section 101.001. The Legislature grants and denies rights to unionized public-sector employees by specific enactment. *See, e.g.*, TEX. GOV'T CODE § 617.002(a) (denying public-sector employees the right to bargain collectively); *id.* § 617.003 (denying public-sector employees the right to strike); *id.* § 617.005 (granting public-sector employees the right to present their grievances concerning wages, hours, or conditions of work through a union representative). At most, the inclusion of "protect" serves as a limitation on the type of union or organization—those formed to protect employees in their employment—whose members are subject to those specific enactments that grant rights, such as the right to present work-related grievances, and deny rights, such as collective bargaining and the right to strike. This reading does not deprive section 101.001 of meaning; rather, when read in connection with the grants and denials of specific rights, it gives section 101.001 precisely the meaning the plain language indicates the Legislature intended: Texas public employees have the right to band together and form labor unions.

C. The Supreme Court's Analysis in *Weingarten* Does Not Apply

Weingarten provides little guidance for important reasons. First, there is no question that Section 7 of the NLRA and the *Weingarten* decision apply only to private-sector employees. *See* 29 U.S.C. § 152(2) (excepting from the definition of "employer" "the United States . . . or any State or political subdivision thereof"). It was not until after the *Weingarten* decision that Congress specifically extended the representation right to federal public-sector employees. *See* 5 U.S.C.

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any such limitations under section 101.001—a task that, even if it were required, is better suited for the Legislature.

§§ 7101(b), 7114(a)(2)(B). In the thirty-eight years since *Weingarten* was decided, the Texas Legislature has declined to enact similar legislation.

Second, Section 7 does not expressly confer the *Weingarten* right, and the Supreme Court recognized that. *See Weingarten*, 420 U.S. at 266–67. In *Weingarten*, the Court merely determined that the NLRB had permissibly construed Section 7 to find the *Weingarten* right rooted in the "concerted activities" portion of that statute, although the language of Section 7 may not actually grant the right. *See id.* (stating that even though the NLRB's construction "may not be required by [Section 7, it] is at least permissible under it"). The Court afforded the NLRB's construction considerable deference because, with its "special competence," the NLRB is entrusted with "responsibility to adapt the [NLRA] to changing patterns of life," and its construction of the NLRA is therefore "subject to limited judicial review." *See id.* at 264–68; *see also Pattern Makers' League of N. Am., AFL-CIO v. NLRB*, 473 U.S. 95, 100 (1985) ("Because of the [NLRB]'s 'special competence' in the field of labor relations, its interpretation of the [NLRA] is accorded substantial deference." (citing *Weingarten*, 420 U.S. at 266)); *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 500 (1978) (noting, when construing a different statute, that "[e]ven if the legislative history arguably pointed toward a contrary view, the [NLRB]'s construction of the statute's policies would be entitled to considerable deference" (citing *Weingarten*, 420 U.S. at 251)). In Texas, we have no NLRB equivalent. Instead, labor policy and regulation is determined exclusively by the Texas Legislature and the language of its legislative enactments. And, unlike the United States Congress, the Texas Legislature has not enacted legislation to confer the right to union representation on Texas public-sector employees during investigatory interviews.

Third, as explained above, the *Weingarten* decision was based on language in Section 7 that is absent from section 101.001. Without anything resembling Section 7's "concerted activities" language, section 101.001 cannot confer on Texas public-sector employees a right to have union representation during investigatory interviews they reasonably believe may result in disciplinary action.

D. Related State and Federal Statutory Enactments Support This Construction of Section 101.001

When a statute is clear and unambiguous, we do not resort to extrinsic aides such as legislative history to interpret the statute. *Entergy*, 282 S.W.3d at 442; *see Molinet v. Kimbrell*, 356 S.W.3d 407, 414 (Tex. 2011) ("[T]he Legislature expresses its intent by the words it enacts and declares to be the law."). In construing a statute, however, we presume that the Legislature acted with knowledge of the background law and with reference to it. *See Tex. Parks & Wildlife Dep't v. Dearing*, 240 S.W.3d 330, 351 (Tex. 2007).

The Legislature enacted the first codification of section 101.001 in 1899, long before Congress enacted the NLRA or the Supreme Court decided the *Weingarten* case. *See* Act of May 27, 1899, 26th Leg., ch. CLIII, 1899 Tex. Gen. Laws 262, 262. The original 1899 provision stated:

> [I]t shall be lawful for any and all persons engaged in any kind of work or labor, manual or mental, or both, to associate themselves together and form trade unions and other organizations for the purpose of protecting themselves in their personal work, personal labor, and personal service, in their respective pursuits and employments.

Id. At the time this provision was enacted, unions were attempting to clarify their position under recent state and federal antitrust legislation. *See Allen Bradley Co. v. Local Union No. 3, Int'l Bhd.*

of Elec. Workers, 325 U.S. 797, 803 (1945) (discussing this "well known history of the era between 1890 and 1914"). In 1890, Congress passed the landmark Sherman Antitrust Act, which included language broad enough to consider labor unions to be trusts. Sherman Act, ch. 647, 26 Stat. 209, 209–10 (1890) (codified as amended at 15 U.S.C. §§ 1–7); *see also Allen Bradley Co.*, 325 U.S. at 801 ("The Sherman Act as originally passed contained no language expressly exempting any labor union activities. Sharp controversy soon arose as to whether the Act applied to unions."); WILLIAM HOWARD TAFT, THE ANTI-TRUST ACT AND THE SUPREME COURT 2 (1914) ("Whether Congress intended it or not, it used language [in the Sherman Antitrust Act] that necessarily forbade the combination of laborers to restrain and obstruct interstate trade."). By 1889, Texas had enacted similar comprehensive antitrust legislation, and the Legislature amended Texas antitrust laws in 1899. *See* Act of May 25, 1899, 26th Leg., ch. CXLVI, 1899 Tex. Gen. Laws 246, 246; Act of March 30, 1889, 21st Leg., ch. 117, 1889 Tex. Gen. Laws 141, 141–42. Two days after passing those amendments, the Legislature enacted the 1899 right-to-organize statute, which included language clarifying labor's role under Texas's antitrust laws. *See* Act of May 27, 1899, 26th Leg., ch. CLIII, 1899 Tex. Gen. Laws 262, 262 ("[N]othing herein contained shall be construed to repeal, affect or diminish the force and effect of any statute now existing on the subject of trusts, conspiracies against trade, pools and monopolies."); *see Connell Constr. Co.*, 421 U.S. at 636 n.18 (citing the 1899 right-to-organize statute as "a good example" of state antitrust laws that tend to make labor activities more likely to violate state antitrust laws).

Courts of appeals have acknowledged this historical context when discussing the former codification of section 101.001. For example, the Seventh Court of Appeals surmised:

> It was probably the purpose of this legislation to make it clear that the early English decisions, which held labor unions under certain circumstances to be unlawful, and our own laws against trusts and combinations in restraint of trade, did not apply to labor unions. The act merely announced that there was no prohibition of law against such unions.

McNatt, 223 S.W. at 505; *see Webb*, 205 S.W. at 469 (harmonizing former codifications of sections 101.001 and 101.002 with Texas antitrust statutes).

As the Texas Legislature had done with the 1899 right-to-organize statute, the United States Congress enacted legislation in 1914 to exempt labor unions from antitrust laws. *See Md. & Va. Milk Producers Ass'n v. United States*, 362 U.S. 458, 464 (1960) (explaining that "Congress in 1914 inserted § 6 in the Clayton Act [to exempt] agricultural organizations, along with labor unions, from the antitrust laws."). The Clayton Act provides:

> Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations, instituted *for the purposes of mutual help* . . . or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objectives thereof; nor shall such organizations, or the members thereof, be held or construed to be *illegal combinations* or conspiracies in *restraint of trade*, under the anti-trust laws.

15 U.S.C. § 17 (emphasis added). This language from the Clayton Act uses terminology similar to that in Texas's 1899 right-to-organize statute, the predecessor to today's section 101.001. *See* Act of May 27, 1899, 26th Leg., ch. CLIII, 1899 Tex. Gen. Laws 262, 262 ("[T]he foregoing sections shall not be held to apply to any *combination or combinations* . . . for any other purpose in *restraint of trade* . . . ." (emphasis added)). In this historical context, it is clear that the 1899 right-to-organize statute aligns more closely with the Clayton Act of 1914, which partially exempted labor unions from violating federal antitrust laws, than with Section 7 of the NLRA, which was not enacted until

much later. The Supreme Court has recognized as much, listing a former codification of section 101.001 alongside the Clayton Act as legislation for the "[l]egalization of labor unions and labor combinations." *See United Mine Workers of Am.*, 259 U.S. at 386 n.1; *see also Connell Constr. Co.* 421 U.S. at 636 n.18 (noting that a former codification of section 101.001 "declare[s] that it is lawful for workers to associate in unions").

This legislative context supports a reading of the statute in line with the plain meaning of the statute—section 101.001 allows individuals to lawfully organize and form labor unions without violating antitrust laws.

E. If Representation Rights Are to Be Conferred on Texas Public-Sector Employees, The Legislature Must Make That Policy Determination

We recognize, as the dissent does, that there are good reasons for Texas public-sector employees to have the same access to union representation in investigatory interviews as private-sector employees and federal public-sector employees. *See* ___ S.W.3d at ___; *see*, *e.g.*, *Weingarten*, 420 U.S. at 262–64. In Texas, however, the Legislature must make this policy determination. *See FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 873 (Tex. 2000) (explaining that, in Texas, legislative power includes the power to set public policy as well as "many functions that have administrative aspects, including the power to provide the details of the law, to promulgate rules and regulations to apply the law, and to ascertain conditions upon which existing laws may operate"). Our role in statutory construction is merely to give effect to the Legislature's intent by examining the plain meaning of the statute. *See Kimbrell*, 356 S.W.3d at 414 ("It is the Legislature's prerogative to enact statutes; it is the judiciary's responsibility to interpret those statutes according

to the language the Legislature used . . . ."). Here, we must give effect to the statute's silence on this issue and the Legislature's decision not to confer representation rights akin to *Weingarten* rights on Texas public-sector employees. *See Seay v. Hall*, 677 S.W.2d 19, 25 (Tex. 1984) ("While this court may properly write in areas traditionally reserved to the judicial branch of government, it would be a usurpation of our powers to add language to a law where the [L]egislature has refrained."); *Simmons v. Arnim*, 220 S.W. 66, 70 (Tex. 1920) ("[Courts] are not the law-making body. They are not responsible for omissions in legislation. They are responsible for a true and fair interpretation of the written law.").

Although it seems an anomaly for Texas public-sector employees to have to face investigatory interviews alone, we note that the Legislature may have good reasons for treating public-sector employees in Texas differently from private-sector employees. *See, e.g.*, *Cong. of Indust. Org. v. City of Dallas*, 198 S.W.2d 143, 144 (Tex. Civ. App.—Dallas 1946, writ ref'd n.r.e.) ("[T]he status of governmental employees, National, State and Municipal, is radically different from that of employees in private business or industry."); *see also Headquarters Nat'l Aeronautics & Space Admin.*, 50 F.L.R.A. 601, 608 n.5 (1995) (noting "Congress'[s] recognition that the [*Weingarten*] right to representation might evolve differently in the private and Federal sectors"). For example, the Legislature may have decided not to extend such a representation right to Texas public-sector employees because unions in Texas lack authority to engage in collective bargaining, unlike the union in *Weingarten*. *See* TEX. GOV'T CODE § 617.002.

IV. Conclusion

We hold that section 101.001 of the Labor Code does not confer on public-sector employees in Texas the right to union representation when an employee reasonably believes that an investigatory interview with the employer may result in disciplinary action. Accordingly, the judgment of the court of appeals is reversed, and we render judgment for declaratory relief consistent with this opinion. *See* TEX. R. APP. P. 60.2(c).

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Paul W. Green
Justice

OPINION DELIVERED: April 5, 2013

IN THE SUPREME COURT OF TEXAS

NO. 10-0666

THE CITY OF ROUND ROCK, TEXAS AND
ROUND ROCK FIRE CHIEF LARRY HODGE, PETITIONERS,

v.

JAIME RODRIGUEZ AND ROUND ROCK
FIREFIGHTERS ASSOCIATION, RESPONDENTS

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

Argued December 8, 2011

CHIEF JUSTICE JEFFERSON, joined by JUSTICE HECHT and JUSTICE LEHRMANN, dissenting.

Fire fighter Jaime Rodriguez learned that his employer, the City of Round Rock, planned to interview him about a personnel complaint his chief[1] had filed against him. The chief told Rodriguez that, at best, his alleged misreporting of 2.5 hours of sick leave could result in discipline, including termination of his employment. At worst, Rodriguez could face criminal charges.[2] The battalion chief ordered Rodriguez not to discuss the investigation with his union president or any of its

[1] Unless otherwise noted, references to the "chief" are to Fire Chief Larry Hodge.

[2] The chief advised Rodriguez that although his answers could not be used against him in a criminal case, they could affect his employment status. In *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967), the Supreme Court held that statements obtained from law enforcement officers and other public employees under threat of discharge could not be used in subsequent criminal proceedings against those individuals.

members; if Rodriguez did so, he would be subject to disciplinary action for violating a direct order. The chief ordered Rodriguez to appear in person, unrepresented, for an interview in the fire chief's office. At that interview, the chief, the assistant fire chief, and the battalion chief interrogated Rodriguez for forty-five minutes. Rodriguez asked that a union representative be permitted to attend the meeting, but the chief refused. Later, the chief met once more with Rodriguez (still unrepresented) and told him that he either had to agree to a five-shift suspension and waive appellate and grievance rights, or be discharged. Rodriguez chose the former.

A Texas statute guarantees employees the right to unionize for job protection.[3] We must decide whether that includes a "representation right,"[4] which permits an employee to have a union representative accompany him when his employer conducts an interview that foreshadows disciplinary action. For decades, private and federal employees have exercised this right, as have Texas public sector employees acting under our statute and the only existing precedent.[5] But in Texas, after today, state and local government employees must go it alone. The Court concedes that the statute permits unionization, but precludes a prime attribute that makes the union worthwhile. Precedent does not compel this anomaly. Nor does a proper reading of the relevant law. I would hold that the statute grants Texas public employees a representation right, much as the Supreme

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[3] *See* TEX. LAB. CODE § 101.001.

[4] The right is also known as the *Weingarten* right, based on the Supreme Court's decision in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

[5] *See Glen v. Tex. State Emps. Union—CWA/AFL–CIO*, *No. 13,723* (Tex. App.—Austin Sept. 1, 1982, no writ) (not designated for publication).

Court of the United States has concluded under a similar federal law. Because the Court holds otherwise, I respectfully dissent.

I. The Labor Code grants public employees the right, upon request, to union representation at an interview at which the employee reasonably believes he may be subject to discipline.

Largely unchanged since its passage more than a century ago, Labor Code section 101.001 states that "[a]ll persons engaged in any kind of labor may associate and form trade unions and other organizations to protect themselves in their personal labor in their respective employment."[6] TEX. LAB. CODE § 101.001. The statute does not state that employees have the right, upon request, to have a union representative participate in an internal interview when the employee reasonably believes that the interview may lead to disciplinary action. The question is whether such a right inheres in an employee's freedom to "associate and form trade unions . . . to protect themselves in their personal labor in their respective employment." *Id.*

Despite the statute's age, only two Texas cases have answered this question—the court of appeals' decision in this case and an earlier, unpublished decision from the same court.[7] Both held

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[6] The original text stated:

> [I]t shall be lawful for any and all persons engaged in any kind of work or labor, manual or mental, or both, to associate themselves together and form trades unions and other organizations for the purpose of protecting themselves in their personal work, personal labor, and personal service in their respective pursuits and employments.

Act of May 27, 1899, 26th Leg., R.S., ch. 153, 1899 Tex. Gen. Laws 262, 262 (amended 1993)(current version at TEX. LAB. CODE § 101.001). The statute underwent a nonsubstantive codification in 1993. *See* Act of May 22, 1993, 73rd Leg., R.S., ch. 269, § 1, 1993 Tex. Gen. Laws 987, 1028.

[7] *See* 317 S.W.3d 871; *Glen*, No. 13,723, slip op. at 8 (holding that Texas statute gave Rusk State Hospital employees the right to union representation at patient abuse interviews).

that the statute gives an employee the right to union representation during internal interviews that might have disciplinary repercussions. Both cases relied on a United States Supreme Court decision interpreting similar language in the National Labor Relations Act. *See NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

Weingarten involved judicial review of an NLRB decision. Of course, we are not bound by *Weingarten*. Our statute was not based on the NLRA, nor does this case involve an appeal of an administrative decision, as *Weingarten* did. Nonetheless, the Supreme Court's interpretation of a statute very similar to our own is instructive. *See, e.g.*, *Sayre v. Mullins*, 681 S.W.2d 25, 28 (Tex. 1984) (applying Supreme Court's interpretation of "condition of work" in NLRA to Texas statute governing grievance rights); *Lunsford v. City of Bryan*, 297 S.W.2d 115, 117 (Tex. 1957) (interpreting Texas's "right to work" statute in light of the Supreme Court's determination that NLRA prohibited firing employees because of union membership); *see also, e.g.*, *Barr v. City of Sinton*, 295 S.W.3d 287, 296 & n.42 (Tex. 2009) (considering decisions applying federal statutes because those statutes and Texas law were "animated in their common history, language, and purpose").

The NLRA grants private employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in *other concerted activities for the purpose of* collective bargaining or other *mutual aid or protection* . . . ." 29 U.S.C. § 157 (emphasis added). In *Weingarten*, the National Labor Relations Board held that an employer violated the Act when it denied an employee's request that her union representative attend an investigatory interview that the employee reasonably believed might result

in disciplinary action. *Weingarten*, 420 U.S. at 252. The United States Court of Appeals for the Fifth Circuit held that the NLRB's construction was wrong, but the Supreme Court reversed. *Id*. at 253.

The Court held that the right "*clearly falls within the literal wording* of [the statute] that '[employees] shall have the right . . . to engage in . . . concerted activities for the purpose of . . . mutual aid or protection.'" *Id*. at 260 (emphasis added). It reasoned that although the employee's predicament may not implicate collective rights, he nevertheless seeks "aid or protection" against a perceived threat to his job. *Id*. The union representative protects not only the particular employee's interest but that of the "entire bargaining unit by exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly." *Id*. at 260-61. The Court noted that "the right inheres in [the statute's] guarantee of the right of employees to act in concert for mutual aid and protection." *Id*. at 256. The Court also emphasized the right's limited nature. It arises only when the employee requests representation and is a member of a labor union. *See id*. at 257. Moreover, the employee's right to do so is limited to situations that he reasonably believes will lead to disciplinary action and when exercising the right does not interfere with legitimate employer prerogatives.[8] *Id*. at 257-58. Finally, the employer has no duty to bargain with any union representative who attends an investigatory interview. *Id*. at 259.

[8] The Court also noted that the employer could refuse, without explanation, to allow union representation and carry on its inquiry without interviewing the employee, "thus leav[ing] to the employee the choice between having an interview unaccompanied by his representative, or having no interview and forgoing any benefits that might be derived from one." *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 258 (1975).

The Court observed that union representation, much like legal representation, may advance both parties' interests. The representative can help an employee form a defense, because employees "may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors." *Id*. at 263. Representation at the interview is preferable to pursuing a grievance afterwards, as "it becomes increasingly difficult for the employee to vindicate himself, and the value of representation is correspondingly diminished. The employer may then be more concerned with justifying his actions than re-examining them." *Id*. at 263-64. The employer may benefit as well, because a knowledgeable representative can streamline the investigation and may promote a more informed decision.[9] *Id*. at 263.

In Texas, the representation right would exist even without the *Weingarten* case and the federal statute it construed. Our statute says employees may unionize for "protect[ion]." TEX. LAB. CODE § 101.001. This case asks what that word describes. Statutes omitting that concept have been held not to convey the right to union participation in employer interviews;[10] laws that include it do.[11]

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[9] The NLRA applies only to private employers. 29 U.S.C. § 152(2). After *Weingarten*, Congress passed a law granting the *Weingarten* right to federal government employees. 5 U.S.C. §§ 7101(b), 7114(a)(2)(B). Our statute, broadly applicable to "[a]ll persons engaged in any kind of labor," predated all of these. TEX. LAB. CODE § 101.001. The City concedes, for purposes of this appeal, that section 101.001 applies to public employees.

[10] *See, e.g.*, *Johnson v. Express One Int'l, Inc.*, 944 F.2d 247, 251 (5th Cir. 1991) (holding that "the absence of the explicit right 'to engage in other concerted activities for the purpose of . . . other mutual aid or protection' in the [Railway Labor Act] proves fatal" to petitioner's claim that the Act granted the *Weingarten* right); *N.Y. City Transit Auth. v. N.Y. State Pub. Employment Relations Bd.*, 864 N.E.2d 56, 57-58 (N.Y. 2007) (holding that New York statute that gave public employees the right to "form, join, and participate in . . . any employee organization of their own choosing" did not confer the *Weingarten* right; "Since the 'mutual aid or protection' language is absent from [the New York statute], *Weingarten* does not support a holding that [the statute] creates a *Weingarten* right").

[11] *See, e.g.*, *City of Clearwater v. Lewis*, 404 So.2d 1156, 1161-63 (Fla. Dist. Ct. App. 1981) (applying *Weingarten* and holding that Florida statute granting public employees the right to engage in concerted activities for "mutual aid or protection," contained language "similar" to NLRA § 7); *Town of Hudson v. Labor Relations Comm'n*,

I am perplexed by the Court's conclusion that "Section 7 [of the NLRA] does not expressly confer the *Weingarten* right, and the Supreme Court recognized that." ___ S.W.3d at ___. In fact, the Supreme Court held that the right "*clearly falls within the literal wording of § 7* that '[employees] shall have the right . . . to engage in . . . concerted activities for the purpose of . . . mutual aid or protection." *Weingarten*, 420 U.S. at 260 (emphasis added). Here, the Court declines to recognize a representation right in part because the Labor Code does not include the NLRA's "'concerted activities' language." ___ S.W.3d at ___. But Texas has given employees not just the ability to unionize—already a constitutional right[12]—but the right to do so "*to protect themselves in their personal labor in their respective employment*." TEX. LAB. CODE § 101.001 (emphasis added). How can unions protect employees' jobs if they cannot engage in conduct to protect employees' jobs? Rodriguez was not only denied representation during the meeting; his employer prohibited him from even seeking his union's advice, *before the meeting*, about how to defend against a disciplinary matter that could culminate in termination of his employment and criminal proceedings. To Rodriguez, the union is an oasis; to the Court, only a mirage. The *Weingarten* court agreed with

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870 N.E.2d 618, 620-21 & n.4 (Mass. Ct. App. 2007) (applying *Weingarten* to Massachusetts statute that granted employees the right to "engage in lawful, concerted activities for the purpose of . . . mutual aid or protection"); *Wayne-Westland Educ. Ass'n v. Wayne-Westland Community Schools*, 439 N.W.2d 372, 373 (Mich. App. 1989) (affirming state labor commission's application of *Weingarten* right under Michigan statute granting public employees the right to engage in "lawful concerted activities for the purpose of . . . mutual aid and protection"); *Office of Admin. v. Pa. Labor Relations Bd.*, 916 A.2d 541, 548-49 (Pa. 2007) (holding that Pennsylvania statute authorizing "lawful concerted activities for the purpose of collective bargaining or other mutual aid and protection" granted the *Weingarten* right).

[12] *See Hitt v. Connell*, 301 F.3d 240, 245 (5th Cir. 2002) ("The First Amendment protects a public employee's right to associate with a union."); *Boddie v. City of Columbus, Miss.*, 989 F.2d 745, 749 (5th Cir. 1993) ("'This right of association encompasses the right of public employees to join unions and the right of their unions to engage in advocacy and to petition government in their behalf.'") (quoting *Prof'l Ass'n of Coll. Educators, TSTA/NEA v. El Paso Cnty. Cmty. Coll. Dist.*, 730 F.2d 258, 262 (5th Cir. 1984), *cert. denied*, 469 U.S. 881 (1984)).

Rodriguez's view, holding that the employee may bring a union representative to the meeting for "'aid or protection' against a perceived threat to his employment security." *Weingarten*, 420 U.S. at 260. I would hold, as the court of appeals did, that the Texas statute, whose language is substantially similar to the federal law, conveys the same right that *Weingarten* recognized. 317 S.W.3d at 888 ("Although not identical, the language is substantially similar with both statutes protecting the same rights-employees' rights to join together to protect themselves in their employment.").

The City and the chief suggest that a representation right is inconsistent with more recent legislative restrictions on Texas public employees' collective activity. Texas, for example, forbids public employees from striking or bargaining collectively.[13] TEX. GOV'T CODE §§ 617.002, .003. But in enacting those restrictions, the Legislature also specified that it did not intend to "impair the right of public employees to present grievances concerning . . . conditions of work either individually or through a representative that does not claim the right to strike." *Id*. § 617.005. Rather than eliminating the representation right, these restrictions (passed decades after section 101.001) demonstrate that the Legislature knows how to limit public employee union activity when it wants to. Instead, it left Labor Code section 101.001 untouched, even in the face of a decision from the United States Supreme Court that thoroughly dissected the scope of the representation right. Just last year, we adopted that Court's interpretation of a federal statute because the Texas Legislature did

[13] There are exceptions to the ban on collective bargaining. Cities (and other political subdivisions) may authorize their fire fighters and police officers to bargain collectively. *See* TEX. LOC. GOV'T CODE §§ 174.023, .051. The City of Round Rock has not authorized the Fire Fighter's Association to collectively bargain, although it adopted Local Government Code chapter 143, which allows the Association to negotiate with the City. *See id*. §§ 142.101, .110.

not amend its similar state law in response to that decision. *See Prairie View A&M Univ. v. Chatha*, 381 S.W.3d 500, 506-07 (Tex. 2012) (holding that Legislature's failure to amend Texas statute meant that decision applying Supreme Court precedent still governed). The same reasoning should apply here.

The Court suggests—and the dissent below agreed[14]—that *Weingarten* was premised on the employee's right to bargain collectively. ___ S.W.3d at ___ ("[T]he Legislature may have decided not to extend representation rights to Texas public-sector employees because their unions lack authority to engage in collective bargaining, unlike the union in *Weingarten*."). They assert that because Texas public employees lack that ability, our statute's right to protection should not be interpreted in the same manner. I disagree.

Weingarten was grounded not in the employee's collective bargaining rights but in "§ 7's guarantee of the right of employees to act in concert for mutual aid and protection." *Weingarten*, 420 U.S. at 256. Although the *Weingarten* court used the phrase "bargaining unit" to describe the employees at that particular workplace,[15] it did so because they were parties to a collective bargaining agreement, not because the phrase itself had special legal significance.

Federal courts of appeals applying *Weingarten* have rejected the notion that it was founded on the right to bargain collectively. The Third Circuit held "it . . . plain beyond cavil that the

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[14] *See* 317 S.W.3d 871, 896 (Puryear, J., dissenting).

[15] *Weingarten*, 420 U.S. at 260-61 (noting that union representation at interviews assists the "entire bargaining unit by exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly" and that the representative would provide an assurance "to other employees in the bargaining unit").

Weingarten right is rooted in [the NLRA's] protection of concerted activity, not [the statute's] guarantee of the right to bargain collectively." *Slaughter v. NLRB*, 794 F.2d 120, 126 (3d Cir. 1986). Conversely, the Fifth Circuit concluded that a statute granting the right to bargain collectively but not the right "to engage in other concerted activities for the purpose of . . . other mutual aid or protection" did not convey the *Weingarten* right. *Johnson*, 944 F.2d at 251 (holding that "[t]he omission of that language is critical because the rule of *Weingarten* . . . is grounded upon it").[16] The Texas collective bargaining ban does not affect a public employee's right to unionize for protection, and it does not provide a basis for denying the representation right.

The Court rejects the right largely because our statute does not "confer[], by its plain language, the specific right to have a union representative present at an investigatory interview that an employee reasonably believes might result in disciplinary action." ___ S.W.3d at ___. Neither does "due process" "confer[] by its plain language" the specific right to notice and a hearing. Yet courts have long said those characteristics are essential to effectuate that constitutional mandate. *See, e.g., Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) ("Many 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

[16] *See also Office of Admin. v. Pa. Labor Relations Bd.*, 916 A.2d 541, 549 (Pa. 2007) (rejecting the lower court's determination that collective bargaining formed the basis of the *Weingarten* right; stating that "we find it clear that *Weingarten* rights were grounded in the NLRA's Section 7 which protects the right of an individual employee to engage in concerted activities for mutual aid and protection"); *Glen*, No. 13723, at 8 ("While the federal act does guarantee [the right to bargain collectively], it was not implicated in *Weingarten* and the Supreme Court did not discuss it.").

case."). To rely on the absence of an expressly articulated right to representation is to deny the Court's obligation to state what the law means.

Words like "protection," "due process," or "equal protection" require judges to expound. The Legislature cannot anticipate every eventuality, and statutes often "embody purposeful ambiguity or are expressed with a generality for future unfolding." Felix Frankfurter, *Some Reflections on the Reading of Statutes, in* VIEWS FROM THE BENCH 181, 181 (Mark W. Cannon & David M. O'Brien, eds., 1985).[17] Courts routinely decide the meaning of such terms. What is a "reasonable time" (a phrase that appears 599 times in our statutes)? A "reasonable effort" (176 times)? "Best efforts" (thirty)? What is an "attempt to monopolize,"[18] a "just and right"[19] property division, or the "best interest of the child"?[20] Without judicial interpretation, these are just empty phrases. If the right to associate and form trade unions for protection is to be more than rhetoric, it must include rights like the one at issue here, and courts must decide the scope of such language. This was true when Texas first granted the right and when the Supreme Court decided *Weingarten* thirty-eight years ago.

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[17] *See also, e.g.*, ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 32-33 (2012) ("Vagueness . . . is often intentional, as general terms . . . are adopted to cover a multitude of situations that cannot practicably be spelled out in detail or even foreseen."); Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 808 (1983) (noting that many constitutional provisions (*e.g.* "free speech, due process, and the right to assistance of counsel") and statutes (like the Sherman Act) "are in reality the foundations, or perhaps in some cases the pretexts, for the evolution of bodies of case law that are the starting point and usually the ending point of analysis for new cases").

[18] TEX. BUS. & COM. CODE § 15.05(b); *see also Caller-Times Publ'g Co., Inc. v. Triad Commc'ns, Inc.*, 826 S.W.2d 576 (Tex. 1992) (deciding what constitutes predatory pricing, an element of a section 15.05(b) claim).

[19] TEX. FAM. CODE § 7.001.

[20] TEX. FAM. CODE § 153.002; *see also Holley v. Adams*, 544 S.W.2d 367, 371-72 (Tex. 1976) (outlining a nonexhaustive list of nine factors courts may consider in ascertaining a child's best interest).

II. Conclusion

The Texas statute was passed in 1899, a time of national labor upheaval and organized activity. Between 1881 and 1900, more than 22,000 labor strikes occurred throughout the country. *See* U.S. DEPARTMENT OF LABOR, SIXTEENTH ANNUAL REPORT OF THE COMMISSIONER OF LABOR, STRIKES AND LOCKOUTS [1881-1905] 340 (1901). Five hundred seventy-four were in Texas. Of those, forty involved workers striking "[a]gainst being compelled to sign [an] agreement to deal with employers as individuals instead of through [a] union"—the third most common complaint, following wage and hour disputes.[21] *Id*. at 406-07. Rodriguez, the Association, and a number of amici provide extensive historical detail about Texas labor relations at that time. Without repeating the specifics here, it is clear that the Legislature was aware of the right to union representation when it granted employees the ability "to associate themselves together and form trades unions and other organizations for the purpose of protecting themselves in their personal work." Act of May 27, 1899, 26th Leg., R.S., ch. 153, 1899 Tex. Gen. Laws 262, 262 (amended 1993) (current version at TEX. LAB. CODE § 101.001). I would not eliminate that protection today. Because the Court does so, I respectfully dissent.

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Wallace B. Jefferson
Chief Justice

[21] According to the Department of Labor, all forty of those strikes were successful. *See* U.S. DEPARTMENT OF LABOR, SIXTEENTH ANNUAL REPORT OF THE COMMISSIONER OF LABOR, STRIKES AND LOCKOUTS [1881-1905] 406 (1901).

OPINION DELIVERED: April 5, 2013

IN THE SUPREME COURT OF TEXAS

NO. 10-0755

THE CITY OF HOUSTON, PETITIONER,

v.

THE ESTATE OF KENNETH SAMUEL JONES, DECEASED, RESPONDENT

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

PER CURIAM

The City of Houston was sued and filed a plea to the jurisdiction. When its plea was denied, the City did not appeal. Several months later it filed an amended plea to the jurisdiction, then filed this interlocutory appeal from the denial of its amended plea. The court of appeals dismissed part of the appeal, but considered the merits of part of it.

The issue presented is whether the court of appeals properly exercised jurisdiction over part of the appeal. We hold that because the amended plea was substantively the same as the earlier plea, the amended plea was a motion to reconsider the earlier plea and time had expired for interlocutory appeal from it. Accordingly, the court of appeals erred by failing to dismiss the entire appeal for lack of jurisdiction.[1]

[1] Judgments of courts of appeals are ordinarily conclusive on interlocutory appeal, but we have jurisdiction to consider whether the court of appeals had interlocutory jurisdiction. *Univ. of Tex. Sw. Med. Ctr. of Dallas v. Margulis*, 11 S.W.3d 186, 187 (Tex. 2000) (per curiam).

The City of Houston issued a demolition permit to a neighbor of Kenneth S. Jones. While performing work under the permit the neighbor destroyed part of Jones's home. Jones sued the City and they eventually filed an agreed motion for continuance in which they stated they had resolved Jones's claim, but that implementation of the agreement had been delayed. Seven months later Jones amended his petition, omitted his original claims, and instead asserted that the City breached the settlement agreement.

The City filed a plea to the jurisdiction. The trial court denied the plea and the court of appeals affirmed, holding that the "sue and be sued" language in the City charter waived the City's immunity from suit. *City of Houston v. Jones*, 2004 WL 1847965 (Tex. App.—Houston [1st Dist.] Aug. 19, 2004). This Court reversed, holding that the City charter language did not waive the City's immunity from suit. *City of Houston v. Jones*, 197 S.W.3d 391, 392 (Tex. 2006) (per curiam). We remanded the case to the trial court to give Jones the opportunity to argue that immunity was waived either under recently enacted sections of the Local Government Code or under the holding of *Texas A & M University-Kingsville v. Lawson*, 87 S.W.3d 518, 522-23 (Tex. 2002), where we addressed waivers of immunity for breach of a settlement agreement. *Jones*, 197 S.W.3d at 392.

On remand the City filed another plea to the jurisdiction ("2006 plea"). In it the City argued that its immunity for breach of a settlement agreement was not waived under *Lawson* because its immunity from suit on the underlying claims had not been waived. It also argued that its immunity was not waived by Local Government Code section 271.152 because the settlement agreement was neither an agreement for providing goods or services to the City nor was it properly executed on behalf of the City as required by that section. *See* TEX. LOC. GOV'T CODE § 271.152.

Jones maintained that the City's immunity was waived under *Lawson*, but did not at any time assert it was waived by section 271.152. *See Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 230 (Tex. 2004) ("[T]he party suing the governmental entity must establish the state's consent, which may be alleged either by reference to a statute or to express legislative permission."). To the contrary, Jones affirmatively agreed that section 271.152 did not waive the City's immunity because that section only applies to contracts for providing goods or services. He also requested a ruling on his previously filed motion for partial summary judgment as to the City's liability for breach of contract.

The trial court implicitly denied the City's plea to the jurisdiction by granting partial summary judgment to Jones on the issue of liability and setting the case for trial on the issue of damages. *See Thomas v. Long*, 207 S.W.3d 334, 339-40 (Tex. 2006). The City did not appeal.

Jones died and the case was transferred to probate court. There, the City filed a motion for summary judgment and an amended plea to the jurisdiction. In its amended plea the City relied on the same bases as it did in its 2006 plea, but presented the additional argument that section 271.152 did not waive the City's immunity because the agreement did not state its essential terms, as was required by that section. Jones's estate[2] ("Jones" for ease of reference), which still had not asserted that section 271.152 waived the City's immunity, responded and agreed—as Jones had in response to the 2006 plea—that section 271.152 did not waive the City's immunity because it applies only to contracts for providing goods or services. Jones also asserted that the City presented no new facts

[2] Robert Bewley was appointed administrator of Jones's estate and is the estate's representative, although the style of the case references the Estate of Jones as the named party.

or law to justify reconsideration of its 2006 plea. The Probate Court denied the City's motion for summary judgment and, construing the City's amended plea as a motion to reconsider the 2006 plea, denied it.

The City filed an interlocutory appeal. Jones sought dismissal of it for lack of jurisdiction. The court of appeals agreed with Jones in part. It determined that the portion of the amended plea that re-urged the arguments asserted in the 2006 plea was a motion to reconsider the ruling on the earlier plea, the City had not appealed the denial of the 2006 plea and it was too late to do so, and the court of appeals did not have jurisdiction over those arguments. 321 S.W.3d 668, 670-71 (citing TEX. CIV. PRAC. & REM. CODE § 51.014). But it held that it had jurisdiction over the "new" ground that immunity was not waived under section 271.152 because the contract did not state the essential terms of the agreement. *Id.* It overruled the issue because the City did not show that the other grounds for waiver could not support the trial court's order. *Id.*

Here, the City asserts the court of appeals erred by concluding that it could not consider all the issues raised in the amended plea to the jurisdiction. Jones responds that the court of appeals lacked interlocutory jurisdiction over any part of the appeal because the City did not raise a new issue in the amended plea. We agree with Jones.

Appellate courts generally have jurisdiction only over appeals from final judgments. *See Bally Total Fitness Corp. v. Jackson*, 53 S.W.3d 352, 355 (Tex. 2001). A party may appeal from certain interlocutory orders such as the denial of a governmental entity's plea to the jurisdiction. TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8). But to do so, a notice of appeal must be filed within twenty days of the date the challenged order was signed. TEX. R. APP. P. 26.1(b), 28.1(a).

Section 51.014(a)(8) permitting interlocutory appeals must be construed so as to give effect to the Legislature's intent. *Tex. A&M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 845 (Tex. 2007). It specifies that "[a] person may appeal from an interlocutory order . . . that . . . grants or denies a plea to the jurisdiction by a governmental unit." TEX. CIV. PRAC. & REM. CODE § 51.014. We have construed "plea to the jurisdiction" in Section 51.014(a)(8) to refer to a substantive claim of immunity rather than to a particular type of procedural vehicle. *Koseoglu*, 233 S.W.3d at 845. But we also "strictly construe Section 51.014(a) as 'a narrow exception to the general rule that only final judgments are appealable.'" *Id.* at 841 (quoting *Jackson*, 53 S.W.3d at 353 (Tex. 2001)).

In *Jackson*, we considered whether an interlocutory appeal could be taken from a trial court's denial of a motion to decertify a class under the provision permitting an interlocutory appeal from an "order certifying or refusing to certify a class." 53 S.W.3d at 353 (quoting TEX. CIV. PRAC. & REM. CODE § 51.014(a)(3)). We concluded that the court of appeals did not have jurisdiction over the appeal from the orders overruling motions to decertify in that case. *Id.* at 353. We recognized that under *De Los Santos v. Occidental Chemical Corp.*, 933 S.W.2d 493, 495 (Tex. 1996), an interlocutory appeal may be taken from an order related to class certification that was not actually an order certifying or refusing to certify a class if the order altered a class's fundamental nature.[3] But we disagreed with the dissent's analysis that "any order denying a motion for reconsideration of a class certification" would be subject to interlocutory review. *Jackson*, 53 S.W.3d at 356. A trial court's refusal to decertify was not the functional equivalent of a decision granting certification; the

[3] We need not decide if a court of appeals has jurisdiction over an interlocutory appeal from a ruling on a motion to reconsider the denial of a plea to the jurisdiction when a substantial change in the situation in the trial court occurred after the plea was denied. Neither party argues that such a change occurred here.

Legislature could have added language to section 51.014(a)(3) to permit appeals from orders refusing to decertify a class, but did not. *Id.* at 358. Further, "[a]llowing interlocutory appeals whenever a trial court refuses to change its mind . . . would invite successive appeals and undermine the statute's purpose of promoting judicial economy." *Id.*

Our reasoning in *Jackson* applies to motions to reconsider the denial of a plea to the jurisdiction. *See Denton Cnty. v. Huther*, 43 S.W.3d 665, 667 & n.2 (Tex. App.—Fort Worth 2001, no pet.) (holding that it did not have jurisdiction over an interlocutory appeal from the denial of a motion to reconsider a plea to the jurisdiction because even though lack of jurisdiction is fundamental error, a court may only correct fundamental error when it has jurisdiction to do so). The City's assertion of a new reason for saying that section 271.152 did not waive its immunity failed to address a contested issue or raise an issue the City did not assert in its 2006 plea. The City's new argument for why section 271.152 did not waive its immunity was form without substance. And the remainder of its amended plea was not different in its essence from the 2006 plea.

Permitting appeals under circumstances such as these would effectively eliminate the requirement that appeals from interlocutory orders must be filed within twenty days after the challenged order is signed. *See* TEX. R. APP. P. 26.1(b), 28.1(a); *In re K.A.F.*, 160 S.W.3d 923, 925 (Tex. 2005) ("[T]he language of rule 26.1(b) is clear and contains no exceptions to the twenty-day deadline."). That would work against the main purpose of the interlocutory appeal statute, which is to increase efficiency of the judicial process. *See Koseoglu*, 233 S.W.3d at 845.

Because the City made a new argument in its amended plea to the jurisdiction, but did not assert a new ground, the amended plea was substantively a motion to reconsider the denial of its

2006 plea. The court of appeals did not have jurisdiction to consider any part of the merits of the interlocutory appeal.

Without hearing oral argument, TEX. R. APP. P. 59.1, we affirm that part of the court of appeals' judgment dismissing part of the appeal. We reverse that part of the judgment affirming part of the trial court's order and dismiss that part of the appeal, also.

OPINION DELIVERED: December 21, 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

SUPPLEMENTAL PER CURIAM
ON MOTION FOR REHEARING OF CAUSE

In their motion for rehearing, respondents contend that this Court's judgment improperly reversed portions of the trial court's judgment that petitioner did not challenge and we did not address. We agree. For the reasons explained in our opinion issued August 31, 2012, the trial court erred in entering judgment for respondents on their claims governed by the joint operating agreement. But petitioner did not challenge the portion of the judgment awarding $7,500 plus $7,500 in associated attorney's fees to Patricia Fry or the portion granting declaratory relief and awarding $55,000 in associated attorney's fees to respondents. We therefore grant the motion for rehearing, withdraw our judgment dated August 31, 2012, and issue a new judgment that affirms those portions

of the trial court's judgment and reverses and renders a take-nothing judgment on the remaining claims.

OPINION DELIVERED: March 29, 2013

IN THE SUPREME COURT OF TEXAS

NO. 10-0933

IN RE TOYOTA MOTOR SALES, U.S.A., INC. AND VISCOUNT PROPERTIES II, L.P., D/B/A HOY FOX TOYOTA/LEXUS, RELATORS

ON PETITION FOR WRIT OF MANDAMUS

Argued January 8, 2013

CHIEF JUSTICE JEFFERSON delivered the opinion of the Court.

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

JUSTICE BOYD did not participate in the decision.

We have recently held that a trial court must explain with reasonable specificity why it has set aside a jury verdict and granted a new trial.[1] Without such an explanation, parties in the case can only speculate about why the court ostensibly circumvented a critical constitutional right. The parties—and the public—are entitled to know why the trial court believes an injustice would occur if the jury's verdict were to stand. In this case, the jury returned a verdict, and the trial court rendered a judgment in conformity with it. The trial court then ordered a new trial. The order is reasonably specific. Its stated reasons are superficially sound. The question is whether an appellate court may, in an original proceeding, determine whether the reasonably specific and legally sound

[1] *In re Columbia Med. Ctr. of Las Colinas, Subsidiary, L.P.*, 290 S.W.3d 204 (Tex. 2009).

rationale is actually true. And if it is not true, we must decide whether the trial court abuses its discretion by granting a new trial.

We hold that an appellate court may conduct a merits review of the bases for a new trial order after a trial court has set aside a jury verdict. If the record does not support the trial court's rationale for ordering a new trial, the appellate court may grant mandamus relief. We conditionally grant relief.

I. Background

A. Facts

Richard King was driving his Toyota 4Runner along a highway when a commercial truck turned onto the road in front of him. King swerved to avoid the truck but lost control of his car, which rolled over several times. King was ejected from the vehicle and died a few hours later.

B. Procedural History

1. Trial Court

King's family sued Toyota and the local Toyota dealership for strict products liability, negligence, wrongful death, and survivorship.[2] The Kings contended that the 4Runner's allegedly defective seat belt system caused his ejection from the car and his subsequent death.

The family asserted that King was wearing his seat belt at the time of the accident. But in a videotaped pretrial deposition, State Trooper Justin Coon, who responded to the emergency call

[2] The Kings sued the commercial truck driver and his employers as well, but those defendants are no longer parties to this dispute.

and arrived on the scene to investigate, testified that he believed that King was not wearing the belt at the time of the rollover. Specifically, Officer Coon testified:

Q:	. . . How do you know about the position of the seat belt?
Officer Coon:	Well, if he was wearing it or if it broke off, it would have been in a position where it wasn't in. Obviously, he wasn't wearing it, because it was in a straight-up position, like it had been sitting there a while, and it hadn't been pulled out.
Q:	So the seat belt was stowed?
Officer Coon:	Yes.
Q:	Did you inspect the webbing, to see if there were any marks on it?
Officer Coon:	There was not any.
Q:	And you did look at it?
Officer Coon:	I always look at the seat belts, if they are not wearing one.
Q:	Did you pull the seat belt out?
Officer Coon:	No, I did not.

The Kings filed a motion to preclude at trial "[a]ny reference to the purported opinions of Officer[] Justin Coon . . . since [he] ha[d] never been identified by Defendants as [an] expert witness[] in this case." At a pretrial hearing, the Kings clarified that they would not object to Officer Coon's testifying about his observations of the accident scene as long as he did not offer his opinion that King had not been wearing a seat belt when the car rolled over. The Kings later filed an additional motion in limine to bar "[a]ny testimony from any purported fact witness including law

enforcement officials, investigators, emergency personnel, medical personnel and bystanders that Richard King was not wearing his seatbelt . . . before or during the [ac]cident." The trial court granted these motions.

The case proceeded to trial in May 2009.[3] Despite the limine orders, Officer Coon's statement found its way into the record, in front of the jury, three times before the close of evidence. Because the trial court's order cites Toyota's "prejudicial," "brazen[]," and "inflammatory" reference to Officer Coon's seat belt testimony as a basis for granting a new trial, it is important to detail precisely the manner in which the information was conveyed to the jury.

The initial instance occurred when Toyota's counsel introduced Officer Coon's video deposition. To comply with the court's limine orders, Toyota had redacted portions of the officer's testimony, and the relevant passage was edited and played into the record as follows:

Q:	~~. . .~~ How do you know about the position of the seat belt?
Officer Coon:	~~Well, if he was wearing it or if it broke off, it would have been in a position where it wasn't in. Obviously, he wasn't wearing it, because~~ it was in a straight-up position~~, like it had been sitting there a while, and it hadn't been pulled out~~.
Q:	So the seat belt was stowed?
Officer Coon:	Yes.
Q:	Did you inspect the webbing, to see if there were any marks on it?
Officer Coon:	There was not any.

[3] An earlier trial ended in a mistrial.

Q: And you did look at it?

Officer Coon: I always look at the seat belts~~, if they are not wearing one~~.

~~**Q**: Did you pull the seat belt out?~~

~~**Officer Coon**: No, I did not.~~

~~**Q**: How tell~~ describe to me how you look[ed] at the seat belt.

Officer Coon: I mean, it was on its side—

Immediately after this testimony, in front of the jury, the Kings' attorney introduced the "if they are not wearing one" portion of the statement into the record:

> **Kings' Counsel**: Your Honor, after the answer, ["]I always look at the seatbelts, *if they are not wearing one*.["] And then there is—under the rule of optional completeness—a question and answer that was not read and I would like to publish that to the jury at this time.

(Emphasis added.)

Toyota's attorney was quick to alert the trial court that *the plaintiffs' counsel* had just introduced Officer Coon's suggestion that King was not wearing a seat belt.

> **Toyota's Counsel:** If I understand it, Your Honor, he just said the question was, ["]Did you look at it?["] And the answer, ["]I always look at the seat belts.["] [To the Kings' attorney] And you said what?
>
> **Kings' Counsel**: And he finishes the answer.
>
> **Toyota's Counsel**: *You* finish the answer.
>
> **Kings' Counsel**: Under the rule of optional completeness, question at line 23, ["]Did you pull the seat belt out? Answer: No, I did not.["] That's what I wanted read into the record.

Toyota's Counsel: Your Honor, I want the full answer to line 21 [just before the previous question and answer] read into the evidence *because he just stated it out loud*.

. . .

(Bench conference.)

. . .

Toyota's Counsel: Right. [To the Kings' attorney] You read, ["]*If they are not wearing one*.["] We all heard it. That's the biggest door opening I have ever seen.

Kings' Counsel: Judge, under the rule of optional completeness I wanted [the next question and answer] read and he can't go back—

The Court: I understand that. *You read it. You just read it. You read it into the record and before the jury*.

(End of bench conference.)

. . .

The Court: . . . [To Toyota's attorney] *I think* [*the Kings' attorney*] *has read into the record what you wanted published*.

Toyota's Counsel: That's correct. And read into the record the complete answer to the prior question.

The Court: *It was already read into the record*.

Toyota's Counsel: Thank you.

The Court: You're welcome.

(Emphases added.)

The Kings' attorney did not move to strike the testimony or seek a mistrial, nor did he request a curative or limiting instruction after quoting the statement. He did not revisit the seat belt issue during his subsequent tender of designated testimony from Officer Coon's deposition.

During Toyota's direct examination of expert witness Lee S. Carr, the statement was again read into the record. Carr, an accident reconstructionist, built a scale model of the accident scene. Before trial, he surveyed the accident site, read available police reports, and reviewed Officer Coon's deposition. The relevant portion of Carr's testimony states:

> **Toyota's Counsel**: All right. And then yesterday, sir, Trooper Coon was presented by deposition. You have read his deposition, have you not, sir?
>
> **Carr:** Yes.
>
> **Toyota's Counsel**: I want to review this deposition passage *which was read into the record*, sir, yesterday. This is page 26 beginning on line 17—or 15, rather.
>
> **Question:** So the seat belt was stowed?
>
> **Answer:** Yes.
>
> **Question:** Did you inspect the webbing to see if there were any marks on it?
>
> **Answer:** There was not any.
>
> **Question:** And did you look at it?
>
> **Answer:** I always look at the seat belt *if they are not wearing one.*
>
> **Question:** Did you pull the seat belt out?
>
> **Answer:** No, I did not.

The Court: Hold on . . . [Kings' attorney] has an objection . . .

Kings' Counsel: Your Honor, we need the jury out.

(Jury is not present.)

Kings' Counsel: Your Honor, let me sort of give you some history here. Yesterday counsel showed what he just showed to the witness, showed it to Your Honor, and said, I'm not going to play this. This is within your ruling where the officer said, ["]If he is not wearing it.["] . . . That that's not testimony consistent with Your Honor's ruling that should be played with the jury.

Yesterday I made a mistake when I stood up on the rule of optional completeness and I was trying to identify where I wanted to insert the testimony. And I inadvertently referenced that subject. Fortunately, Your Honor . . . what a lawyer says is not testimony, right? . . .

I take it under some sort of guise that I opened the door . . . but that's something . . . that [Toyota's attorney] should have sought a clarification for. I think frankly that is sanctionable conduct . . . If he felt that there had been a waiver . . . he should have approached.

The Court: [Toyota's counsel]?

Toyota's Counsel: Your Honor, I did bring to everyone's attention that [Kings' attorney] had failed to even object to this passage prior to it being played. Your Honor will recall and the record reflect we had a bench conference shortly before this passage was being offered to the jury. [Kings' attorney] told me and told the Court that he was going to offer something for purposes of optional completeness. I said, on the record, ["]Well, if you do, be careful of the motion in limine.["] He said, ["]I've got it.["] He went back to counsel table . . . we completed our video offer, he stood up and he said, ["]*For purposes of optional completeness*["]—*this wasn't lawyer talk, this was evidence and he read,* ["]*If they are not wearing one.*["] . . .

We then had another bench conference . . . At first [Kings' attorney] tried to deny that he said that. *Your Honor had reminded him,* ["]*No, you just said that. It's in the record, it's before the jury.*["] [Kings' attorney] said, ["]If it's in the record, it's in the record, what's before the jury is before the jury.["] . . . I don't need to seek a clarification of what's in evidence or what's in before the jury when we had multiple bench conferences about it. Mistake or not—which I know does happen on occasions despite it having been pointed out several times—as [Kings' attorney] said yesterday, ["]It's before the jury, it's in the record and I'm free to use what is in the evidence in framing my questions.["]

So there is nothing sanctionable about that. I know the plaintiffs are disappointed that they did that, but there is nothing sanctionable[.]

. . .

The Court: . . . [T]he record is going to have to speak for itself. My recollection . . . is that it was a question that you were reading from the deposition for optional completeness. I understand and recognize that that may have been inadvertent . . .

. . . I'm not going to sanction anybody, but . . . [Toyota's counsel], [do] not . . . publish that to the jury. It has been mentioned. You had already agreed that that would not go before the jury. The evidence is going to be reflected in the record . . .

Toyota's Counsel: . . . I understand the Court's ruling . . . except for the . . . statement that I agreed that that would not be before the jury. I'm not the one that put it before the jury, your Honor, and *I don't think I agreed that it would be after he put it before the jury. I agreed before they put it before the jury that I wouldn't do it. But after he put it in the record and even conceded to the Court, and I'm sure it will appear in the record, [what's] before the jury, is before the jury* . . . I will simply ask Mr. Carr the follow-up question that I was going to ask him, but I will not publish that again.

The Court: Thank you. I appreciate it.

(Emphases added.) The jury returned, and Toyota's counsel resumed questioning Carr, without publishing Coon's statement again. Later, the statement resurfaced during Toyota's direct examination of William Van Arsdell, Ph.D., another of Toyota's expert witnesses. Dr. Van Arsdell testified that he had been retained to evaluate the seat belt's design and performance, and to investigate whether King's seat belt functioned properly and whether he was wearing it when the accident occurred. Dr. Van Arsdell reviewed the depositions of all witnesses, including Officer Coon. The relevant portion of Dr. Van Arsdell's direct examination by Toyota's attorney states:

> **Toyota's Counsel**: . . . During the course of your work in the case, you obviously, thoroughly inspected the driver's and passengers' seat belt of the Toyota 4 Runner.
>
> **Dr. Van Arsdell**: Yes.
>
> **Toyota's Counsel**: You also read depositions?
>
> **Dr. Van Arsdell**: Yes.
>
> **Toyota's Counsel**: Did you read the deposition of Officer Coon?
>
> **Dr. Van Arsdell**: Yes, I did.
>
> **Toyota's Counsel**: And based on your reading of his deposition, did he examine the driver's seat belt of the Toyota 4 Runner?
>
> **Dr. Van Arsdell**: Yes, he said he always would examine the seat belts, *if someone was not wearing their seat belt*.

(Emphasis added.) The Kings' attorney did not object to Dr. Van Arsdell's statement.

After the close of evidence, but before arguments commenced, the Kings' attorney asked the trial court for guidance on the point with respect to Officer Coon's testimony:

Kings' Counsel: [R]emember there was that issue where I was trying to identify a point for optional completeness and *I misread or should not have read that.* I want to make sure that counsel is not going to use that during their [closing] argument because you ruled on that point four or five times.

The Court: Just make your objections and we will preserve the record and appropriate sanctions will be issued to either party *if they argue outside the record*.

Toyota's Counsel: And just on that point, Your Honor, we do intend to . . . share that with the jury. It's before the jury, *it was read into the record*, didn't allow us to publish, but as [the Kings' own attorney] himself stated, What is before the jury, is before the jury . . .

. . .

The Court: [To the Kings' attorney] And you make your objection, and I will sanction people accordingly. My recollections of it was that . . . [Officer Coon's conclusions] are outside the record.

Toyota's Counsel: His statement that [King] was unbelted is outside the record. What *is* in the record and was read in by [the Kings'] counsel, Your Honor, is the testimony that, ["]I checked the seat belt. And did you look at it? Answer: I always look at the seat belts *if they are not wearing one*.["] That is what was read into the record.

The Court: *I don't believe that was read into the record at all.*

Toyota's Counsel: Well, we do, Your Honor, and we know it was, so we will just argue accordingly.

The Court: [To the Kings' attorney] Make your objections and ask for your sanctions.

Kings' Counsel: I will make the objection if that is done.

(Emphases added.)

During Toyota's closing argument, Toyota's counsel quoted the previously admitted line of questioning from Officer Coon's deposition:

> **Toyota's Counsel**: Dr. Wright and Mr. Flynn also agreed with Mr. Coon's testimony about the condition of the seat belt.
>
> **Question:** So is the seat belt stowed? [Aside] This was read into the record.
>
> **Answer:** Yes.
>
> **Question:** Did you inspect the webbing to see if there were any marks on it?
>
> **Ans[w]er:** There was not any.
>
> **Question:** And you did look at it?
>
> **Answer:** I always look at the seat belts *if they are not wearing one*.

(Emphasis added.)

The Kings' attorney objected, arguing that Toyota violated the trial court's limine order. The trial judge sustained the objection. But despite the objection, the Kings' attorney did not move to strike and did not request a curative or limiting instruction. Toyota's attorney responded, "You heard that, and it was read into the record by [the Kings' own attorney] when Mr. Coon's deposition testimony was offered," and continued with closing argument.

The jury returned a verdict in Toyota's favor, and the trial court signed a corresponding judgment. A few weeks later, the Kings moved for new trial, alleging that Toyota's counsel had

violated the trial court's limine rulings by reading, during closing argument, the disputed portion of Officer Coon's deposition.[4]

Toyota responded that the Kings' lawyer violated the limine rulings by offering the evidence first. Toyota elaborated:

> The Court acknowledged on the record that [*the Kings' own attorney*] *had read Officer Coon's statement into the record.* Because [he] read this testimony into evidence, [*Toyota*] *had every right to make closing arguments regarding evidence already in the record*. Plaintiffs cannot introduce evidence, and then allege the prejudice from this evidence justifies a new trial.

(Emphasis added.)

Nevertheless, the trial court granted the Kings' motion on two grounds. First, the trial court stated that Toyota had violated the limine order and "purported to present evidence outside the record." The court explained that its decision was based on Toyota's reference during closing to Coon's testimony:

> Specifically, during closing argument, [Toyota] read from the [d]eposition of witness Justin Coon concerning his lay opinion, and conclusion that Mr. King was not wearing a seat belt at the time of the commencement of the rollover. The Court had previously excluded these lay opinions and conclusory remarks by witness Coon on the grounds that they were not based on his personal knowledge and were, therefore, conclusory and incompetent to be presented to the jury and because witness Coon did

---

[4] Before the trial court ruled on the new trial motion, but more than thirty days after the judgment was signed, the Kings filed an amended motion for new trial alleging "newly discovered evidence" about a former Toyota employee's unrelated allegations against Toyota for "calculated conspiracy." Toyota contended that the amended motion was untimely. *See* TEX. R. CIV. P. 329b(b) ("One or more amended motions for new trial may be filed without leave of court before any preceding motion for new trial . . . is overruled and within thirty days after the judgment . . . is signed."); *see also Moritz v. Preiss*, 121 S.W.3d 715, 720 (Tex. 2003) (holding that "an amended motion for new trial filed more than thirty days after the trial court signs a final judgment is untimely" and does not preserve issues for appellate review but that "the trial court may, at its discretion, consider the grounds raised in an untimely motion and grant a new trial under its inherent authority before the court loses plenary power").

Regardless, although the trial court considered the Amended Motion for New Trial, its order relied solely on arguments already in the original motion. Accordingly, we need not address the timeliness of the amended motion.

> not have the requisite training, education, schooling, or experience to opine whether or not Mr. King had been belted at the start of the rollover.

The court thus granted a new trial "in the interest of justice."

Second, the trial court reasoned that a new trial was warranted to sanction Toyota for violating the limine order, because a limiting instruction could not eliminate the harm. *See* TEX. R. CIV. P. 320 ("New trials may be granted and judgment set aside for good cause, on motion or on the court's own motion on such terms as the court shall direct.").

2. Court of Appeals

Toyota sought a writ of mandamus from the court of appeals, which denied relief. 327 S.W.3d 302. The court evaluated the trial court's order in light of *In re Columbia*. The court of appeals recognized that after *Columbia*, a new trial order must include the basis for the trial court's decision. *Id.* at 305. But after considering the trial court's order—reproduced in its entirety in the court of appeals' opinion—the court concluded that "there is no question that the trial court . . . *specified the reasons* for its decision to grant the Kings' motion [for new trial], and thereby satisfied the specificity requirements of *Columbia*." *Id.* (emphasis added). The court of appeals rejected the notion that "*Columbia* supports further review of the *merits* of the grounds specified," and was "unpersuaded that the language Toyota relie[d] upon [in requesting mandamus relief] supports such an expansion of *Columbia*." *Id.* at 305-06 (emphasis added).

3. This Court

Toyota then filed an original proceeding in this Court.[5] We set the matter for argument, 55 Tex. Sup. Ct. J. 1212 (Tex. Aug. 31, 2012), and now conditionally grant relief.

II. Discussion

A. An appellate court may conduct merits-based mandamus review of a trial court's articulated reasons for granting new trial.

In the decades leading up to *Columbia*, our jurisprudence gave trial courts broad deference in granting new trials and, specifically, "approved the practice of trial courts failing to specify reasons for setting aside jury verdicts." *Columbia*, 290 S.W.3d at 208. We generally precluded review of new trial orders, except in two narrow instances. *Id.*; *see also Johnson v. Court of Civil Appeals*, 350 S.W.2d 330, 331 (Tex. 1961) (recognizing that "[t]here are only two instances where any appellate court of this state has ever directed the trial judge to set aside its order granting motion for new trial": when the order was void or when the trial court erroneously concluded that the jury's answers to special issues conflicted irreconcilably).

But in *Columbia*, we emphasized that the discretion given trial courts was "not limitless." *Columbia*, 290 S.W.3d at 210. In that case, the jury returned a verdict in favor of the hospital-defendants after a four-week trial. *Id.* at 206. The trial judge granted the plaintiffs' new trial motion "in the interests of justice and fairness," without further elaboration. *Id.* We held that this was inadequate, noting that "such a vague explanation [whe]n setting aside a jury verdict does not enhance respect for the judiciary or the rule of law, detracts from transparency we strive to achieve

[5] The Texas Civil Justice League and the Texas Association of Defense Counsel submitted briefs as amici curiae in support of the petition for writ of mandamus.

in our legal system, and does not sufficiently respect the reasonable expectations of parties and the public when a lawsuit is tried to a jury." *Id.* at 213.

We disapproved of our prior approach under *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916 (Tex. 1985), and held that "just as appellate courts that set aside jury verdicts are required to detail reasons for doing so, trial courts must give more explanation than 'in the interest of justice' for setting aside a jury verdict." *Columbia*, 290 S.W.3d at 205. We held that "the parties and public are entitled to an *understandable, reasonably specific explanation* [of] why their expectations are frustrated by a jury verdict being disregarded or set aside, the trial process being nullified, and the case having to be retried." *Id*. at 213 (emphasis added). We did not detail exactly what such an explanation would require, although it would have to be more than a bare assertion of "in the interests of justice and fairness." *Id.*

More recently, we decided *In re United Scaffolding, Inc.*, 377 S.W.3d 685 (Tex. 2012), which presented a related, but narrower, question. There, we were asked to decide whether a trial court that gave four reasons for granting a new trial, including "in the interest of justice and fairness," and linked them by "and/or" satisfied *Columbia*. *Id.* at 689.

In concluding that it did not, we noted that *Columbia*'s purpose "w[ould] 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." *Id.* at 688 (emphases added). We acknowledged that *Columbia* focused "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*." *Id.* at 688 (citing *Columbia*, 290 S.W.3d at 213)).

We held that the trial court's "use of 'and/or' le[ft] open the possibility that 'in the interest of justice and fairness' [could be] the sole rationale." *Id.* at 689. That possibility, if true, would have violated our *Columbia* standard.

We held that "a trial court does not abuse its discretion[6] 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." *Id.* at 688–89 (emphases added). Applying this new standard to the new trial order, we concluded that because, under *Columbia,* "in the interests of justice or fairness" or similar language "is never an independently sufficient reason for granting new trial," the "and/or" order failed the test's first prong. *Id.* at 689–90.

This case represents the next step in that progression. We must decide whether, on mandamus review, an appellate court may evaluate the merits of a new trial order that states a clear, legally appropriate, and reasonably specific reason for granting a new trial. Stated differently, if a trial court's order facially comports with *Columbia* and *United Scaffolding*, may an appellate court review the correctness of the stated reasons for granting a new trial? Absent further guidance from

[6] We also provided a non-exhaustive list of examples of new trial orders that would be clear abuses of discretion, including: giving a reason (specific or not) that was not a legally valid reason; plain statements that the trial court merely substituted its own judgment for the jury's; statements that the trial court simply disliked one party's lawyer; invidious discrimination; an explanation that provides little or no insight into the trial judge's reasoning; and pro forma template language absent a trial judge's analysis. *United Scaffolding*, 377 S.W.3d at 689.

this Court, our courts of appeals have generally been reluctant to engage in merits-based review of new trial orders.[7]

* * *

To answer this question, we consider *Columbia* and *United Scaffolding* together. A new trial order must be "understandable," "reasonably specific," *see Columbia*, 290 S.W.3d at 213, "cogent," "legally appropriate," "specific enough to indicate that the trial court did not simply parrot a pro forma template," and issued "only after careful thought and *for valid reasons*," *see United Scaffolding*, 377 S.W.3d at 688 (emphasis added). An order that does not satisfy these requirements may be corrected by mandamus.

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[7] *See, e.g.*, *In re Health Care Unlimited, Inc.*, No. 04–12–00192–CV, 2012 WL 1142302 (Tex. App.—San Antonio Apr. 4, 2012, orig. proceeding [mand. pending]) (mem. op.) (denying mandamus with no additional explanation other than simply being "of the opinion that relator is not entitled to the relief sought"); *In re Oliver*, No. 09–11–00546–CV, 2011 WL 5594606 (Tex. App.—Beaumont Nov. 17, 2011, orig. proceeding [mand. pending]) (mem. op.) (denying mandamus relief after concluding that relator had "not shown that the trial court's reasons provide no valid basis in th[e] case, or that the trial court clearly abused its discretion"); *In re State Farm Mut. Auto. Ins. Co.*, No. 04–11–00708–CV, 2011 WL 4830177 (Tex. App.—San Antonio Oct. 12, 2011, orig. proceeding [mand. pending]) (mem. op.) (denying mandamus relief and concluding mandamus review is not available when relators are simply asking appellate court to "review the trial court's reasons for not granting a new trial"); *In re Camp Mystic, Inc.*, No. 04–11–00694–CV, 2011 WL 4591194 (Tex. App.—San Antonio Oct. 5, 2011, orig. proceeding) (mem. op.) (denying mandamus relief and reading *Columbia* to "provide mandamus relief when the trial court fails to specify the reasons for granting a new trial, not to provide a merit-based review on mandamus"); *In re Jazzercize, Inc.*, No. 05–11–01034–CV, 2011 WL 3805545 (Tex. App.—Dallas Aug. 30, 2011, orig. proceeding [mand. pending]) (mem. op.) (denying mandamus relief despite relators' challenge that trial court order granting new trial was "on erroneous and pretextual reasons"); *In re Whataburger Rests., LP*, 2010 WL 4983563 (Tex. App.—El Paso 2010, orig. proceeding [mand. pending]) (denying mandamus relief and interpreting *In re Columbia* to mean mandamus review is available only "if the trial court fails to specify the reasons for ordering the new trial," since the "merits of the grounds stated . . . are not reviewable by mandamus").

But see In re Lufkin Indus., Inc., 317 S.W.3d 516, 518 (Tex. App.—Texarkana 2010, orig. proceeding [mand. denied]) (denying mandamus relief because it found trial court was within its discretion on at least one ground, *but* holding that a trial court's reasons for granting new trial *are* reviewable on appeal).

Notably, after *In re Lufkin*, the Texarkana court of appeals clarified its position in *In re Smith*, 332 S.W.3d 704, 708–09 (Tex. App.—Texarkana 2011, orig. proceeding) (denying mandamus relief and clarifying its earlier decision in *In re Lufkin* that "[n]ever . . . did we state the proposition . . . that the appellate court should review the entire record, as in an ordinary appeal, in our mandamus review").

Having already decided that new trial orders must meet these requirements and that non-compliant orders will be subject to mandamus review, it would make little sense to conclude now that the correctness or validity of the orders' articulated reasons cannot also be evaluated. To deny merits-based review would mean that a trial court could set aside a verdict for reasons that are unsupported by the law or the evidence, as long as those reasons are facially valid. *Columbia's* requirements would be mere formalities, lacking any substantive "checks" by appellate courts to ensure that the discretion to grant new trials has been exercised appropriately. Transparency without accountability is meaningless. While we reiterate our "faith in the integrity of our trial bench as well as that of the appellate bench," *Columbia*, 290 S.W.3d at 214, we decline to hold that their decisions are immune from substantive review.

We have recognized two narrow instances in which new trial orders are reviewable, on the merits, by mandamus: when the trial court's order was void or when the trial court erroneously concluded that the jury's answers to special issues were irreconcilably in conflict. *See Columbia*, 290 S.W.3d at 208 (citing *Wilkins v. Methodist Health Care Sys.*, 160 S.W.3d 559, 563 (Tex. 2005)).[8] As to the latter, since at least 1926, we have granted mandamus relief to correct a trial court's erroneous ruling. *See Gulf, C. & S.F. Ry. Co. v. Canty*, 285 S.W. 296, 302 (Tex. 1926). In such cases, merits-based mandamus review is relatively straightforward—an appellate court may compare the jury charge against the jury's answers, and decide whether the trial court correctly concluded that they conflicted irreconcilably.

[8] *See also Angelina Cas. Co. v. Fisher*, 319 S.W.2d 387, 388 (Tex. 1962) (noting that if a trial court is "mistaken" about whether jury answers were in irreconcilable conflict, mandamus would issue to compel entry of judgment).

This case is analogous. Appellate courts must be able to conduct merits-based review of new trial orders. If, despite conformity with the procedural requirements of our precedent, a trial court's articulated reasons are not supported by the underlying record, the new trial order cannot stand.

While this review is new to us, it is old hat to our colleagues on the federal bench. Federal appellate courts regularly conduct record-bound, merits-based review of new trial orders to evaluate their validity.[9] For instance, in *Peterson v. Wilson*, 141 F.3d 573, 580 (5th Cir. 1998), the United States Court of Appeals for the Fifth Circuit reversed a district court's ruling granting a new trial, vacated the judgment rendered after a jury verdict in a second trial, and reinstated the first trial's results. The Fifth Circuit observed that the trial court had granted the defendant's "bare-bones" new trial motion despite an original verdict for the plaintiff, after the court "met with and interrogated the jurors after the verdict (concededly, outside the presence of the parties and counsel), and then acted on the comments of some of the jurors as though their remarks were newly discovered evidence." *Id.* at 575. After examining the district court's stated reason and "conduct[ing] the obligatory 'cumbersome review' of the multi-volume trial record," the court concluded from its "meticulous review of the record of the first trial" that "[t]he instant record [could not] support any such conclusion [that the evidence was insufficient to support the original jury verdict]." *Id.* at 575–79 (internal citations omitted).[10]

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[9] *See, e.g.*, *Van Steenburgh v. Rival Co.*, 171 F.3d 1155, 1160 (8th Cir. 1999) (noting that "[a] district court must adequately articulate its reasons for overturning a jury verdict . . . so that the reviewing court can exercise a meaningful degree of scrutiny and safeguard parties' right to a jury trial").

[10] Toyota actually argues that *Peterson* and the federal model "run[] headlong into established Texas law that [generally] precludes appellate review of a new-trial order [or a final judgment] after a subsequent retrial," *see Cummins v. Paisan Constr. Co.*, 682 S.W.2d 235, 236 (Tex. 1984), but concedes that "[e]ven under the federal model, there are cases in which the court of appeals granted mandamus to review a new-trial order before a subsequent retrial could

Similarly, in *Cruthirds v. RCI, Inc., d/b/a Red Carpet Inn of Beaumont, Texas*, 624 F.2d 632, 635, 636 (5th Cir. 1980), the Fifth Circuit "review[ed] the record carefully to make certain that the district court [did] not merely substitute[] its own judgment for that of the jury" when that court "disregard[ed] the verdict and grant[ed] a new trial." The court consulted the record to evaluate the district court's two stated grounds for granting new trial—the first, an erroneous jury charge on comparative negligence, and the second, an "against the great weight and preponderance" and "prevent[ion of] a miscarriage of justice" type rationale. *Id.*[11] Relevant for our purposes is the fact that the Fifth Circuit has long engaged in merits-based review of new trial orders, looking to the records available on a case-by-case basis. Though not binding on this Court, this approach supports our decision today that the reasons articulated in a new trial order are subject to merits-based mandamus review.

B. Under this standard, the trial court abused its discretion in granting a new trial.

1. Merits-Based Review of This Order

Having concluded that the reasons articulated in a new trial order are reviewable on the merits by mandamus, we now evaluate the trial court's grant of new trial against the underlying record.

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occur." We reference these federal cases only to demonstrate that we are not the first nor the only court to conclude that, in certain instances, review of the record to evaluate a new trial order may be warranted.

[11] The court noted that "the record in this case does not clearly reveal what error in the instructions to the jury was so troubling to the district court," but ultimately concluded that the district court had committed a fundamental error in the jury instructions which, though unobjected to by plaintiff's counsel, was severe enough to warrant *sua sponte* correction by new trial. *Cruthirds v. RCI, Inc., d/b/a Red Carpet Inn of Beaumont, Texas*, 624 F.2d 632, 635–36 (5th Cir. 1980).

The new trial order complies with *Columbia*'s procedural "form" requirements. The trial judge's three-page order, which pinpointed Toyota's reference to Officer Coon's testimony in closing argument as the basis for granting new trial, is distinguishable from the *Columbia* order's bare assertion of "in the interests of justice and fairness." This order, on its face, comports with *Columbia*.

Similarly, the trial court's explanation of and reference to the specific grounds for new trial from Toyota's closing argument satisfy, facially, *United Scaffolding*'s requirements that the reasons listed (if accurate) would have been "legally appropriate" grounds for new trial, and are "specific enough" that they are not simply pro forma. 377 S.W.3d at 688–89.

The trouble is that the record squarely conflicts with the trial judge's expressed reasons for granting new trial. Simply articulating understandable, reasonably specific, and legally appropriate reasons is not enough; the reasons must be valid and correct. Having undertaken our own "'cumbersome review' of the multi-volume trial record," *Peterson*, 141 F.3d at 579 (internal citations omitted), we conclude that the record does not support the new trial order.

The trial court initially granted the Kings' motion in limine to preclude Officer Coon's deposition testimony regarding King's seat belt usage at the time of the crash. But a protective limine order alone does not preserve error. *See Pool v. Ford Motor Co.*, 715 S.W.2d 629, 637 (Tex. 1986) (noting that "to preserve error as to an improper question asked in contravention of a sustained motion in limine, a timely objection is necessary"). Furthermore, where, as here, the party that requested the limine order *itself* introduces the evidence into the record, and then fails to immediately object, ask for a curative or limiting instruction or, alternatively, move for mistrial, the party waives

any subsequent alleged error on the point. *See, e.g.*, *Bay Area Healthcare Grp., Ltd. v. McShane*, 239 S.W.3d 231, 235 (Tex. 2007) ("Error is waived if the complaining party allows the evidence to be introduced without objection."); *State Bar of Tex. v. Evans*, 774 S.W.2d 656, 659 n.6 (Tex. 1989) ("Failure to request the court to instruct the jury to disregard the inadmissible testimony results in waiver of the alleged error where the instruction would have cured the error."); *see also* TEX. R. APP. P. 33.1(a) (detailing requirements for preservation of appellate complaints); TEX. R. EVID. 103(a) (describing effects of erroneous admission or exclusion of evidentiary rulings); JOHN HENRY WIGMORE, WIGMORE'S CODE OF THE RULES OF EVIDENCE IN TRIALS AT LAW § 140 (3d ed. 1942) ("The objector waives an objection when he himself *subsequently introduces* evidence which is directed to prove or disprove the same matter and is liable to the same objection.").

Even if the attorney's actions were inadvertent, the Kings introduced the point into evidence and waived the point of error. The trial court acknowledged the introduction of the evidence, stating three times that the Kings' attorney had "read it into the record." The Kings argue that because the statement came from their *attorney*, and not directly from Officer Coon's deposition, it cannot be considered a tender or proffer of testimony. The record reflects, however, that the Kings' attorney quoted the relevant deposition testimony when making an offer under the rule of optional completeness and that the trial court repeatedly acknowledged that the evidence had been read into the record. *See* TEX. R. EVID. 107 ("When part of a[] . . . recorded statement is given in evidence by one party, the whole on the same subject may be inquired into by the other, and any other . . . recorded statement which is necessary to make it fully understood or to explain the same may also be given in evidence.") Surely, the Kings would not argue that their *intended* quotation for optional

completeness was a tender of testimony, while their *inadvertent* quotation was not. Once the evidence was in the record—without objection or a request that it be stricken or that the jury be instructed to disregard—it was in for all purposes and a proper subject of closing argument.

Toyota's counsel fairly referenced the previous day's proceedings during Lee Carr's direct examination, by noting that he "wanted to review [Officer Coon's] deposition passage which was read into the record . . . yesterday." Though the Kings' attorney objected to Toyota's questioning, he again neglected to ask the trial court for any sort of ruling, or for a limiting or curative instruction. The colloquy ended with the trial court's noting her recollection that Kings' counsel had previously "read[] from the deposition for optional completeness" and that his disclosure may have been "inadvertent." She stated that she was not going to sanction anyone, that "[t]he record is going to have to speak for itself," and that "[t]he evidence is going to be reflected in the record." *See* discussion *supra*, ___ S.W.3d at ___.

On the third instance, during Dr. Van Arsdell's direct examination, the Kings' attorney again remained silent. The Kings' attorney's objection during closing argument was too late. The statement was in evidence. Attorneys in closing must "confine the argument strictly to the evidence"; any evidence in the record is fair game. *See* TEX. R. CIV. P. 269(e) ("Counsel shall be required to confine the argument strictly to the evidence and to the arguments of opposing counsel.").

The trial court's pretrial limine rulings prevented Toyota from introducing the evidence, and the record—specifically, the redacted deposition Toyota offered—reflects Toyota's compliance with those rulings. After the Kings' attorney read the testimony into evidence, and after Toyota's counsel repeated the excerpt subsequently, the parties sought clarification from the trial court, who repeatedly

stated that the record would reflect what was in evidence. The trial court did not instruct Toyota not to mention Coon's statement during closing; rather, she warned that "appropriate sanctions [would] be issued to either party *if they argue outside the record*." (Emphasis added.) We agree with Toyota that it did not violate the trial court's rulings by referencing Officer Coon's deposition in closing.

We acknowledge that appellate courts benefit from the hindsight that a complete record provides. Trial courts, on the other hand, must make difficult, often dispositive, decisions based on their recollection and best judgment alone, frequently without the aid of full records, transcripts, or briefing. Nevertheless, having thoroughly reviewed the record here, we conclude that the trial court's articulated reason for granting new trial—that Toyota's counsel "willfully disregarded, brazenly and intentionally violated" the limine orders in closing—is unsupported. The record directly contravenes the order, including the trial court's acknowledgment during trial that the Kings' attorney "ha[d] read into the record what [Toyota] wanted published."

Because the record does not support the articulated reason, the trial court abused its discretion by granting a new trial on that ground.

2. New Trial as a Sanction

The trial court further explained that it was ordering a new trial pursuant to its inherent authority to issue sanctions, irrespective of or in addition to Texas Rule of Civil Procedure 320, because of Toyota's reference to Officer Coon's testimony during closing argument. The court held that the reference was so prejudicial and inflammatory that an instruction to disregard could not eliminate the harm.

A new trial on that basis presupposes sanctionable conduct, and we have just held that Toyota's statements during closing argument were appropriate. The record reflects that Toyota and its counsel complied with the limine orders regarding Officer Coon's deposition, as demonstrated by the playback of mechanically redacted portions of the videotaped testimony. There is nothing to suggest that either Toyota or its counsel intended, prior to the statement's first introduction by the Kings' attorney, to introduce the statement regarding King's seat belt usage to the jury. In fact, Toyota made clear prior to Officer Coon's deposition playback that it had voluntarily deleted the "if they are not wearing one" excerpt, even though there had been no objection or ruling on that portion specifically. Once the statement was in evidence, however, and in light of subsequent bench conferences, Toyota's reference to it during closing argument was appropriate. Given that, the trial court abused its discretion in sanctioning Toyota for that conduct.

III. Conclusion

On mandamus review, an appellate court may conduct a merits-based review of the reasons given for granting a new trial. That review compels us to conclude that the trial court abused its discretion in granting a new trial here. The stated reasons, though complying in form with the requirements of *Columbia* and *United Scaffolding*, lacked substantive merit. Further, a new trial was an improper sanction.

We conditionally grant relief and order the trial court to withdraw its order and render judgment on the verdict. We are confident the trial court will comply, and the writ will issue only if it does not.

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Wallace B. Jefferson
Chief Justice

OPINION DELIVERED: August 30, 2013

IN THE SUPREME COURT OF TEXAS

NO. 10-0933

IN RE TOYOTA MOTOR SALES, U.S.A., INC. AND VISCOUNT PROPERTIES II, L.P., D/B/A HOY FOX TOYOTA/LEXUS, RELATORS

ON PETITION FOR WRIT OF MANDAMUS

JUSTICE LEHRMANN, joined by JUSTICE DEVINE, concurring.

"The right of trial by jury shall remain inviolate." TEX. CONST. art. I, § 15. The importance of protecting that right was the underpinning of the Court's recent holding that mandamus relief is appropriate when a trial court fails to explain with reasonable specificity the reasons it has set aside a jury verdict and granted a new trial. *In re Columbia Med. Ctr. of Las Colinas, Subsidiary, L.P.*, 290 S.W.3d 204, 209 (Tex. 2009). Today the Court takes another step along that path by authorizing appellate courts to conduct merits-based review of such new-trial orders. *See* ___ S.W.3d at ___. It is essential to remember in conducting this review, however, that the trial court's authority to grant a new trial "'is not in derogation of the right of trial by jury but is one of the historic safeguards of that right.'" *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 433 (1996) (quoting *Aetna Cas. & Sur. Co. v. Yeatts*, 122 F.2d 350, 353 (4th Cir. 1941)). I thus concur in the Court's opinion, but write separately to emphasize the significant discretion trial courts are, and must continue to be, afforded in determining whether good cause exists to grant a new trial following a jury verdict.

The specific issue presented in *Columbia* was a narrow one: "whether trial courts must give more explanation than 'in the interest of justice' for setting aside a jury verdict." 290 S.W.3d at 206. In affirmatively answering that question and conditionally granting mandamus relief to require such specificity, we recognized the significant departure from our longstanding mandamus jurisprudence, which had to that point "approved the practice of trial courts failing to specify reasons for setting aside jury verdicts" and "preclude[d], for the most part, appellate review of orders granting new trials." *Id.* at 208 (citing *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 918 (Tex. 1985), and *Wilkins v. Methodist Health Care Sys.*, 160 S.W.3d 559, 563 (Tex. 2005)). Both *Columbia* and our subsequent opinion in *In re United Scaffolding, Inc.*, 377 S.W.3d 685 (Tex. 2012), focused on transparency in the context of setting aside jury verdicts, noting the importance of ensuring that trial courts do not impermissibly substitute their judgment for that of the jury. *Id.* at 688; *Columbia*, 290 S.W.3d at 214. This concern, however, is not present with respect to new-trial orders that do not set aside a jury verdict, such as orders issued after a bench trial or setting aside a default judgment. Accordingly, in my view, the *Columbia* line of cases does not apply to such orders.

Having required trial courts to "provide[] a cogent and reasonably specific explanation of the reasoning" for new trial orders, *United Scaffolding*, 377 S.W.3d at 688, the Court now concludes that, for the sake of averting "[t]ransparency without accountability," such reasoning cannot be "immune from substantive review." ___ S.W.3d at ___. Engaging in that review, the Court further holds that "the record squarely conflicts with the trial judge's expressed reasons for granting new trial" and that the court therefore abused its discretion in doing so. *Id.* at ___.

I agree that, in this case, determining whether the order granting a new trial was an abuse of discretion is "relatively straightforward." *Id.* at ___. It is undisputed that, notwithstanding the trial court's order *in limine* precluding the introduction of Officer Coon's deposition testimony regarding King's seatbelt usage, the testimony was disclosed to the jury twice without objection, the first time inadvertently by the Kings' attorney (who did not request that the jury be instructed to disregard the statement or otherwise clarify the mistake when pointed out by Toyota's counsel), and the second time by one of Toyota's expert witnesses on direct examination. Notably, neither the Kings' motion for new trial nor the order granting it referenced the introduction of that testimony as a basis for the order. Instead, both the motion and order focused solely on Toyota's counsel's referencing the testimony during his closing argument, and the order clarified the trial court's conclusion that Toyota's counsel "purported to present evidence outside the record, and commented on matters in violation of [the trial c]ourt's order in limine." The trial transcript dispositively reveals, however, that the complained-of and unobjected-to evidence discussed by Toyota's counsel during closing argument was *not* outside the record and thus was not improper. *See Tex. Sand Co. v. Shield*, 381 S.W.2d 48, 57–58 (Tex. 1964) ("Counsel may properly discuss the reasonableness or unreasonableness of the evidence and its probative effect or lack of probative effect; but such latitude extends only to the facts and issues raised by the evidence admitted under the ruling of the Court.").

But while review of a cold record appears to be exactly what was needed in this case to evaluate the substantive merit of the new-trial order, that limitation frequently places appellate courts at a disadvantage in evaluating whether there is good cause to grant a new trial. *See United Scaffolding*, 377 S.W.3d at 688. As we recognized in *Columbia*, "there are differences between the

review that can be accomplished by appellate judges who have only the record to consider and trial judges who have seen the parties and witnesses and sensed the [e]ffect of certain evidence or occurrences on the trial." 290 S.W.3d at 211; *see also United Scaffolding*, 377 S.W.3d at 688 (noting that "the trial judge may have observed irregularities not wholly apparent in a cold record"); *Jennings v. Jones*, 587 F.3d 430, 437 (1st Cir. 2009) ("[Appellate courts], reading the dry pages of the record, do not experience the tenor of the testimony at trial. The balance of proof is often close and may hinge on personal evaluations of witness demeanor.'" (quoting *United States v. Alston*, 974 F.2d 1206, 1212 (9th Cir. 1992))). The trial court, for example, may conclude, based on observations of the jurors' reactions, that they were particularly influenced by improperly admitted evidence or by attorney misconduct and that such error unfairly affected the verdict. Or the trial court may observe jurors being significantly distracted during the presentation of crucial evidence in the case and discern a prejudicial effect on the verdict. And in the context of new-trial orders based on evidentiary insufficiency, we recognized in *United Scaffolding* that trial courts need not furnish the same level of detail in explaining their decisions that courts of appeals must provide.[1] 377 S.W.3d at 688. This is because the concerns that exist as to whether the "court of appeals ha[s] 'considered and weighed all the evidence before arriving at a decision of insufficiency'" are not present with respect to the trial court, which "has, in most instances, been present and a participant in the entire trial." *Id.* (quoting *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986)).

[1] This ground for a new trial raises yet another wrinkle, as this Court lacks jurisdiction to conduct factual sufficiency reviews. *See* TEX. GOV'T CODE § 22.001(a); *see also Sw. Bell Tel. Co. v. Garza*, 164 S.W.3d 607, 619–20 (Tex. 2004) (distinguishing between legal sufficiency and factual sufficiency reviews).

These examples illustrate that determining whether a trial court abused its discretion in granting a motion for new trial after a jury verdict will rarely be as cut-and-dry as confirming that evidence or testimony referenced during a closing argument is or is not in the record. Often, the trial court's presence and observations throughout the trial will be indispensable in evaluating whether the requisite good cause exists to justify setting aside a jury verdict and granting a new trial. *See Columbia*, 290 S.W.3d at 212 ("We do not retreat from the position that trial courts have significant discretion in granting new trials."). Recognizing the need to defer to trial courts with respect to such determinations is crucial to ensuring that parties receive a fair trial.

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Debra H. Lehrmann
Justice

OPINION DELIVERED: August 30, 2013

IN THE SUPREME COURT OF TEXAS

NO. 10-1020

TEXAS DEPARTMENT OF TRANSPORTATION AND CITY OF EDINBURG, PETITIONERS,

v.

A.P.I. PIPE AND SUPPLY, LLC AND PAISANO SERVICE COMPANY, INC., RESPONDENTS

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

Argued September 12, 2012

JUSTICE WILLETT delivered the opinion of the Court.

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

Texas legal rules governing real-estate transactions demand assiduousness, lest uncertainty subvert the orderly transfer of property. This inverse-condemnation dispute over ten acres in Hidalgo County asks a simple question: Who has title to the parcel? The answer turns on the validity of conflicting recorded judgments:

1. 2003 Judgment—which the Texas Department of Transportation (TxDOT) and the City of Edinburg claim gives the City fee-simple ownership, subject to a drainage easement granted to TxDOT.

2. 2004 Judgment—which A.P.I. Pipe Supply, LLC and Paisano Service Company, Inc. (collectively API) claim gives API fee-simple ownership,

> subject to a drainage easement granted to the City (and, via subsequent conveyance, to TxDOT).

In 2005, TxDOT began its drainage project, and API, relying on the 2004 Judgment, brought a takings claim for the value of the removed soil. TxDOT counters that API lacks any ownership interest because the 2004 Judgment, which purports to declare the 2003 Judgment "null and void," is itself void—to which API replies, even if the 2003 Judgment controls, API is an "innocent purchaser" entitled to ownership under Property Code section 13.001.

We agree with TxDOT. The void 2004 Judgment cannot supersede the valid 2003 Judgment; API is statutorily ineligible for "innocent purchaser" status; and equitable estoppel is inapplicable against the government in this case. Because API's takings claim fails, we reverse the court of appeals' judgment and dismiss the suit.

I. Facts

The chain of title contains conflicting records, so we first describe how the City, TxDOT, and API obtained their purported interests in the land.

A. The 2003 Judgment Giving the City Ownership

Herschell White originally owned the land, and the City brought a condemnation action so it could dig a drainage channel. As compensation for the land, the commissioners awarded, and White accepted, $207,249 (plus $17,000 for damage to the remainder of the property). The special commissioners' report described the interest conveyed as a "right-of-way" but also incorporated by reference the City's original petition for condemnation, which described the interest sought as a "fee

title." No one objected to the special commissioners' award, and the trial court adopted it as the judgment of the court (the 2003 Judgment).[1]

B. The 2004 Judgment Nunc Pro Tunc Giving API Ownership

A year later, the same trial court entered a "Judgment Nunc Pro Tunc" (the 2004 Judgment), which was agreed to by the City's and White's attorneys. A TxDOT employee apparently also approved the 2004 Judgment by email.[2]

The 2004 Judgment purported to render the 2003 Judgment "null and void." The 2004 Judgment states that the City's interest in the land was a "right of way easement" obtained "for the purpose of opening, constructing and maintaining a permanent channel or drainage easement . . . ." Unlike the 2003 Judgment, the 2004 Judgment did not incorporate the special commissioners' report or the City's original condemnation petition. Rather, it referred to the City's interest *only* as an easement, not fee-simple ownership.

C. Subsequent Title Transfers

Three months after the trial court signed the 2004 Judgment, White sold the ten acres and some surrounding property to API.[3] Both the 2003 Judgment and the 2004 Judgment were recorded in the county registry before API purchased the property. In 2005, the City granted TxDOT an easement to build a drainage ditch and to remove any excavated "stone, earth, gravel or caliche."

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[1] *See* TEX. PROP. CODE § 21.061 (providing that if no party objects to the findings of the special commissioners, the trial court "shall adopt the commissioners' findings as the judgment of the court").

[2] The record is unclear as to why the parties agreed to the 2004 judgment, or why TxDOT, which did not yet have an interest in the property, would agree to the nunc pro tunc judgment.

[3] API paid $292,800 for approximately 34 acres, including the 9.869 acres at issue in this case.

II. Proceedings Below

When TxDOT started digging, API filed an inverse-condemnation action against the City and TxDOT over the removed dirt. TxDOT and the City filed a plea to the jurisdiction, which the trial court denied. The court of appeals affirmed, holding the 2004 Judgment was void but saying the record was unclear as to whether API had notice of the 2003 Judgment.[4]

Upon remand to the trial court, TxDOT and the City produced evidence that the 2003 Judgment was indeed recorded in the county registry. TxDOT and the City filed a second plea to the jurisdiction, arguing that, because the 2004 Judgment was void and API had notice of the 2003 Judgment, the City held fee-simple title to the land, subject only to TxDOT's easement. The trial court denied the second plea to the jurisdiction, and the court of appeals affirmed, concluding that API was a good-faith purchaser for value since the 2004 Judgment superseded the 2003 Judgment.[5]

III. Discussion

Whether a court has jurisdiction is a matter of law we decide de novo.[6] Evidence can be introduced and considered at the plea to the jurisdiction stage if needed to determine jurisdiction.[7]

A trial court lacks jurisdiction and should grant a plea to the jurisdiction where a plaintiff "cannot establish a viable takings claim."[8] Further, "[i]t is fundamental that, to recover under the

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[4] *Tex. Dep't of Transp. v. A.P.I. Pipe & Supply, LLC*, No. 13-07-221-CV, 2008 Tex. App. LEXIS 276, at *8–*14 (Tex. App.—Corpus Christi Jan. 10, 2008, no pet.) (mem. op.).

[5] 328 S.W.3d 82, 90–92.

[6] *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004).

[7] *Id.* at 227.

[8] *Hearts Bluff Game Ranch, Inc. v. State*, 381 S.W.3d 468, 491 (Tex. 2012).

constitutional takings clause, one must first demonstrate an ownership interest in the property taken."[9] Thus, if API does not own the disputed land, the takings claim is not viable and the trial court lacks jurisdiction. Given that the dispositive question is whether API is the property owner, the trial court was correct to consider the 2003 and 2004 Judgments as extrinsic, undisputed evidence.

For the reasons discussed below, we hold that API does not own the land and cannot assert the good-faith purchaser[10] or equitable estoppel doctrines. We thus conclude that the trial court should have granted the plea to the jurisdiction.

A. The 2004 Judgment in Favor of the City Was Void.

A judgment nunc pro tunc can correct a clerical error in the original judgment, but not a judicial one.[11] An attempted nunc pro tunc judgment entered after the trial court loses plenary jurisdiction is void if it corrects judicial rather than clerical errors.[12] "A clerical error is one which does not result from judicial reasoning or determination."[13] Even a significant alteration to the original judgment may be accomplished through a judgment nunc pro tunc so long as it merely

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[9] *Tex. Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 644 (Tex. 2004).

[10] We have jurisdiction over this interlocutory appeal under Texas Government Code section 22.225(c) because of a conflict between the court of appeals' decision and a decision of another court of appeals. *See* TEX. GOV'T CODE §§ 22.001(a)(2), .225(c). As explained below, the court of appeals' misapplication of the good-faith purchaser doctrine is inconsistent with *Wall v. Lubbock*, 118 S.W. 886, 888 (Tex. Civ. App.—Austin 1908, writ ref'd).

[11] *Andrews v. Koch*, 702 S.W.2d 584, 585 (Tex. 1986) (per curiam).

[12] *Dikeman v. Snell*, 490 S.W.2d 183, 186 (Tex. 1973).

[13] *Andrews*, 702 S.W.2d at 585.

corrects a clerical error.[14] If "the signed judgment inaccurately reflects the true decision of the court," then "the error is clerical and may be corrected."[15]

Here, the change was undeniably significant. The 2003 Judgment granted a fee simple to the City, while the 2004 Judgment purported to turn the City's outright ownership into a mere easement. Again, the fact that the change was significant is not fatal to the 2004 Judgment's nunc pro tunc status. However, TxDOT and the City produced evidence showing that the 2003 Judgment correctly reflected the underlying judicial determination,[16] and no party produced any evidence indicating that the 2004 Judgment was merely correcting a clerical error. That is, nothing suggests that the 2003 Judgment really meant to convey to the City an easement rather than a fee simple.

Further, the trial court in this case was by law required to adopt the award of the special commissioners, who in turn granted the fee-simple title the City sought in its condemnation petition. If parties do not timely object to a special commissioners' report, the trial court is required to enter "the [special] commissioners' findings as the judgment of the court."[17] Objection is timely only if raised within 20 days of the special commissioners' award.[18] Here, the parties point to no evidence

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[14] *See id.* at 584–86 (using a nunc pro tunc judgment to add an easement to a deed; a prior court order had required the easement, so exclusion of the easement was clearly a clerical mistake).

[15] *Id.* at 586.

[16] There is circumstantial evidence that the 2003 Judgment intended to award a fee simple rather than an easement. The condemnation award approved by the court in the 2003 Judgment provided compensation of over $207,000 for 10 acres in April 2003, whereas API purchased that tract plus 20 more acres for approximately $90,000 more in August 2004.

[17] TEX. PROP. CODE § 21.061.

[18] *Id.* § 21.018. The time for making objections to the special commissioners' award is tolled if the parties are not given proper notice of the special commissioners' award. *John v. State*, 826 S.W.2d 138, 141 n.5 (Tex. 1992). However, there is no evidence here that there were any notice problems regarding the award.

of a timely objection. Indeed, the 2003 Judgment indicated that no party objected to the award. Therefore, the trial court could "only perform its ministerial function and render judgment based upon the commissioner's award."[19] The trial court did just that in the 2003 Judgment, awarding compensation for fee simple title. Conversely, the 2004 Judgment exceeded the scope of this "ministerial function" by shrinking the interest awarded by the special commissioners from a fee simple to an easement. As the special commissioners' award was not changed pursuant to timely objection, the 2004 Judgment was void.

One more timing issue cuts against API: the expiration of the trial court's plenary power. Such power usually lasts 30 days.[20] The 2004 Judgment, though labeled a Judgment Nunc Pro Tunc, was undeniably a substantive alteration to the 2003 Judgment. However, the trial court's plenary power to make substantive alterations had expired 300-plus days before the 2004 Judgment was rendered.[21]

Because the 2004 Judgment was void, it did not convey anything to anyone. Instead, under the 2003 Judgment, the City continued to hold fee-simple title. White continued to have no interest in the land, and API could not buy from White what White did not own.

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[19] *John*, 826 S.W.2d at 141 n.5. *See also Pearson v. State*, 315 S.W.2d 935, 938 (Tex. 1958) (noting that if there are no objections to the special commissioners' award, "[n]o jurisdiction is conferred upon the court to do anything more than accept and adopt the [special commissioners'] award as its judgment, and this follows by operation of law and the ministerial act of the county judge").

[20] *See* TEX. R. CIV. P. 329b(d)–(f).

[21] Here, the 2004 Judgment was entered 351 days after the 2003 Judgment.

B. The Innocent-Purchaser and Equitable Estoppel Doctrines Are Inapplicable.

API urges that, even if the 2004 Judgment is void such that White had no interest to convey, API should still prevail because it depended on the 2004 Judgment when it bought the land from White. API presents two theories, neither persuasive.

1. The Innocent-Purchaser Statute, by its Terms, Does not Apply to Recorded Judgments.

The court of appeals held that API was a good-faith purchaser for value. However, we refused the writ of error in a case holding that this doctrine does not protect a purchaser whose chain of title includes a void deed: "One holding under a void title cannot claim protection as an innocent purchaser."[22]

Codified at Property Code section 13.001, the innocent-purchaser doctrine is simply inapplicable here:

> A conveyance of real property or an interest in real property . . . is void as to . . . a subsequent purchaser for a valuable consideration without notice unless the instrument has been . . . proved and filed for record as required by law.[23]

By its terms, the statute protects purchasers from *unrecorded* property conveyances—covert, off-the-books transfers that leave buyers unaware of adverse interests. But one cannot be "innocent" of a *recorded* judgment, and here, API concedes it knew of the recorded 2003 Judgment before it purchased the property.

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[22] *Wall*, 118 S.W. at 888.

[23] TEX. PROP. CODE § 13.001(a).

API essentially argues that the 2003 Judgment was superseded by the 2004 Judgment because the latter purported to nullify the former. But our caselaw does not support the idea that earlier instruments in a chain of title can be rendered meaningless by later instruments that are contradictory.[24] Instead, we refused the writ of error in a case that explicitly held that the innocent-purchaser doctrine cannot protect those who claim under a void deed.[25] Further, the consistent theme in our cases is that "[a] purchaser is charged with knowledge of the provisions and contents of recorded instruments. Purchasers are also charged with notice of the terms of deeds which form an essential link in their chain of ownership."[26] That is, a purchaser is deemed to have notice of all recorded instruments, not just the most recent one. Thirty years ago, we stated in *Westland Oil Development Corp. v. Gulf Oil Corp.*:

> *[A]ny* description, recital of fact, or reference to other documents puts the purchaser upon inquiry, and he is bound to follow up this inquiry, step by step, from one discovery to another and from one instrument to another, until the whole series of title deeds is exhausted and a complete knowledge of *all the matters referred* to and affecting the estate is obtained.[27]

In other words, API, constructively and actually aware of the recorded 2003 Judgment, was responsible for squaring it with the contradictory 2004 Judgment.

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[24] API does not argue, and we do not consider, whether the 2004 Judgment is a "correction instrument" under recently enacted sections 5.027–.031 of the Property Code.

[25] *Wall*, 118 S.W. at 888.

[26] *Cooksey v. Snider*, 682 S.W.2d 252, 253 (Tex. 1984) (per curiam).

[27] 637 S.W.2d 903, 908 (Tex. 1982) (citations and quotations omitted) (emphases in original).

Slaughter v. Qualls,[28] on which the court of appeals relied, is not to the contrary. *Slaughter* suggests that a recorded but void foreclosure sale could protect a subsequent good-faith purchaser.[29] However, the statement was dicta because the subsequent purchaser's claim was not before the Court.[30] In any event, the *Slaughter* dicta suggests that such purchasers merit protection under equitable estoppel principles (describing a contrary result as "inequitable"[31]) and not under the innocent-purchaser doctrine codified in the Property Code. Section 13.001 defines the elements of innocent-purchaser status for *all* cases, and courts may not disregard or rewrite the statute when they believe straight-up application would be inequitable. The statute is categorical and makes no case-by-case exceptions: A purchaser with notice of an adverse interest cannot claim innocent-purchaser status.

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[28] 162 S.W.2d 671 (Tex. 1942).

[29] *Id.* at 675.

[30] *Id.* at 674.

[31] That is, *Slaughter* says (in its explanation of its dicta):

> It is true that under circumstances such as we have here, those who purchased interests in or took liens on the land in good faith from [the purchaser of a deed voided by a wrongful foreclosure sale] acquired good title as against [the debtor who had originally executed the deed of trust]; but this is so *not on the theory that the title actually passed,* but rather on the theory that [the debtor], by the execution of the deed of trust, made it possible for the trustee to create the appearance of good title in [the purchaser at the foreclosure sale], and *it would be inequitable* to permit [the debtor] now to show otherwise as against those who have purchased in good faith in reliance thereon.

Id. at 675 (emphases added).

2. API Cannot Prevail on Equitable Estoppel, Which Is Inapplicable Against the Government on These Facts.

API argues that TxDOT's acquiescence to the 2004 Judgment bars it from objecting now to what it accepted then. While the argument has a certain force—purchasers should be able to rely upon facially valid judgments—this argument goes to equitable estoppel, a doctrine inapplicable against the government in this case.

For estoppel to apply against the government, two requirements must exist: (1) "the circumstances [must] clearly demand [estoppel's] application to prevent manifest injustice,"[32] *and* (2) no governmental function can be impaired.[33] Neither requirement exists here.

As to the first requirement, we have applied estoppel to prevent manifest injustice if, "officials acted deliberately to induce a party to act in a way that benefitted the [government]."[34] Here, no evidence suggests deliberate inducement (as opposed to mistaken acquiescence) by TxDOT or the City, or that they benefitted when the City's fee title was erroneously relegated to a mere easement.[35] (White benefitted handsomely, though, being paid twice for fee title to the same

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[32] *City of White Settlement v. Super Wash, Inc.*, 198 S.W.3d 770, 774 (Tex. 2006) (quotations omitted).

[33] *Id.* at 776–78.

[34] *Id.* at 775.

[35] Apparently for the first time, API argued at oral argument before this Court that TxDOT and the City *did* receive a benefit from their interest being merely an easement. API alleges that it let the government use other portions of API's property, which API thought was required so that the government could make reasonable use of its purported easement. However, we find this argument unavailing. First, we note that this last-minute allegation of the government's benefit from the easement is not preserved for our review. TEX. R. APP. P. 33.1(a). Further, this last-minute allegation is not even enough to lead us to remand to allow API to amend its jurisdictional allegations. Any purported benefit to TxDOT and the City is minimal compared to the substantial loss to the government for giving up its right to fee-simple title. This purported benefit is "simply too attenuated to establish grounds for equitable relief." *Super Wash*, 198 S.W.3d at 775. Finally, availability of "alternative remedies weighs strongly against" estoppel against the government, *id.*, and API may well have other remedies available for the government's alleged wrongful use of API's surrounding property

property.) This case stands in stark contrast to two cases where we have held the government estopped—cases where the government stalled private citizens from providing proper notice of claims until after the notice deadline had passed.[36]

We have also held that the fact that a governmental error was "discoverable" militates against applying estoppel.[37] The error here was discoverable because API could have examined the conflicting judgments and seen that the 2004 Judgment was issued in error. Red flags were plentiful: (1) the 2004 Judgment was styled a nunc pro tunc even though it made a judicial change, not a clerical one; (2) it was issued long after the 2003 Judgment; (3) it nowhere mentioned the unobjected-to special commissioners' award. We thus conclude that the manifest-injustice requirement for applying estoppel against the government is not satisfied.

The second requirement—that there is no impairment to a governmental function—is also absent. Designing and planning a drainage ditch is a governmental function,[38] and applying estoppel here would impair that governmental function. If TxDOT and the City are estopped, their ability to manage the drainage project would have to accommodate API's ownership of the land, complicating

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in digging the ditch.

[36] *Super Wash*, 198 S.W.3d at 774–76 (explaining the significance of the only two cases where we have applied estoppel against the government, *Roberts v. Haltom City*, 543 S.W.2d 75 (Tex. 1976) and *City of San Antonio v. Schautteet*, 706 S.W.2d 103 (Tex. 1986)).

[37] *Super Wash*, 198 S.W.3d at 775.

[38] *City of Tyler v. Likes*, 962 S.W.2d 489, 501 (Tex. 1997) (holding that, under common law, "design and planning" of drainage ditches was a "quasi-judicial function[] subject to governmental immunity," whereas "the acts of constructing and maintaining a storm sewer are proprietary at common law"). The Texas Tort Claims Act also classifies governmental acts related to "sanitary and storm sewers" as "governmental functions." TEX. CIV. PRAC. & REM. CODE § 101.0215(9). While this legislative interpretation of "governmental functions" is binding only in the context of the Tort Claims Act, we have previously found that "the statute is helpful" in our interpretation of whether an activity is a "governmental function." *Super Wash*, 198 S.W.3d at 776–77.

the government's ability to carry out its project.[39] The land was purchased through eminent domain for the precise purpose of digging a drainage ditch, and restricting the government's ability to freely dig on the land burdens that undisputed governmental function.

IV. Conclusion

The 2004 Judgment was void. The pleadings and evidence establish that API holds no interest in the land and thus "cannot establish a viable takings claim,"[40] meaning the trial court lacked jurisdiction.[41] We reverse the court of appeals' judgment and dismiss the case.

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Don R. Willett
Justice

OPINION DELIVERED: April 5, 2013

[39] If we found that the government was estopped, the government would have only a few options for removing dirt from the property, such as paying API to remove the dirt, relying on API to remove the dirt, or obtaining API's consent to let the government dump the dirt on API's surrounding land. Any of these options could impair plans to expand or improve the ditches by impeding the dirt-removal process.

[40] *Hearts Bluff Game Ranch*, 381 S.W.3d at 491.

[41] *Id.* at 491–92.

IN THE SUPREME COURT OF TEXAS

NO. 10-1020

TEXAS DEPARTMENT OF TRANSPORTATION AND CITY OF EDINBURG,
PETITIONERS,

v.

A.P.I. PIPE AND SUPPLY, LLC AND PAISANO SERVICE COMPANY, INC.,
RESPONDENTS

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

JUSTICE LEHRMANN, joined by JUSTICE GUZMAN, concurring.

I join the Court's opinion because I agree that the 2004 Judgment, which was issued after the expiration of the trial court's plenary power, makes a judicial change to the 2003 Judgment and is therefore void. I write separately to clarify why I agree.

As the Court notes, "a significant alteration to the original judgment may be accomplished through a judgment nunc pro tunc so long as it merely corrects a clerical error." ___ S.W.3d at ___ (citing *Andrews v. Koch*, 702 S.W.2d 584, 584–86 (Tex. 1986) (per curiam)). Indeed, clerical errors frequently concern matters of substance; they are simply errors "made in *entering* final judgment" and not "in *rendering* a final judgment." *Escobar v. Escobar*, 711 S.W.2d 230, 231 (Tex. 1986). Thus, the fact that the change made in the 2004 Judgment—which awards the City an easement as

opposed to the fee simple interest awarded in the 2003 Judgment—is undeniably significant has no bearing on the validity of the nunc pro tunc judgment. Rather, the change was invalid because the 2003 Judgment correctly reflects the true decision of the court, and the 2004 Judgment therefore improperly makes a judicial change beyond the expiration of the court's plenary power such that the 2004 Judgment is void.

In many cases, depending on the state of the record, it may be difficult for an appellate court to discern which of two conflicting judgments accurately "reflects the true decision of the [trial] court," ___ S.W.3d at ___ (quoting *Andrews*, 702 S.W.2d at 586) (internal quotation marks omitted), and, in turn, whether a judgment nunc pro tunc is valid. However, this case does not present such a dilemma. The evidence establishing the fee simple nature of the conveyance reflected in the 2003 Judgment is conclusive. In that judgment, the trial court ordered that the special commissioners' award "is hereby made[] the judgment of this [c]ourt." In turn, the special commissioners "award[ed] to [the City] all rights described and prayed for in [the City]'s Original Statement and Petition for Condemnation." And the City's condemnation petition requested "a final judgment of condemnation vesting in the City of Edinburg the fee title to said land and the rights therein." Further, as noted by the Court, the trial court in this case essentially conducted a ministerial duty in entering judgment on the special commissioners' findings, to which no one had objected. ___ S.W.3d at ___. In light of this evidence, there is no question that the "true decision of the court" was to award fee simple title. Thus, the 2004 Judgment's award of an easement to the City did not merely correct a clerical error and could not be accomplished through a judgment nunc pro tunc.

API contends the use of the term "right-of-way" in the City's condemnation petition and the 2003 Judgment renders it unclear whether the 2003 Judgment was awarding fee simple title or an easement. For example, the 2003 Judgment awards the City "title (right of way) described in attached Exhibit 'A' [the special commissioners' award] and 'B' [condemnation petition]," and orders issuance of a writ of possession to allow the City to "enter upon said right-of-way." The commissioners' award notes that the City sought a decree "vesting in [the City] a right-of-way . . . more fully described in [the City]'s [p]etition." The condemnation petition, in the paragraph setting out the purpose for the action, alleges that the land is sought for the purpose of "laying out, opening, constructing, reconstructing, maintaining, and operating . . . a certain right-of-way," specifically the US Highway 281 Drainage outfall ditches project.

However, such language does not call into question the effect of the 2003 Judgment. The term "right-of-way," used alone, may mean either a "right of passage" over a parcel of land or the parcel of land itself that "is to be used as a right of way." *Tex. Elec. Ry. Co. v. Neale*, 252 S.W.2d 451, 454 (Tex. 1952); *see also Lakeside Launches, Inc. v. Austin Yacht Club, Inc.*, 750 S.W.2d 868, 871 (Tex. App.–Austin 1988, writ denied). There is no indication that the condemnation petition, the special commissioners' award, or the 2003 Judgment used the term "right-of-way" synonymously with an easement or right of passage; rather, it was used to denote the property itself.

Further, the City's agreement with the issuance and recording of the 2004 Judgment nunc pro tunc, while potentially relevant to an equitable claim, does not call into question the true decision of the trial court in entering the 2003 Judgment. At that time, the trial court had before it the City's request for a judgment for "fee title" in the property and the unobjected-to special commissioners'

award, which awarded all rights prayed for in the petition. Again, because the 2003 Judgment adopted the award as the judgment of the court, it is clear that the 2003 Judgment awarded fee title to the City. Therefore, the 2004 Judgment purporting to award an easement, even if the City agreed to it, goes beyond the correction of a clerical error and is void.

It bears repeating that the invalidity of the 2004 Judgment is not evident from the fact that the two judgments are facially in conflict, which in and of itself does not raise suspicion. In reality, most nunc pro tunc judgments conflict substantively with the underlying judgments they are entered to correct. The nunc pro tunc judgment that merely corrects a misspelled word or a grammatical error is an anomaly. After all, reasonable parties do not generally file lawsuits to correct trivial mistakes such as missing commas or misspelled words. Rather, reasonable litigants go to court to correct clerical errors affecting substantive rights. A thorough review of this record, however, conclusively shows that the true decision of the trial court, as reflected in the 2003 Judgment, was to award fee simple title to the City.

Given that the 2004 Judgment was void, API could not acquire legal title from White because the City owned the land. I agree with the Court that any recovery against TxDOT and the City would necessitate application of the doctrine of equitable estoppel, which does not apply against the government under the circumstances of this case. Accordingly, I concur in the Court's opinion and judgment.

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Debra H. Lehrmann
Justice

OPINION DELIVERED: April 5, 2013

IN THE SUPREME COURT OF TEXAS

NO. 11-0104

KOPPLOW DEVELOPMENT, INC., PETITIONER,

v.

THE CITY OF SAN ANTONIO, RESPONDENT

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

Argued September 13, 2012

JUSTICE GUZMAN delivered the opinion of the Court.

In this case we determine whether an inverse condemnation claim is premature when premised on the owner's inability to develop its property as the city previously approved. The landowner purchased the property for the purpose of developing the land, obtained permits, and filled the portion of the property at issue in this proceeding to the 100-year flood level. The municipality then constructed a facility partly on the property that would detain storm water on the property in a significant flood, thus causing the property to again be below the 100-year flood level and undevelopable without additional fill. The landowner sought damages under statutory and inverse condemnation theories. The jury awarded damages of $694,600 and the trial court entered judgment on the verdict. The court of appeals reversed as to the inverse condemnation claim, holding the claim was premature because the property had not yet flooded. Because we conclude

that the landowner's claim is for the present inability to develop the property as previously approved unless the property is filled, we hold the claim is not premature. Accordingly, we reverse the judgment of the court of appeals and remand to the court of appeals for further proceedings.

I. Background

Kopplow Development, Inc. (Kopplow) purchased 18.451 acres of land adjoining Loop 410 in San Antonio in 1996 or early 1997.[1] After retaining an engineering firm, Kopplow filed a plat application on November 27, 1996 and obtained utility and construction easements on the adjoining tract south of its property to connect sewer service. Because Kopplow's property was below the 100-year floodplain elevation of 741 feet above mean sea level, as defined by the Federal Emergency Management Agency (FEMA), Kopplow obtained a floodplain permit from the City of San Antonio (City) and filled most of the property to 741 feet in 2000. About one fourth of the property still fell within the 100-year floodplain, and Kopplow dedicated a drainage easement over this area. In 2004, the City granted Kopplow a vested rights permit, allowing it to develop the property under the rules in effect in November 1996 when Kopplow filed its plat application. A vested rights permit insulates pending development from most future ordinance changes. But certain floodplain regulation changes apply retroactively even against vested rights holders. *See* TEX. LOC. GOV'T CODE §§ 245.002, 245.004(9).

[1] The record does not reflect when Kopplow acquired the property. Company president Edward Kopplow testified that Kopplow acquired the property "in 1996. It might have been early '97." Kopplow's plat application of November 27, 1996 lists it as the owner. Kopplow originally purchased a larger tract and sold two portions to develop as restaurants in early 1997.

San Antonio experienced 100-year floods in 1998 and 2002. The City then planned a regional storm water detention facility for the Leon Creek watershed south of Kopplow's property to mitigate downstream flooding. It determined in 2002 that the project would inundate portions of Kopplow's property and the tract south of Kopplow's property. The City asked Kopplow in late 2003 to donate an easement that the City planned to inundate as part of the project. Kopplow refused. The City obtained a 207-acre drainage easement from the owner of the property south of the Kopplow tract in January 2004 and then built a concrete in-flow wall on the portion of the adjoining tract that includes Kopplow's easements (where Kopplow's easements and the City's drainage easement overlap on the property south of the Kopplow tract). The City also built a large berm or dam south of the Kopplow property. The dam's peak elevation is 748 feet. Once Leon Creek reaches the height of the in-flow wall in a 10-year flood, the wall will guide storm water to be detained by the berm until storm water in Leon Creek subsides, allowing drainage pipes in the berm to open and slowly return the detained water into Leon Creek.

The parties agree the facility will cause increased inundation on Kopplow's property and that the FEMA 100-year floodplain is two feet higher on Kopplow's property because of the facility. But the City asserts that the in-flow wall does not cause the increased inundation because it is under water in a 100-year flood and instead that the berm causes the increased inundation.

The City also changed its regulatory 100-year floodplain to account for future, upstream development.[2] A City representative testified that, although Kopplow must file for a floodplain

[2] By contrast, FEMA's 100-year floodplain accounts for only existing conditions.

development permit to further develop its property, the City will permit Kopplow to develop its property if it fills the property to the new level of the 100-year floodplain. Ultimately, Kopplow must fill the portion of its property to be developed from the existing 741-foot level to 745.16 feet: two feet due to the detention facility and two feet due to the City's ordinance change.

Kopplow sued the City for a taking in May 2004 while it was constructing the facility. The City counterclaimed for condemnation of Kopplow's easement. Before trial, the trial court granted the City's motion that Kopplow's vested rights permit was not effective against subsequent floodplain ordinances and excluded Kopplow's evidence pertaining to two of the four feet of additional fill needed to develop the property.[3] The jury found that: (1) the value of the part taken was $4,600; (2) the City's use of the part taken proximately caused damages to the remainder; and (3) Kopplow's remainder damages were $690,000.

The City and Kopplow both appealed. The court of appeals affirmed the $4,600 damage award for the part taken under the statutory takings claim. 335 S.W.3d 288, 296. It reversed the award of remainder damages under the statutory takings theory, holding that the inflow wall would not inundate Kopplow's property, even during a 100-year flood. *Id.* at 294–95. The court also held the remainder damages unrecoverable under Kopplow's inverse condemnation theory because the property had not yet flooded and the inverse condemnation claim was therefore premature. *Id*. at

[3] *See* TEX. LOC. GOV'T CODE § 245.004(9) (vested rights do not apply against "regulations to prevent imminent destruction of property or injury to persons from flooding that are effective only within a flood plain established by a federal flood control program and enacted to prevent the flooding of buildings intended for public occupancy").

296. In light of its holding, the court of appeals did not reach the City's factual sufficiency challenge or Kopplow's two cross-appeal points.[4] *Id*. at 296–97.

II. Discussion

We have described the right to own private property as "fundamental, natural, inherent, inalienable, not derived from the legislature and as preexisting even constitutions." *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 140 (Tex. 1977). One of the most important purposes of our government is to protect private property rights. *Id*. The Texas Constitution resolves the tension between private property rights and the government's ability to take private property by requiring takings to be for public use, with the government paying the landowner just compensation. TEX. CONST. art. I, § 17 ("No person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made . . . ."). The United States Supreme Court has stated that the rationale for compensating landowners for takings for public use is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). When only part of a tract is taken, Texas law assures just compensation by entitling the landowner to the value of the part taken as well as the damage to the owner's remaining property. TEX. PROP. CODE § 21.042(c).

Takings may be categorized as either statutory (if the government compensates the owner for the taking) or inverse (if the owner must file suit because the government took, damaged, or

[4] Kopplow asserted that: (1) Kopplow's vested right to develop the property meant that the trial court erred in excluding evidence of the value of the entire property; and (2) the trial court erred by including a proximate cause question. 335 S.W.3d at 296.

destroyed the property without paying compensation). *Westgate, Ltd. v. State*, 843 S.W.2d 448, 452 (Tex. 1992). This proceeding has involved statutory and inverse claims. Initially, Kopplow sued because the City did not admit to damaging the property, which sounds in inverse condemnation. 335 S.W.3d at 291. The City later counterclaimed for a statutory taking, admitting it had taken Kopplow's easement. *Id*.

A. Waiver

The City contends, and the court of appeals held, that Kopplow's inverse condemnation claim is not yet ripe. We disagree. As an initial matter, the City asserts that Kopplow did not plead or try an inverse condemnation claim. But Texas is a notice pleading jurisdiction, and a "petition is sufficient if it gives fair and adequate notice of the facts upon which the pleader bases his claim. The purpose of this rule is to give the opposing party information sufficient to enable him to prepare a defense." *Roark v. Allen*, 633 S.W.2d 804, 810 (Tex. 1982). The City responded to Kopplow's pleading by asserting that Kopplow's claim was not yet ripe (a response to an inverse condemnation claim) and the inverse condemnation claim failed because there was no intentional taking. The City moved for summary judgment on Kopplow's claim, stating that Kopplow alleges that "the City has inversely condemned a portion of its . . . property" but that "there is no evidence to support Plaintiff's claim for inverse condemnation." The City's subsequent motion for summary judgment stated: "[t]his is an inverse condemnation case wherein Plaintiff's damages are based on the increase in the flood plain elevation on its property . . . ." The City also specially excepted to the inverse condemnation claim, TEX. R. CIV. P. 90, but it failed to obtain a ruling before the case was submitted to the jury. In sum, the City understood Kopplow was pleading an inverse condemnation claim and

prepared the defense that the claim was not yet ripe but failed to obtain a ruling on its special exception. *See Roark*, 633 S.W.2d at 810 (party waived pleading defect issue by failing to specially except).

Kopplow also pursued the claim at trial and on appeal. The City asserted at the pre-trial conference that Kopplow must decide whether to proceed on the statutory or inverse claim but failed to obtain a specific ruling from the trial court that Kopplow could not proceed on the inverse claim. In the court of appeals, Kopplow noted that, "[t]o the extent that Kopplow's damage claim could be correctly characterized as an inverse condemnation claim, the [trial] Court found as a matter of law that the claim was compensable." Kopplow maintained the position in this Court that its claim was both statutory and inverse in nature. We conclude Kopplow preserved its inverse condemnation claim.

B. Ripeness

Substantively, the court of appeals held that, to the extent Kopplow's claim was for inverse condemnation, it was premature. 335 S.W.3d at 296. The court of appeals relied primarily on *Tarrant Regional Water District v. Gragg*, 151 S.W.3d 546, 555 (Tex. 2004). *Gragg* involved a water supply reservoir that the Tarrant Regional Water District built. *Id*. at 550. Heavy rains caused the District to open the reservoir floodgates in 1990, extensively flooding the Gragg Ranch. *Id*. at 550. Gragg sued for inverse condemnation, and by the time the case was tried in 1998, the ranch had experienced a large number of floods. *Id*. The District argued that the reservoir did not add more downstream water than would naturally pass through, and if it did, it was mere negligence and there was not sufficient intent to support an inverse condemnation claim. *Id*. at 554.

We observed that mere negligence that eventually contributes to property damage will not qualify as a taking, primarily because the public would bear the burden of paying for damage for which it receives no benefit. *Id*. at 554–55. We also noted that, "[i]n the case of flood-water impacts, recurrence is a probative factor in determining the extent of the taking and whether it is necessarily incident to authorized government activity, and therefore substantially certain to occur." *Id*. at 555. We held that, "[w]hile nonrecurrent flooding may cause damage, a single flood event does not generally rise to the level of a taking" because "its benefit to the public, [is] too temporal or speculative to warrant compensation." *Id*.

In a companion case, we clarified that "the requisite intent is present when a governmental entity knows that a specific act is causing identifiable harm or knows that the harm is substantially certain to result." *Id*. (citing *City of Dallas v. Jennings*, 142 S.W.3d 310, 314 (Tex. 2004)). With flood water impacts, recurrence is a probative factor in assessing intent and the extent of the taking. *Id*. We rejected the District's argument that it was, at most, only negligent and found some evidence to support the taking because the reservoir changed the character of the flooding on the Gragg Ranch to make the flood waters arrive sooner, flow faster and more forcefully, and last longer. *Id*. We observed this could be attributable to the reservoir's ability to hold only eight percent excess storage, compared to twenty-five to one hundred percent for other reservoirs. *Id*. at 556.

In *Gragg*, we reaffirmed a statement we made over 50 years ago:

> [g]overnmental agencies and authorities are necessities. They are capable of rendering great and beneficent public services. But any appeal to the tradition of our laws which omits a decent regard for private property rights is both inaccurate and distorted. It is because of this regard that our governmental agencies and authorities in acquiring properties for their public purposes are generally required to proceed

> under the power of eminent domain rather than under the police power. Such a policy has not resulted in a destruction of flood control and improvement agencies in the past and there is no reason to apprehend that the continuation of such policy will prove overly costly or inimical to the American way of life in the future.

Id. at 556 (quoting *Brazos River Auth. v. City of Graham*, 354 S.W.2d 99, 107 (Tex. 1961)).

Our holding in *Gragg* does not, as the court of appeals concluded, compel a holding here that Kopplow's inverse condemnation claim is premature. The focus of *Gragg* is that the government's negligent acts that result in an occasional flood do not benefit the public and cannot qualify as a taking. *Id*. at 555. The governmental entity in *Gragg* intentionally constructed a reservoir with minimal overflow capacity, and the frequent flooding at the ranch indicated this was not mere negligence. *Id*. at 556. Here, we need not look to evidence of the frequency of flooding to deduce the government's intent: the City knew the project would inundate part of Kopplow's property before it ever began construction, prompting the City to seek a drainage easement from Kopplow. The project would only result in one tract other than Kopplow's being below the 100-year flood level, and the City obtained a drainage easement for the applicable portion of that tract. Based on these facts, there is little dispute that the City intended to take Kopplow's property for the project, and *Gragg* does not bar the inverse condemnation claim. *Id*. at 555; *Jennings*, 142 S.W.3d at 314.

The court of appeals also relied on *Howard v. City of Kerrville*, 75 S.W.3d 112 (Tex. App.—San Antonio 2002, pet. denied), to support its holding that Kopplow's inverse condemnation claim is not yet ripe. 335 S.W.3d at 296. In *Howard,* a flood destroyed a dam, which the city rebuilt with the same specifications. 75 S.W.3d at 115. But the earlier FEMA floodplain maps did not account for the impact of the dam or increased flow in the Guadalupe River. *Id*. The new flood level

was above the level to which Howard had previously filled his property. *Id*. At various times during city regulation changes, Howard filed and withdrew applications to develop the property and later sued, in part, for a regulatory taking. *Id*. at 116. The court of appeals held that Howard's regulatory takings claim was not ripe because he had no application on file and the court could not determine what use he sought and what uses the city would or would not allow. *Id*. at 118. In contrast, here, there was undisputed testimony that Kopplow sought to develop its property pursuant to the previously approved plat and that the City would require Kopplow to fill its property to 745.16 feet to so develop it. Unlike the record in *Howard*, on this record, we are able to determine whether the municipality will approve the use the landowner seeks.

The City further contends that Kopplow's inverse condemnation claim is not yet ripe under *Westgate*, 843 S.W.2d at 453. There, Westgate, Ltd. (Westgate) completed construction of commercial buildings shortly before the government announced plans to build a highway at a route directly through one of the new buildings. *Id*. at 450. Westgate was having difficulty leasing the space in light of the proposed roadway. *Id*. at 450–51. When the government brought statutory takings proceedings, Westgate counterclaimed for inverse condemnation to recover its lost profits accrued before the government acquired the property. *Id*. at 451. The trial court awarded Westgate $2,734,000 for the statutory takings claim as the difference in value of Westgate's entire tract before and after the taking. *Id*. It also awarded Westgate $633,000 in lost profits for its inverse condemnation claim. *Id*. We affirmed the reversal of the award of lost profits under the inverse condemnation claim because the government's proposed taking was not a direct restriction on Westgate's property before it actually acquired the property. *Id*. at 452–53.

We cited approvingly in *Westgate* two court of appeals cases where a future loss of property did not give rise to a present takings claim. *Id*. at 452–53. Both *Allen v. City of Texas City*[5] and *Hubler v. City of Corpus Christi*[6] involved city drainage systems that rendered the owners' properties more susceptible to flooding. *Westgate*, 843 S.W.2d at 453. In *Allen*, a class of plaintiffs affected by a levee pleaded an inverse condemnation claim, alleging the levee diminished the value of their land and made it more susceptible to flooding. 775 S.W.2d 863, 864 (Tex. App.—Houston [1st Dist.] 1989, writ denied). The *Allen* court disallowed the claim because no flooding had occurred and the government had not otherwise appropriated the property. *Id*. at 865. In *Hubler*, the plaintiff asserted that the combined effect of a current drainage project and several proposed others would increase the surface waters on his land and that the city should have taken a drainage easement. 564 S.W.2d 816, 821 (Tex. App.—Corpus Christi 1978, writ ref'd n.r.e.). The *Hubler* court disallowed the claim because no flooding had occurred as a result of the completed projects. *Id*.

Reliance on *Allen* and *Hubler* is misplaced because they address when an inverse condemnation claim for flooding is premature. Kopplow's claim is about development, not flooding. Kopplow purchased the property to develop it, obtained development permits (including a vested rights permit), and filled the property to the 100-year flood level to develop it before the City constructed the project that rendered the land undevelopable unless filled again. Even if the Kopplow property never actually floods, the property is nonetheless undevelopable unless filled because of the project. The direct, immediate restriction on Kopplow's property is that it can no

[5] 775 S.W.2d 863 (Tex. App.—Houston [1st Dist.] 1989, writ denied).

[6] 564 S.W.2d 816 (Tex. App.—Corpus Christi 1978, writ ref'd n.r.e.).

longer develop the property as previously approved, and, on these facts, a lack of ripeness does not bar Kopplow's inverse condemnation claim.

We next address two remaining questions: (1) whether proximate cause affects the inverse condemnation claim, and (2) whether the damages awarded by the jury are recoverable under the inverse condemnation claim. Here, the charge asked the jury whether the use of the part taken proximately caused damage to the remainder. The jury answered in the affirmative. The City challenged the sufficiency of the evidence supporting that answer on appeal, arguing that the use of the part taken was for the in-flow wall only and would not impound flood waters on Kopplow's remainder. 335 S.W.3d at 292. A proximate cause question is properly submitted in a partial statutory takings case where the parties dispute whether the use of the part taken damaged the remainder. *State v. Petropoulos*, 346 S.W.3d 525, 531 (Tex. 2011). Moreover, causation is still relevant in an inverse condemnation claim: owners of inversely condemned property cannot recover damages the government did not cause. *See Gragg*, 151 S.W.3d at 555 (holding that the government need not pay even for negligent takings because they do not benefit the public). But while causation in a partial statutory taking focuses on whether the use of the part taken damaged the remainder, causation in an inverse condemnation focuses on the extent of the government's restriction on the property. *See Hearts Bluff Game Ranch, Inc. v. State*, 381 S.W.3d 468, 477 (Tex. 2012).

Even if the City's challenge to the sufficiency of the evidence also applies to Kopplow's inverse condemnation claim, it would be legally insignificant as the parties agree that the berm will impound flood waters on Kopplow's property in a 100-year flood, causing the property to again be below the 100-year flood level. Likewise, the parties agree that Kopplow must fill its property to

the new 100-year flood level in order to develop it as previously approved. Thus, there is no dispute as to causation for Kopplow's inverse condemnation claim.

Moreover, the damages the jury awarded are proper for Kopplow's inverse condemnation claim. The damages the jury found for the easement ($4,600)[7] and the remainder of Kopplow's property ($690,000) are recoverable under the inverse condemnation claim, and Kopplow submitted a single question that would have resulted in this amount. *See Westgate*, 843 S.W.2d at 457 (holding broad form condemnation charges should ask the difference in value of the property before and after the taking). Instead, the City requested, and the trial court approved, a separate question for damages for the easement and the remainder of the property. It was not harmful error under our Rules and precedent to charge the jury here separately as to the damages for the easement under the statutory takings claim and the remainder of the property under the inverse condemnation claim because the ultimate result was the same. *See id*. at 451 (damages to property and lost profits pled under separate theories), 457 (level of recovery for condemnation is the difference in value of the property before and after the taking). Accordingly, because Kopplow's inverse condemnation claim is ripe and was not waived, it supports the $690,000 damage award.

III. Conclusion

Kopplow purchased the property to develop it, obtained floodplain and vested rights permits, and filled the property to the 100-year flood level before the City built a flood control project partly on its property to detain storm water on the property. That project prevents Kopplow from

[7] The trial court entered judgment on this award, and the court of appeals affirmed. 335 S.W.3d at 297. Neither party challenges that ruling here.

developing the property as planned unless it fills it to the new 100-year flood level. Kopplow's inverse condemnation claim sought damages for the fill. The fact that flooding has not yet occurred does not render the claim premature because the claim is based on the thwarting of approved development, not flooding. We thus conclude the award of remainder damages is recoverable under Kopplow's inverse condemnation claim. In light of the court of appeals' ruling, it failed to reach Kopplow's cross-appeal point that the trial court erred in excluding some of the evidence of the cost of the fill. Accordingly, we reverse the judgment of the court of appeals and remand to the court of appeals for further proceedings consistent with this opinion.

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Eva M. Guzman
Justice

OPINION DELIVERED: March 8, 2013

IN THE SUPREME COURT OF TEXAS

NO. 11-0155

ANN WOOD SHOOK, PETITIONER,

v.

DAVID GRAY, RESPONDENT

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

PER CURIAM

G.W., David Gray and Lucy Wood's nine-year-old daughter, has lived with her maternal grandmother, Ann Shook, for her entire life. Although G.W.'s parents have been in and out of her life to varying degrees since she was born, no one disputes that at the time of the custody hearing the grandmother's home was the only home G.W. had ever known. We are asked to decide whether the court of appeals erred by remanding this case to the trial court for hearings to determine the custody and visitation rights as between Gray and Wood only. We grant Shook's motion for rehearing of her petition for review and, pursuant to Rule 59.1 of the Rules of Appellate Procedure, hold that, by barring the trial court from considering Shook, the court of appeals unduly restricted the trial court's ability to protect the child's best interest.

When G.W. was three-and-a-half years old, Gray filed an original suit affecting the parent-child relationship requesting that he and Wood be appointed joint managing conservators and that

Wood be given the primary right to establish G.W.'s residence.[1] Shook intervened on the basis that she "has had actual care, control, and possession of [G.W.] for more than 6 months ending no more than 90 days preceding the date of filing of [the] petition." *See* TEX. FAM. CODE § 102.003(a)(9). She requested that she and Wood be appointed joint managing conservators and that she be named the joint managing conservator with the exclusive right to designate G.W.'s primary residence. She also asked that Gray be appointed possessory conservator. Subsequently, Gray amended his petition to request that the trial court appoint him joint managing conservator with the exclusive right to establish G.W.'s residence. Gray did not specify who should be named the other joint managing conservator.

Shortly after G.W. was born, G.W. and her mother moved into Shook's home in Victoria, Texas. At the time of the custody hearing, when G.W. was almost five years old, G.W. still lived with Shook. Wood had moved out of Shook's home to live on her own two years earlier, and Gray had lived in Houston, New Jersey, Colorado, and Seattle between G.W.'s birth and the time of the custody hearing. The trial court appointed Shook as G.W.'s sole managing conservator and named Gray and Wood as G.W.'s possessory conservators.

The court of appeals reversed, holding that the trial court abused its discretion in naming Shook, a nonparent, as G.W.'s sole managing conservator because Shook failed to present any evidence that could overcome the presumption that a parent should be named as managing

[1] In his petition, Gray stated, "The best interest of [G.W.] will be served by the appointment of Lucy Wood as joint managing conservator with the exclusive right to designate the primary residence of the child, and [Gray] so requests." Gray further requested that "appropriate orders be made for access to the child and the allocation of the rights and duties of the conservators." Although Gray does not explicitly state the type of conservatorship he sought, we infer that he wished to be named a joint managing conservator.

conservator. 329 S.W.3d at 198–99; TEX. FAM. CODE § 153.131 (stating that a parent shall be appointed as a sole managing conservator or both parents shall be appointed as joint managing conservators "unless the court finds that appointment of the parent or parents would not be in the best interest of the child because the appointment would significantly impair the child's physical health or emotional development"). Additionally, the court of appeals remanded the case for the trial court to reconsider the conservatorship and access rights between Gray and Wood only and explained:

> [T]he trial court held in Shook's favor, making it unnecessary for that court to determine G.W.'s best interest as it related to the custodial or visitation rights that should exist between Gray and [Wood] only. Because of this, and because we have overturned the trial court's ruling designating Shook as sole managing conservator, we find it to be in the interest of justice not to simply render judgment in Gray's favor. Further, more than a year has passed since the custodial hearing; circumstances may have changed during this time such that it would not be in G.W.'s best interest to appoint Gray as her sole managing conservator, and we have no ability to determine the present circumstances of any of the parties, nor do we have the luxury of sitting as a fact-finder. For the forgoing reasons, we remand this case to the trial court for custodial hearings to determine the rights as between Gray and [Wood] only.

329 S.W.3d at 199. Shook contends that the court of appeals should not have precluded the trial court from considering her role in G.W.'s life on remand. We agree.

By foreclosing the trial court from considering Shook on remand, the trial court may be unable to protect G.W.'s best interest. TEX. FAM. CODE § 153.002 ("The best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child."). As the court of appeals pointed out, it had "no ability to determine the present circumstances of any of the parties, nor d[id it] have the luxury of sitting

as a fact-finder." *Id*. That statement illustrates the problem with remanding for custodial hearings between Gray and Wood only. The trial court must be able to consider the changed circumstances. G.W. is now nine years old and over four years have passed since the trial court issued its order. Even assuming Shook previously failed to present evidence capable of overcoming the parental presumption, it does not follow that she will necessarily be unable to overcome the parental presumption under the present circumstances.

Moreover, Shook pled and established general standing to file a suit for conservatorship and access, as someone who has had care, control, and possession of a child for the designated time. TEX. FAM. CODE § 102.003 (authorizing suit by "a person, other than a foster parent, who has had actual care, control, and possession of the child for at least six months ending not more than 90 days preceding the date of the filing of the petition"). Shook's inability to overcome the parental presumption does not deprive her of standing to be considered for conservatorship or access. If Shook fails to overcome the presumption that a parent should be named managing conservator on remand, the trial court may still name Shook as a possessory conservator or grant her access if that would be in G.W.'s best interest.

Thus, we conclude that the court of appeals erred in preventing the trial court from considering Shook for conservatorship of or access to G.W. Accordingly, without hearing oral argument, we affirm the court of appeals' judgment remanding the case, but reverse to the extent the judgment limits the trial court's consideration of the role Shook should play in G.W.'s life, whether as conservator or a person with defined access rights. TEX. R. APP. P. 59.1.

OPINION DELIVERED: October 5, 2012

IN THE SUPREME COURT OF TEXAS

NO. 11-0195

MONCRIEF OIL INTERNATIONAL INC., PETITIONER,

v.

OAO GAZPROM, GAZPROM EXPORT, LLC, AND GAZPROM MARKETING & TRADING, LTD., RESPONDENTS

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

Argued February 6, 2012

JUSTICE GUZMAN delivered the opinion of the Court.

CHIEF JUSTICE JEFFERSON did not participate in the decision.

We have observed that the business contacts needed for specific personal jurisdiction over a nonresident defendant "are generally a matter of physical fact, while tort liability (especially misrepresentation cases) turns on what the parties thought, said, or intended. Far better that judges should limit their jurisdictional decisions to the former rather than involving themselves in trying the latter."[1] Here, nonresident defendants allegedly committed the tort of misappropriating purported trade secrets from a Texas company concerning a proposed Texas venture during two meetings in

[1] *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 791 (Tex. 2005).

Texas. The defendants claim their intent in attending the meetings was to discuss an unrelated matter and that they informed the plaintiff of that intent at the meetings. But what the parties thought, said, or intended is generally irrelevant to their jurisdictional contacts. Regardless of the defendants' subjective intent, their Texas contacts are sufficient to confer specific jurisdiction over the defendants as to the trade secrets claim.

The nonresident defendants also face claims of tortious interference with the Texas corporation's relationship with a California corporation. But the tortious interference claims either arise from a meeting in California (which cannot support jurisdiction in Texas) or the formation of a competing enterprise in Texas by an entity not subject to jurisdiction in this proceeding. The trial court granted the special appearance, which the court of appeals affirmed. Because we hold there is jurisdiction over the trade secrets claim, but not over the tortious interference claims, we reverse in part and affirm in part the court of appeals' judgment and remand to the trial court for further proceedings.

I. Background

Moncrief Oil International, Inc. (Moncrief) is a Texas-based company that entered into a series of contracts in 1997 and 1998 with two subsidiaries of OAO Gazprom (Gazprom) regarding development of a Russian gas field known as the Y-R Field. *Moncrief Oil Int'l Inc. v. OAO Gazprom*, 481 F.3d 309, 310 (5th Cir. 2007). Gazprom, a Russian company, is among the world's largest producers of natural gas. After assuring Moncrief it would honor the contractual obligations of its subsidiaries, Gazprom later contracted with German entities to develop the Y-R Field. *Moncrief*, 481 F.3d at 311.

In the fall of 2003, Gazprom announced its intention to sell liquified natural gas to the United States and contacted oil companies in the American market. When Moncrief asked Gazprom to recognize its claimed interest or sell it an interest in the Y-R Field, Gazprom replied that it was interested only in trading its resources for access to the American downstream market. Along those lines, Moncrief had developed alleged trade secret information regarding a proposed joint venture with California-based Occidental Petroleum Corporation to import liquified natural gas to a regasification facility to be built in Ingleside, Texas.

Moncrief and Gazprom engaged in a series of communications (including phone calls, emails, and in-person meetings) to discuss Moncrief's rights in the Y-R Field and the establishment of a consortium with Moncrief, Occidental, and Gazprom to import liquified natural gas to Texas. Gazprom Export, LLC (Gazprom Export)—the Gazprom subsidiary that exports natural gas to countries outside the former Soviet Union—also took part in the discussions.

These discussions began with a meeting in Moscow in September 2004, where Moncrief proposed that: (1) Gazprom would grant Moncrief an interest in the Y-R Field; (2) Moncrief would grant Gazprom an interest in the proposed Texas regasification facility; and (3) Moncrief would grant Occidental a share of its interest in the Y-R Field. At the meeting, Moncrief provided Gazprom alleged trade secrets concerning the Texas facility and marketing plan. Later that month, Moncrief and Gazprom met in Washington, D.C., where Moncrief again provided Gazprom the alleged trade secrets. The parties then exchanged a series of emails and phone calls regarding the proposal.

In February 2005, Gazprom informed Moncrief it would not accept Moncrief's proposal. In June 2005, Moncrief sued Gazprom and the two subsidiaries it dealt with regarding the Y-R Field in federal court in Texas over its interest in the Y-R Field. *Moncrief*, 481 F.3d at 311. Ultimately, the Fifth Circuit Court of Appeals affirmed the dismissal of Gazprom due to lack of personal jurisdiction but noted that "even without other contacts, jurisdiction would exist if Gazprom committed a tort while in the state." *Id*. at 314–15.

In late 2005, the parties resumed in-person discussions, with meetings in Houston, Boston, and Fort Worth, where Moncrief provided updated versions of the alleged trade secrets to Gazprom. Gazprom representatives later met directly with Occidental representatives in California, and Occidental terminated the proposed venture with Moncrief after Gazprom refused to participate in the venture. A subsidiary of Gazprom Export (Gazprom Marketing & Trading, Ltd.) then established Gazprom Marketing & Trading USA, Inc. (GMT USA) in Houston to import Gazprom's liquified natural gas, regasify it, and sell it in the Unites States.

Moncrief sued Gazprom, Gazprom Export, and GMT USA in state court for tortious interference, trade-secret misappropriation, conspiracy to tortiously interfere, and conspiracy to misappropriate trade secrets. Gazprom and Gazprom Export (collectively the Gazprom Defendants) specially appeared, asserting that their contacts with Texas were random, not purposeful, and that Moncrief unilaterally disclosed the trade secrets. After a special appearance hearing with no live testimony, the trial court granted the Gazprom Defendants' special appearances. Findings of fact and conclusions of law were not requested or filed.

The court of appeals affirmed, holding that legally and factually sufficient evidence supported an implied finding that the location of the two Texas meetings was "merely random or fortuitous" as to Moncrief's trade secrets claim. 332 S.W.3d 1, 19–20. As to the tortious interference claims, the court held that the record conclusively established that any alleged tortious interference that might have occurred took place in California. *Id*. at 13–14. The court of appeals further held that the trial court did not abuse its discretion in refusing to allow Moncrief additional depositions.[2] *Id*. at 22–23.[3]

II. Discussion

A. Standard of Review

Texas courts may exercise personal jurisdiction over a nonresident if "(1) the Texas long-arm statute authorizes the exercise of jurisdiction, and (2) the exercise of jurisdiction is consistent with federal and state constitutional due-process guarantees." *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 574 (Tex. 2007). Under the Texas long-arm statute, the plaintiff bears the initial burden of pleading allegations sufficient to confer jurisdiction. *Retamco Operating, Inc. v. Republic Drilling Co.*, 278 S.W.3d 333, 337 (Tex. 2009). The long-arm statute allows the exercise of personal

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[2] Moncrief also sued Gazprom Marketing & Trading, Ltd. and Gazprom Bank. Gazprom Bank was allegedly part of Gazprom's meeting with Occidental in California. The trial court granted its special appearance, and the court of appeals granted Moncrief's motion to dismiss Gazprom Bank. 332 S.W.3d at 5, n.1. Further, the court of appeals held that there was no jurisdiction over Gazprom Marketing & Trading, Ltd.—which Moncrief does not complain of here. *Id*. at 20–22.

[3] The Texas Civil Justice League, the Texas Oil & Gas Association, the Texas Association of Manufacturers, the Association of Electric Companies of Texas, and the Texas Association of Business collectively submitted an *amicus curiae* brief in support of Moncrief.

jurisdiction over a nonresident defendant who "commits a tort in whole or in part in this state." TEX. CIV. PRAC. & REM. CODE § 17.042(2). Although allegations that a tort was committed in Texas satisfy our long-arm statute, such allegations do not necessarily satisfy the U.S. Constitution. *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 788 (Tex. 2005). Here, Moncrief pled that the Gazprom Defendants committed torts in Texas by misappropriating Moncrief's alleged trade secrets at Texas meetings. Thus, Moncrief has met its initial burden of alleging a cause of action sufficient to confer jurisdiction under the long-arm statute. *See* TEX. CIV. PRAC. & REM. CODE § 17.042(2).

When the initial burden is met, the burden shifts to the defendant to negate all potential bases for personal jurisdiction the plaintiff pled. *Retamco*, 278 S.W.3d at 337. As Moncrief's sole allegation as to personal jurisdiction is that the Gazprom Defendants committed torts in Texas, the Gazprom Defendants must negate that basis. In response, the Gazprom Defendants argue that exercising jurisdiction over them would violate due process. Asserting personal jurisdiction comports with due process when (1) the nonresident defendant has minimum contacts with the forum state, and (2) asserting jurisdiction complies with traditional notions of fair play and substantial justice. *Id*. at 338. A defendant establishes minimum contacts with a forum when it "purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Id*. (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

A nonresident's contacts can give rise to general or specific personal jurisdiction. *Id*. Continuous and systematic contacts with a state give rise to general jurisdiction, while specific jurisdiction exists when the cause of action arises from or is related to purposeful activities in the

state. *Id*. Here, Moncrief's asserted basis is specific jurisdiction, which focuses on the relationship between the defendant, Texas, and the litigation to determine whether the claim arises from the Texas contacts. *See id*.

When, as here, the trial court does not issue findings of fact and conclusions of law, we imply all relevant facts necessary to support the judgment that are supported by evidence.[4] *Id*. at 337 (quoting *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 795 (Tex. 2002)). The ultimate question of whether a court has personal jurisdiction over a nonresident defendant is a question of law we review *de novo*. *Moki Mac*, 221 S.W.3d at 574.

As an initial matter, specific jurisdiction requires us to analyze jurisdictional contacts on a claim-by-claim basis. *See, e.g.*, *Kelly v. Gen. Interior Constr., Inc.*, 301 S.W.3d 653, 660 (Tex. 2010) (separately analyzing jurisdictional contacts for fraud and trust fund claims to determine specific jurisdiction). The Fifth Circuit has expressly held that a "plaintiff bringing multiple claims that arise out of different forum contacts of the defendant must establish specific jurisdiction for each claim." *Seiferth v. Helicopteros Atuneros, Inc.*, 472 F.3d 266, 275 (5th Cir. 2006). As the Court explained,

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[4] Moncrief's briefing asserts that an appellate court should review a trial court's implied findings on a special appearance *de novo* when there is no live testimony. But we need not address this issue because the relevant facts are undisputed. As to the trade secrets claim, the Gazprom Defendants' contacts with Texas are sufficient to support specific jurisdiction under our existing framework for reviewing special appearance rulings. *See infra* Part II.B. And as to the tortious interference claims, we agree with the courts below that the claims do not arise from or relate to Texas contacts—a question of law unaffected by the operation of implied findings of relevant fact necessary to support the special appearance ruling. *See infra* Part II.C*; see also Moki Mac*, 221 S.W.3d at 588–89.

> This result flows logically from the distinction between general and specific jurisdiction and is confirmed by the decisions of our sister circuits. If a defendant does not have enough contacts to justify the exercise of general jurisdiction, the Due Process Clause prohibits the exercise of jurisdiction over any claim that does not arise out of or result from the defendant's forum contacts.

Id. at 274–75.[5] Of course, a court need not assess contacts on a claim-by-claim basis if all claims arise from the same forum contacts.[6] Because we determine that the tortious interference claims arise from separate jurisdictional contacts than the trade secrets claim, we analyze those contacts separately.

B. Trade Secrets Claim

1. Minimum Contacts

The parties primarily dispute whether Gazprom's Texas contacts relating to the trade secrets claim were purposeful. The Gazprom Defendants assert that any contacts with Texas were not purposeful because Moncrief unilaterally disclosed the alleged trade secrets and the meetings in Texas were simply fortuitous—as evidenced by meetings held in Moscow, Boston, and Washington, D.C. The Gazprom Defendants assert they informed Moncrief at the meetings that they would only discuss the potential venture once Moncrief dismissed the lawsuit regarding the Y-R Field. Moncrief contends the disclosure was not unilateral because: (1) the purpose of discussions was to settle the

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[5] *See also Touradji v. Beach Capital P'ship*, 316 S.W.3d 15, 25–26 (Tex. App.—Houston [1st Dist.] 2010, no pet.); *Barnhill v. Automated Shrimp Corp.*, 222 S.W.3d 756, 766–67 (Tex. App.—Waco 2007, no pet.); *Remick v. Manfredy*, 238 F.3d 248, 255–56 (3d Cir. 2001); *Phillips Exeter Acad. v. Howard Phillips Fund, Inc.*, 196 F.3d 284, 289 (1st Cir. 1999).

[6] *See, e.g.*, *Touradji*, 316 S.W.3d at 26; *Sutton v. Advanced Aquaculture Sys., Inc.*, 621 F.Supp.2d 435, 442 (W.D. Tex. 2007).

dispute relating to the Y-R Field in exchange for Gazprom's participation in the venture, and (2) the Texas meetings were not fortuitous because they were located in the state where Moncrief is headquartered and where the proposed regasification facility would be located. We agree with Moncrief that the contacts were purposeful but for different reasons.

When determining whether a nonresident purposefully availed itself of the privilege of conducting activities in Texas, we consider three factors:

> First, only the defendant's contacts with the forum are relevant, not the unilateral activity of another party or a third person. Second, the contacts relied upon must be purposeful rather than random, fortuitous, or attenuated. Thus, sellers who reach out beyond one state and create continuing relationships and obligations with citizens of another state are subject to the jurisdiction of the latter in suits based on their activities. Finally, the defendant must seek some benefit, advantage or profit by availing itself of the jurisdiction.

Retamco, 278 S.W.3d at 338–39; *see Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473, 475 (1985); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). This analysis assesses the quality and nature of the contacts, not the quantity. *Retamco*, 278 S.W.3d at 339.

The United States Supreme Court has specified that a nonresident's contacts are not unilateral or random and fortuitous when the defendant "has created 'continuing obligations' between *himself* and residents of the forum," which shields the nonresident with the benefits and protections of the forum's laws. *Burger King*, 471 U.S. at 475 (quoting *Travelers Health Ass'n v. Virginia*, 339 U.S. 643, 648 (1950)). Further, the Court has stated that jurisdiction is proper "where the contacts proximately result from actions by the defendant himself that create a substantial connection with the forum State." *Id*. (quotation marks omitted). A substantial connection can result from even a single act. *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957). But the unilateral activity of

another person cannot create jurisdiction. *Burger King*, 471 U.S. at 475. Physical presence in the state is not required but "frequently will enhance a potential defendant's affiliation with a State and reinforce the reasonable foreseeability of suit there." *Id*. at 476. At its core, the purposeful availment analysis seeks to determine whether a nonresident's conduct and connection to a forum are such that it could reasonably anticipate being haled into court there. *Id*. at 474.

The Court has also recognized "it is beyond dispute that [a forum] has a significant interest in redressing injuries that actually occur within the State." *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 776 (1984). As the Court has expounded:

> A state has an especial interest in exercising judicial jurisdiction over those who commit torts within its territory. This is because torts involve wrongful conduct which a state seeks to deter, and against which it attempts to afford protection, by providing that a tortfeasor shall be liable for damages which are the proximate result of his tort.

Id. (quoting *Leeper v. Leeper*, 319 A.2d 626, 629 (N.H. 1974); RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 36, cmt. c (1971)).[7] Of course, states have an interest in protecting against more than torts, and the Supreme Court has recognized state interests in protecting regulatory schemes and contracts as well. *See Travelers Health Ass'n*, 339 U.S. at 648 (recognizing the "state's interest in faithful observance" of its regulatory scheme by nonresidents); *McGee*, 355 U.S. at 223 (observing that the forum "has a manifest interest in providing effective means of redress for its residents" in relation to contract disputes).

[7] The Restatement provides that "[a] state has power to exercise judicial jurisdiction over an individual who has done, or has caused to be done, an act in the state with respect to any cause of action in tort arising from the act." RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 36 (1971).

Although a forum's interest in protecting against torts may operate to enhance the substantiality of the connection between the defendant and the forum, it cannot displace the purposeful availment inquiry. We have previously observed that Texas's interest in protecting its citizens against torts is insufficient to automatically exercise personal jurisdiction upon an allegation that a nonresident directed a tort from outside the forum against a resident. *Michiana*, 168 S.W.3d at 790–91. In *Michiana*, a Texan placed a phone call to an Indiana recreational vehicle dealer, paid for the vehicle in Indiana, and arranged to have the vehicle shipped from Indiana to Texas. *Id*. at 784. He later sued the dealer in Texas, claiming a misrepresentation in the phone call from Texas subjected the dealer to specific personal jurisdiction in Texas court. *Id*. We held that, although the dealer allegedly committed a tort against a resident, its contacts with Texas were only receiving the phone call and transferring the vehicle to the shipper the buyer had designated to transport the vehicle to Texas. *Id*. at 786–87. Neither contact constituted purposeful availment because the dealer "had no say in the matter."[8] *Id*. at 787.

Michiana overruled a myriad of court of appeals cases where jurisdiction was predicated solely on the receipt of an out-of-state phone call or that analyzed whether the defendant's contacts were tortious rather than examining the contacts themselves. *Id*. at 791–92. But, importantly, we differentiated cases where the defendant's conduct "was much more extensive and was aimed at getting extensive business in or from the forum state." *Id*. at 789–90 & n.70. We cited as an

[8] *See also CMMC v. Salinas*, 929 S.W.2d 435, 439 (Tex. 1996) (a French winepress maker shipping a winepress to a Texas customer was insufficient to constitute purposeful availment).

example a case predicating jurisdiction on acts seeking to obtain business in Texas. *Id*. at 790 n.70 (citing *Union Carbide Corp. v. UGI Corp.*, 731 F.2d 1186, 1189-90 (5th Cir. 1984)).

Here, the Gazprom Defendants' contacts with Texas were neither unilateral activities by Moncrief nor random and fortuitous. Unlike in *Michiana*, the Gazprom Defendants had a "say in the matter." 168 S.W.3d at 787. They were not unilaterally haled into forming contacts with Texas; rather, they agreed to attend Texas meetings.[9] And the Gazprom Defendants accepted Moncrief's alleged trade secrets at those meetings.[10] *See Retamco*, 278 S.W.3d at 340 (affirming exercise of specific personal jurisdiction when defendant "was a willing participant in a transaction with an affiliated Texas company").[11]

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[9] *See Woodson*, 444 U.S. at 299 (no jurisdiction over a nonresident automobile distributor whose only tie to the state was a customer's unilateral decision to drive there); *Kulko v. Cal. Superior Court*, 436 U.S. 84, 93–94 (1978) (no jurisdiction over a nonresident divorced husband owing child support to a former spouse who unilaterally decided to move to another state); *Hanson*, 357 U.S. at 251 (no jurisdiction over a nonresident trustee whose only connection to the state resulted from the settlor's unilateral decision to exercise her power of appointment in that state).

[10] Moncrief substantiated its allegations with evidence that the Gazprom Defendants accepted the alleged trade secrets at the Texas meetings. For example, an affidavit and deposition testimony of Richard Moncrief, who attended the Texas meetings, stated that Moncrief provided the Gazprom Defendants updated versions of the trade secrets at both meetings. The Gazprom Defendants cite to evidence that they announced an intent not to discuss the proposed joint venture at the meetings and did not agree to keep the alleged trade secrets confidential in exchange for receiving them. But the Gazprom Defendants do not cite, and we cannot locate, any evidence in the record that the Gazprom Defendants did not receive the alleged trade secrets at the meetings. Therefore, we cannot imply a finding that the Gazprom Defendants did not receive the alleged trade secrets because such a finding is not supported by evidence. *See Retamco*, 278 S.W.3d at 337.

[11] Moreover, the previous meetings in Moscow, Boston, and Washington, D.C. did not render the two Texas meetings random and fortuitous because: (1) the discussions were regarding a joint venture in Texas, *see Michiana*, 168 S.W.3d at 789–90 & n.70, and (2) Moncrief was headquartered in Texas, *see Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102, 114 (1987). Moreover, the information was revised and updated before the Texas meetings.

Additionally, the Gazprom Defendants' contacts were purposeful and substantial because their activity "was aimed at getting extensive business in or from the forum state." *Michiana*, 168 S.W.3d at 789–90. While we have held that a single business transaction occurring outside the state is insufficient to confer specific jurisdiction, *id*. at 787–88, the United States Supreme Court concluded that forming an enterprise in one state to send payments to a corporation in the forum state was sufficient to confer specific jurisdiction, *Burger King*, 471 U.S. at 468, 478. Because the Gazprom Defendants attended two Texas meetings, at which they accepted Moncrief's alleged trade secrets regarding a proposed joint venture in Texas, their contacts were not unilaterally from Moncrief, nor were they random and fortuitous.[12]

The Gazprom Defendants protest that their subjective intent in attending the meetings was solely to discuss settlement of the Y-R Field dispute, indicating they did not purposefully avail themselves of doing business in Texas. But the Gazprom Defendants attended the two Texas meetings where they accepted the alleged trade secrets regarding a proposed Texas joint venture, which is the crux of the matter. As we stated in *Michiana*, courts at the jurisdiction phase examine business contacts, not what the parties thought or intended—which is the role of the fact-finder in assessing the merits of the claim. *See* 168 S.W.3d at 791. For example, if a nonresident defendant intended to drive through Texas and caused a vehicular accident in the state, her intent to simply pass

[12] Moncrief also asserts in its briefing the additional contacts by the Gazprom Defendants of use of the trade secrets in Texas. But Moncrief's live pleading alleges GMT USA is using those trade secrets in Texas and does not allege that the Gazprom Defendants provided the trade secrets to GMT USA in Texas. Moreover, the court of appeals rejected Moncrief's theory that GMT USA is the alter ego of another Gazprom subsidiary, which Moncrief does not appeal here. 332 S.W.3d at 20–22. Accordingly, we will not analyze these contacts for our purposeful availment analysis.

through the state would not negate the fact that she caused a vehicular accident. Here, the Gazprom Defendants intended to, and did, come to Texas for two meetings, at which they accepted alleged trade secrets from Moncrief that involved a proposed joint venture in Texas. The Gazprom Defendants' subjective intent does not negate their business contacts. *See id*.

Finally, the Gazprom Defendants benefitted from Texas. For contacts to be purposeful, the defendant must seek some "benefit, advantage, or profit" by availing itself of the forum. *Id*. at 785. This is premised on implied consent: a nonresident consents to suit by invoking the benefits and protections of a forum's laws.[13] *Id*. at 784. We have found jurisdiction over nonresidents with no physical ties to Texas when an out-of-state contract was formed "for the sole purpose of building a hotel in Texas," *Zac Smith & Co., Inc. v. Otis Elevator Co.*, 734 S.W.2d 662, 665–66 (Tex. 1987), and when enrollment for out-of-state school was executed in Arizona but was "actively and successfully solicited" in Texas, *Siskind v. Villa Found. for Educ., Inc.*, 642 S.W.2d 434, 437 (Tex. 1982); *see also Michiana*, 168 S.W.3d at 789–90 (discussing cases finding specific jurisdiction when forum contact "was aimed at getting extensive business in or from the forum state"). Here, Gazprom attended two Texas meetings with a Texas corporation and accepted alleged trade secrets created in Texas regarding a potential joint venture in Texas with the Texas corporation. Far from seeking to avoid Texas, Gazprom sought out Texas and the benefits and protections of its laws. *Burger King*, 471 U.S. at 474; *Michiana*, 168 S.W.3d at 785; *BMC Software*, 83 S.W.3d at 795.

[13] A nonresident may structure its business so as to not profit from a forum's laws and not be subject to its jurisdiction. *Michiana*, 168 S.W.3d at 785.

2. Fair Play and Substantial Justice

In addition to minimum contacts, due process requires the exercise of personal jurisdiction to comply with traditional notions of fair play and substantial justice. *Retamco*, 278 S.W.3d at 338. If a nonresident has minimum contacts with the forum, rarely will the exercise of jurisdiction over the nonresident not comport with traditional notions of fair play and substantial justice. *Id.* at 341. We undertake this evaluation in light of the following factors, when appropriate: (1) the burden on the defendant; (2) the interests of the forum in adjudicating the dispute; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the international judicial system's interest in obtaining the most efficient resolution of controversies; and (5) the shared interest of the several nations in furthering fundamental substantive social policies. *Spir Star AG v. Kimich*, 310 S.W.3d 868, 878 (Tex. 2010); *see Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102, 113 (1987).

On balance, asserting personal jurisdiction over the Gazprom Defendants as to the trade secrets claim would not offend traditional notions of fair play and substantial justice. Subjecting the Gazprom Defendants to suit in Texas certainly imposes a burden on them, but the same can be said of all nonresidents. Distance alone cannot ordinarily defeat jurisdiction. *Spir Star*, 310 S.W.3d at 879 ("Nor is distance alone ordinarily sufficient to defeat jurisdiction: 'modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.'" (quoting *McGee*, 355 U.S. at 223)). Given the Gazprom Defendants' meetings with Moncrief in Texas and their increased familiarity with the forum and legal system through establishing a subsidiary headquartered here, the burden of litigating in Texas is not so severe as to defeat jurisdiction. *See id*. (holding jurisdiction was appropriate where German

company officers traveled to Houston to establish a distributing company). And this burden is somewhat mitigated by the convenience to Moncrief, a Texas resident, of litigating in the forum where the alleged trade secrets were appropriated and then purportedly used. Moreover, the allegations that the Gazprom Defendants committed a tort in Texas against a resident implicate a serious state interest in adjudicating the dispute.[14] Finally, because these claims will be litigated with GMT USA in a Texas court, it promotes judicial economy to litigate the claims as to all parties in one court. *See id*. ("[B]ecause the claims against [the resident defendant] will be heard in Texas, it would be more efficient to adjudicate the entire case in the same place."). On balance, the burden on the Gazprom Defendants of litigating in a foreign jurisdiction is minimal and outweighed by Texas's interests in adjudicating the dispute. *Id*. at 879–80.

The Gazprom Defendants counter that the Russian government is the majority owner of Gazprom and government officials at the highest level are aware of Moncrief's claims. In support, the Gazprom Defendants cite to *Solgas Energy Ltd. v. Global Steel Holdings Ltd.*, where a nonresident was sued over an alleged bribe to a Nigerian official to terminate its contract with the plaintiff. No. 04-06-00731-CV, 2007 WL 1892206, at *2, 7 (Tex. App.—San Antonio July 3, 2007, no pet.) (mem. op.). There, the court of appeals held that Texas's interest in resolving the dispute was tenuous because the United States federal government has an interest in foreign relations and the bribery allegations implicated Nigerian law. *Id*. at *7. But here, Gazprom is not wholly owned

[14] *See Keeton*, 465 U.S. at 776 ("A state has an especial interest in exercising judicial jurisdiction over those who commit torts within its territory."); *see also Asahi Metal*, 480 U.S. at 114 ("Because the plaintiff is not a California resident, California's legitimate interests in the dispute have considerably diminished.").

by the Russian government, Moncrief's claims against the Gazprom Defendants do not implicate any government officials, and no other jurisdiction has as significant an interest as Texas does in resolving a claim for a tort committed in Texas against a Texas resident. On balance, this is not one of the rare cases where exercising jurisdiction fails to comport with fair play and substantial justice.[15] Accordingly, we hold that the trial court has jurisdiction over the Gazprom Defendants as to the trade secrets claim.

C. Tortious Interference Claims

Moncrief also brought claims against the Gazprom Defendants for tortiously interfering with existing and prospective business relationships. Moncrief contends the Gazprom Defendants' appropriation of the alleged trade secrets in Texas and use of the information to form a competing enterprise destroyed Moncrief's existing and prospective relationships with Occidental. The Gazprom Defendants respond, and the court of appeals held, that the tortious interference claims do not arise from the Texas meetings or their receipt of the information from Moncrief. We agree.

Specific jurisdiction exists only if the alleged liability arises out of or is related to the defendant's activity within the forum. *Moki Mac*, 221 S.W.3d at 573. In considering competing interpretations of the phrase, we ultimately determined "for a nonresident defendant's forum contacts to support an exercise of specific jurisdiction, there must be a substantial connection between those contacts and the operative facts of the litigation." *Id*. at 585. In *Moki Mac*, a Texas teenager fell to

[15] The Gazprom Defendants also contend the information they received from Moncrief did not constitute trade secrets. Although they may well ultimately prevail on this theory, it is a merits issue that is inappropriate at the jurisdiction stage. *Michiana*, 168 S.W.3d at 790–91.

his death in Arizona while on a hike supervised by a Utah-based company. *Id*. at 573. His parents filed suit against the company in Texas for wrongful death, maintaining the claim arose from misrepresentations in documents the company mailed to them in Texas as well as the company's other Texas contacts. *Id*. at 573, 576. We disagreed, holding "the operative facts of the [plaintiffs'] suit concern principally the guides' conduct of the hiking expedition and whether they exercised reasonable care in supervising" the teenager. *Id*. at 585. We further observed the "events on the trail and the guides' supervision of the hike will be the focus of the trial, will consume most if not all of the litigation's attention, and the overwhelming majority of the evidence will be directed to that question." *Id*.

Here, Moncrief alleges the Gazprom Defendants tortiously interfered with its agreement and relationship with Occidental, causing Occidental to breach its agreement and cease its relationship with Moncrief. *See Wal-Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711, 721–22, 727 (Tex. 2001) (discussing tortious interference with contract and tortious interference with prospective contractual or business relations claims). Under the framework we established in *Moki Mac*, Moncrief's tortious inference claims principally concern two activities: (1) discussions between Gazprom and Occidental in California where Gazprom allegedly attempted to convince Occidental to proceed with a joint venture that did not include Moncrief, and (2) the Gazprom Defendants' establishment of a competing enterprise in Texas, thereby diminishing the value of a joint venture between Occidental and Moncrief to accomplish the same purpose. *See Moki Mac*, 221 S.W.3d at 585.

Moncrief also argues its tortious interference claims arise from a third set of contacts: the Gazprom Defendants' purported misappropriation of Moncrief's alleged trade secrets in Texas. We

disagree. Much like the accident in *Moki Mac* would not have occurred but for executing contract materials in Texas, the establishment of a competing enterprise arguably would not be possible without the Gazprom Defendants' purported acquisition of the alleged trade secrets. *See id*. at 585. However, but-for causation alone is insufficient. *Id*. Just as the wrongful death claim in *Moki Mac* was principally concerned with alleged negligence in Arizona, the tortious interference claim here is principally concerned with the California meeting and the competing Texas enterprise—not the purported misappropriation of alleged trade secrets. *See id*.

Neither the California meeting nor the competing enterprise in Texas can form the basis for specific jurisdiction over the Gazprom Defendants in Texas. As we held in *Michiana*, a nonresident directing a tort at Texas from afar is insufficient to confer specific jurisdiction. 168 S.W.3d at 790–92. The focus is properly on the extent of the defendant's activities in the forum, not the residence of the plaintiff. *Id*. at 789. Thus, the Gazprom Defendants' alleged tortious conduct in California against a Texas resident is insufficient to confer specific jurisdiction over the Gazprom Defendants as to Moncrief's tortious interference claims. *See id*. at 789–92.

Moreover, Moncrief's allegation that the Gazprom Defendants established a competing enterprise in Texas cannot support specific jurisdiction. Moncrief alleges Gazprom Marketing & Trading, Ltd., a Gazprom subsidiary, formed GMT USA as a competing enterprise in Texas. But the court of appeals rejected Moncrief's theory that GMT USA is the alter ego of Gazprom Marketing & Trading, Ltd. 332 S.W.3d at 20–22; *see PHC-Minden, L.P. v. Kimberly-Clark Corp.*, 235 S.W.3d 163, 175 (Tex. 2007) (imputing jurisdictional contacts to another entity requires assessing "the amount of the subsidiary's stock owned by the parent corporation, the existence of

separate headquarters, the observance of corporate formalities, and the degree of the parent's control over the general policy and administration of the subsidiary"). Moncrief does not challenge that ruling here. Additionally, Moncrief does not allege the Gazprom Defendants provided the trade secrets to GMT USA in Texas. Therefore, we cannot impute the Texas contacts regarding the competing enterprise to the Gazprom Defendants. In sum, we conclude neither the California contacts nor the establishment of a competing enterprise supports an exercise of jurisdiction over the Gazprom Defendants as to the tortious interference claims.

D. Additional Depositions

Finally, Moncrief contends the trial court erred in refusing to allow the deposition of Gazprom's deputy chairman and a representative of Gazprom Bank. The court of appeals held the trial court did not abuse its discretion because it could have reasonably concluded the testimony would be cumulative as to the jurisdictional facts. 332 S.W.3d at 23. We agree.

Initially, we note that because we have concluded the trial court has specific jurisdiction over the Gazprom Defendants as to the trade secrets claim, further deposition testimony regarding these claims is unnecessary. But we have also determined there is no specific jurisdiction over the Gazprom Defendants as to the tortious interference claims. If the depositions Moncrief sought could yield jurisdictional facts that support jurisdiction as to the tortious interference claims, then the trial court abused its discretion.

Because Moncrief has not demonstrated what additional jurisdictional facts the depositions would provide, we conclude the trial court did not abuse its discretion. Moncrief claims Gazprom's deputy chairman sent a representative of Gazprom Bank to California to meet with Occidental. In

its motion to compel, Moncrief sought to depose Gazprom's deputy chairman because it believed he would provide testimony regarding the meetings with Moncrief. It also sought to depose the Gazprom Bank representative because it believed he would provide testimony regarding his meeting with Occidental. But Moncrief already deposed the consultant for Gazprom who attended the meeting with Occidental (as well as both Texas meetings) and one of Occidental's representatives from that meeting—who both testified as to what the Gazprom Bank representative said. Moncrief has not identified what additional testimony the depositions of the Gazprom Bank representative or Gazprom's deputy chairman would provide regarding Texas contacts with respect to the tortious interference claims. Therefore, we hold the trial court did not abuse its discretion in denying Moncrief's motion to compel the depositions. *See BMC Software*, 83 S.W.3d at 800–01 (holding trial court did not abuse discretion in denying continuance before special appearance hearing).

III. Conclusion

The Gazprom Defendants attended two Texas meetings with a Texas corporation and accepted alleged trade secrets created in Texas regarding a potential Texas-based joint venture with the Texas corporation. These contacts were neither unilaterally from Moncrief nor random and fortuitous, and they indicate the Gazprom Defendants were benefitting from the protection of Texas laws. Therefore, we conclude the trial court has specific personal jurisdiction over Moncrief's trade secrets claim, and the court of appeals erred in affirming the special appearance as to this claims.[16]

[16] Moncrief's conspiracy claims (for conspiracy to tortiously interfere and conspiracy to misappropriate trade secrets) are not factually distinct from the underlying trade secret and tortious interference claims. *See* 332 S.W.3d at 10 n.7 ("[B]ecause no factually distinct basis exists for Moncrief Oil's conspiracy claims, they add nothing to our jurisdictional analysis."). Accordingly,

But we agree with court of appeals that the trial court has no specific personal jurisdiction over the Gazprom Defendants as to Moncrief's tortious interference claims and that the trial court did not abuse its discretion in refusing to compel additional depositions. Accordingly, we reverse the judgment of the court of appeals in part, affirm in part, and remand to the trial court for further proceedings consistent with this opinion.

Eva M. Guzman
Justice

OPINION DELIVERED: August 30, 2013

the exercise of jurisdiction is proper over the conspiracy to misappropriate trade secrets claim, *see supra* Part II.B, and improper over the conspiracy to tortiously interfere claim, *see supra* Part II.C.

IN THE SUPREME COURT OF TEXAS

NO. 11-0228

BYRON D. NEELY, INDIVIDUALLY AND BYRON D. NEELY, M.D., P.A., PETITIONERS,

v.

NANCI WILSON, CBS STATIONS GROUP OF TEXAS, L.P., D/B/A KEYE-TV, AND VIACOM, INC., RESPONDENTS

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

Argued September 13, 2012

JUSTICE GUZMAN delivered the opinion of the Court, in which JUSTICE JOHNSON, JUSTICE WILLETT, JUSTICE BOYD, and JUSTICE DEVINE joined.

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

JUSTICE HECHT did not participate in the decision.

This is an appeal of a summary judgment granted to media defendants in a suit stemming from their investigative broadcast involving a physician. This suit, like all defamation suits, implicates the competing constitutional rights to seek redress for reputational torts and the constitutional rights to free speech and press. But we have long held that despite these concerns, we

adhere to our well-settled summary judgment standards.[1] Thus, we decide here whether the physician raised a genuine issue of material fact to defeat summary judgment and proceed to trial on his defamation claim.

Truth is a defense to all defamation suits. Additionally, the Legislature has provided other specific defenses for media defendants, such as the official/judicial proceedings privilege, the fair comment privilege, and the due care provision. Here, the media defendants raised various defenses in their summary judgment motion but focused primarily on the truth defense: there is no defamation liability if the gist of the broadcast is substantially true. In the court of appeals, the media defendants mainly argued that we created a rule in *McIlvain v. Jacobs*[2] that a media defendant's reporting of third-party allegations is substantially true if it accurately reports the allegations—even if the allegations themselves are false. But the almost-universal rule in the United States is that one is liable for republishing a defamatory statement.[3] *McIlvain* did not change that rule but rather reaffirmed that one must prove the substantial truth of the gist of a broadcast to avail oneself of the truth defense. Here, a person of ordinary intelligence could conclude that the gist of the broadcast at issue was that the physician was disciplined for operating on patients while taking dangerous drugs or controlled substances. We therefore hold the physician raised a genuine issue of material fact as

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[1] *Casso v. Brand*, 776 S.W.2d 551, 555 n.3 (Tex. 1989) (noting that constitutional implications in defamation claims do not alter our summary judgment standards).

[2] 794 S.W.2d 14 (Tex. 1990).

[3] *See, e.g.*, *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 386 (1973); RESTATEMENT (SECOND) OF TORTS § 578 (1977); 1 ROBERT D. SACK, SACK ON DEFAMATION § 2.7.1 (3d ed. 2009).

to the truth or falsity of that gist with evidence that he was not disciplined for taking dangerous drugs or controlled substances and had never performed surgery while taking them.

As to the remaining defenses, the media defendants did not raise the due care provision in their summary judgment motion and have not conclusively proven the application of another defense or privilege. At trial, the media defendants may well prevail on the truth defense or on one or more of these other defenses and privileges, but they have not conclusively done so here. We therefore reverse the judgment of the court of appeals and remand the case to the trial court for further proceedings.

I. Factual Background

Dr. Byron Neely is a neurosurgeon who practiced in Austin. In 1999, he installed a shunt to drain fluid from a tumor in Paul Jetton's brain. An enterobacterial infection set in, leaving Paul in a debilitated state even after 12 subsequent brain surgeries. Paul and his wife, Sheila, sued Neely and others, and Neely settled. In 2002, the Jettons filed a complaint with the Texas Medical Board (Board), and the Board investigation found no wrongdoing by Neely.

Neely also performed surgery on Wei Wu in 1999. After removing a brain tumor, Neely reported seeing small deposits of metastatic melanoma on the surface of Wu's brain during surgery.[4] Soon after Wu recovered from the operation and learned of the melanoma deposits from his oncologist, he committed suicide. The autopsy report indicated "no residual metastatic melanoma

[4] "Metastatic cancer is cancer that has spread from the place where it first started to another place in the body." *Metastatic Cancer*, National Cancer Institute (Mar. 28, 2013), http://www.cancer.gov/cancertopics/factsheet/Sites-Types/metastatic (on file with Clerk's office).

on gross inspection," which the coroner later clarified to mean that he believed Wu no longer had any melanoma after the operation. Wu's ex-wife sued Neely on behalf of her minor son, but the suit was dismissed on procedural grounds.[5]

In 2003, after a separate investigation by the Board, Neely entered into an Agreed Order (Order). In the Order, the Board found that Neely had self-prescribed medications between 1999 and 2002 and had a prior history of hand tremors. Further, the Board found that he was subject to disciplinary action due to his "inability to practice medicine with reasonable skill and safety to patients, due to mental or physical condition" and his self-prescription of medications. The Order suspended Neely's license, but stayed the suspension, placed him on probation for three years, ordered physical and psychiatric evaluations, and prohibited Neely from prescribing medications to himself or his family.

In January 2004, KEYE-TV in Austin ran a 7-minute investigative report by Nanci Wilson (collectively "KEYE") regarding Neely. The transcript of the entire broadcast is attached as Appendix A. The broadcast began with anchor Fred Cantu asking:

> If you needed surgery would you want to know if your surgeon had been disciplined for prescribing himself and taking dangerous drugs, had a history of hand tremors and had been sued several times for malpractice in the last few years?

Co-anchor Judy Maggio continued:

> A central Texas couple says they didn't learn about this until it was too late. They're outraged the [Board] is allowing Dr. Byron Neely to continue to practice. KEYE

[5] The Board also investigated the Wu case and found no wrongdoing, but that order issued after the broadcast in question.

> news investigative reporter Nanci Wilson tells us if you go to St. David's Hospital with a head injury you could be Dr. Neely's next patient.

Wilson then interviewed Paul Jetton, who related that Neely recommended surgery after an MRI indicated he had a brain tumor. Wilson stated that the hospital discharged Jetton despite the fact that a bacterial infection set in at the surgical site. Wilson continued:

> The result: numerous surgeries and a life of disability. Paul's wife, Sheila, says what they learned from other doctors was the final blow.

Sheila Jetton then stated:

> Every neurosurgeon that's looked at Paul's MRIs from before Neely operated on him have [sic] said they would have never done surgery. They would have watched him with MRIs over years.

Wilson segued to discuss the Wu case, relating that Neely discovered and removed malignant melanoma from Wu's brain during surgery and that Wu committed suicide after learning of the diagnosis. Wilson then stated that when

> the Travis County Medical Examiner's office, analyz[ed] Wu's brain[], examiners noted no residual metastatic melanoma. Meaning Wei Wu did not have brain cancer.

Wilson continued:

> The [Board] investigated Dr. Neely. The board found Neely had a history of hand tremors and that between 1999 and 2002, Dr. Neely was writing prescriptions, not only for his patients but for himself as well. Narcotics, muscle relaxers and pain killers. Something former patient Paul Jetton finds shocking.

Paul Jetton commented:

> Narcotics, opiates, I mean it's just things that, I mean things that they don't even let people operate machinery or drive cars when they're, when they're taking them and this guy's doing brain surgery on people. I mean it's just, even now I'm just, it's just incredulous, you just can't even believe that it even happened.

Wilson then related that the Order placed Neely on probation, required him to see a psychiatrist, and prohibited him from prescribing to himself or his family. Wilson interviewed a Board representative and asked:

> But how would they know if he is using? He can get somebody else to prescribe him. I mean he could say, "I've followed the order." . . . . How do we, how do we know that he's, that we're not putting somebody right back out there to do the same thing he was doing before?

The Board representative responded:

> That's a very good question and why this order doesn't include drug testing, I, I honestly don't know the answer to that.

The broadcast then included a statement from Paul Jetton:

> I think it's just deplorable, I mean if, if it was another profession, uh, the guy would be in jail.

Wilson related a comment from Neely's attorney that

> two highly qualified neurosurgeons who reviewed the case agree with the medical decisions made by Dr. Neely. In addition, the [Board] investigated the Jetton case and found no wrong doing.

Wilson noted that Neely's hospital had a pending investigation regarding whether to continue Neely's privileges. The broadcast ended by noting that the Jettons settled their suit with Neely, Wu's suit was dismissed, the other suits remained pending, and the Board posts final decisions on its website.

After the report aired, Neely claims his practice collapsed. His referrals from other physicians dwindled, existing appointments cancelled (citing the broadcast as the reason for the cancellation), his income diminished, and his home went into foreclosure. He and his professional

association (collectively "Neely") sued KEYE[6] for libel. KEYE moved for summary judgment, which the trial court granted without specifying the grounds. Neely raised seven issues in the court of appeals, three of which are relevant here: (1) the trial court erred generally by granting summary judgment; (2) the trial court erred because Neely had probative evidence on each element of his defamation claim; and (3) there is no rule in Texas shielding media defendants from liability simply because they accurately report defamatory statements made by a third party. 331 S.W.3d 900, 914. The court of appeals held that under *McIlvain v. Jacobs*, 794 S.W.2d 14 (Tex. 1990), none of the statements were actionable as a matter of law because KEYE accurately reported third-party allegations. 331 S.W.3d at 922, 926–28. The court of appeals affirmed the trial court's grant of summary judgment.[7] *Id*. at 928.

II. Standard of Review

We review a trial court's grant of summary judgment de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). The party moving for summary judgment bears the burden of proof. *Roskey v. Tex. Health Facilities Comm'n*, 639 S.W.2d 302, 303 (Tex. 1982). Though these burdens vary for traditional and no-evidence motions, the summary judgment motion here was a hybrid motion and both parties brought forth summary judgment evidence; therefore, the differing burdens are immaterial and the ultimate issue is whether a fact issue exists. *Buck v.*

[6] Neely also sued Viacom, Inc., but the court of appeals held that Neely waived any challenge as to summary judgment dismissal of the claims against Viacom. 331 S.W.3d 900, 914. Neely does not contest that ruling here.

[7] The court of appeals also affirmed the trial court's exclusion of some of Neely's summary judgment evidence. 331 S.W.3d at 928–29. Neely does not challenge that ruling here.

Palmer, 381 S.W.3d 525, 527 & n.2 (Tex. 2012). A fact issue exists if there is more than a scintilla of probative evidence. *See id*. at 527; TEX. R. CIV. P. 166a(c),(i). We must review the summary judgment 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). "In reviewing a summary judgment, we consider all grounds presented to the trial court and preserved on appeal in the interest of judicial economy." *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 846 (Tex. 2005). We have held that the constitutional concerns over defamation, discussed below, do not affect these summary judgment standards of review. *Casso v. Brand*, 776 S.W.2d 551, 555 n.3 (Tex. 1989).

III. Discussion

A. Competing Constitutional Concerns

The common law has long allowed a person to recover for damage to her reputation occasioned by the publication of false and defamatory statements. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 11 (1990). Chief Justice Rehnquist noted that Shakespeare penned the rationale for the cause of action in Othello:

> Good name in man and woman, dear my lord,
>
> Is the immediate jewel of their souls.
>
> Who steals my purse steals trash;
>
> 'Tis something, nothing;
>
> 'Twas mine, 'tis his, and has been slave to thousands;
>
> But he that filches from me my good name

Robs me of that which not enriches him,

And makes me poor indeed.

WILLIAM SHAKESPEARE, OTHELLO, act 3 sc. 3, *quoted in Milkovich*, 497 U.S. at 12. Unlike the federal Constitution, the Texas Constitution twice expressly guarantees the right to bring reputational torts. *See* TEX. CONST. art. I, §§ 8 ("Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege."), 13 ("All courts shall be open, and every person for an injury done him, in his lands, goods, person *or reputation*, shall have remedy by due course of law." (emphasis added)).

The right to recover for defamation, however, is not the only constitutional concern at stake. Of significant import are the constitutional rights to free speech and a free press. *See Cain v. Hearst Corp.*, 878 S.W.2d 577, 582 (Tex. 1994). As the United States Supreme Court has articulated, "[w]hatever is added to the field of libel is taken from the field of free debate." *New York Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964). To balance these competing interests, the United States Supreme Court through federal constitutional law, this Court through the common law, and the Legislature through statutes, have undertaken to tailor the tort of defamation so as to preserve the right to recover for reputational damages while minimally impinging on the rights to free speech and a free press. *Cain*, 878 S.W.2d at 582.

B. Elements of Defamation

The tort of defamation includes libel and slander. Libel occurs when the defamatory statements are in writing. TEX. CIV. PRAC. & REM. CODE § 73.001. Slander occurs when the statements are spoken. *Milkovich*, 497 U.S. at 17. The broadcast of defamatory statements read

from a script is libel, not slander. *Christy v. Stauffer Publ'ns, Inc.*, 437 S.W.2d 814, 815 (Tex. 1969). Libel "tends to injure a living person's reputation and thereby expose the person to public hatred, contempt or ridicule, or financial injury or to impeach any person's honesty, integrity, virtue, or reputation . . . ." TEX. CIV. PRAC. & REM. CODE § 73.001.

We have revised the elements of the defamation cause of action in response to the United States Supreme Court's application of constitutional principles to defamation claims. Before *Sullivan*, 376 U.S. at 254, the defamation plaintiff generally prevailed by proving the defendant published a statement that defamed her unless the defendant proved the truth of the statement. Pierre N. Leval, *The No-Money, No-Fault Libel Suit: Keeping* Sullivan *in Its Proper Place*, 101 HARV. L. REV. 1287, 1287 (1988). But the Supreme Court held in *Sullivan* that freedom of expression requires "breathing space," and that if the plaintiff is a public official, she must prove the defendant had actual malice. 376 U.S. at 272, 279–80. The Court later held that public figures and limited purpose public figures must also prove actual malice, and that states may set their own level of fault for private plaintiffs.[8] *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345, 347 (1974). The Court left the precise standard of fault to the states, and we have chosen a negligence standard for a private figure seeking defamation damages from a media defendant.[9] *WFAA-TV, Inc. v. McLemore*, 978

[8] The Court also determined actual malice requires proof by clear and convincing evidence. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974).

[9] The majority of states have adopted a negligence standard for private figures, while Alaska, Colorado, Indiana, and New Jersey have adopted the actual malice standard for private figures. 1 RODNEY A. SMOLLA, LAW OF DEFAMATION § 3:31 (2d ed. 1991), *cited in* Kaitlin M. Gurney, *Myspace, Your Reputation: A Call to Change Libel Laws for Juveniles Using Social Networking Sites*, 82 TEMP. L. REV. 241, 251 & n.97 (2009).

S.W.2d 568, 571 (Tex. 1998); *see also Gertz*, 418 U.S. at 353 (Blackmun, J., concurring) ("[T]he Court now conditions a libel action by a private person upon a showing of negligence, as contrasted with a showing of willful or reckless disregard."); RESTATEMENT (SECOND) OF TORTS § 580B (1977). In light of these holdings, to recover defamation damages in Texas, a plaintiff must prove the media defendant: (1) published a statement; (2) that defamed the plaintiff; (3) while either acting with actual malice (if the plaintiff was a public official or public figure) or negligence (if the plaintiff was a private individual) regarding the truth of the statement. *McLemore*, 978 S.W.2d at 571.

A central issue in this proceeding is the liability of a media defendant for republishing a third-party's allegedly defamatory statements. We first observe that it is a well-settled legal principle that one is liable for republishing the defamatory statement of another. *See Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 386 (1973) (noting that a "newspaper may not defend a libel suit on the ground that the falsely defamatory statements are not its own").[10] The rule's broad application has thus brought about efforts to soften its impact, such as the *Sullivan* and *Gertz* decisions requiring a showing of fault as well as the privileges and defenses described below. 1 ROBERT D. SACK, SACK ON DEFAMATION § 2.7.1 (3d ed. 2009).

[10] *See also* RESTATEMENT (SECOND) OF TORTS § 578 (1977) ("[O]ne who repeats or otherwise republishes defamatory material is subject to liability as if he had originally published it."); SACK, *supra* note 3, § 2.7.1 ("'The common law of libel has long held that one who republishes a defamatory statement adopts it as his own and is liable [for false, defamatory statements] in equal measure to the original defamer.'" (quoting *Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1298 (D.C. Cir. 1988)) (alteration in original)).

C. Privileges and Defenses

The common law and statutes provide certain defenses and privileges to defamation claims. These include the defense of truth, TEX. CIV. PRAC. & REM. CODE § 73.005, which we have interpreted to require defendants to prove the publication was substantially true, *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 115 (Tex. 2000). Moreover, statements that are not verifiable as false cannot form the basis of a defamation claim. *Milkovich*, 497 U.S. at 21–22. Further, the common law has recognized a judicial proceedings privilege since at least 1772 for parties, witnesses, lawyers, judges, and jurors.[11] Additionally, one cannot recover mental anguish damages for defamation of a deceased individual. *Renfro Drug Co. v. Lawson*, 160 S.W.2d 246, 250 (Tex. 1942); *see also* RESTATEMENT (SECOND) OF TORTS § 560 (1977). And a qualified privilege exists under the common law when a statement is made in good faith and the author, recipient, a third person, or one of their family members has an interest that is sufficiently affected by the statement. *Diamond Shamrock Ref. & Mktg. Co. v. Mendez*, 844 S.W.2d 198, 210 (Tex. 1992) (Hightower, J., concurring).

The United States Supreme Court, this Court, and the Legislature have afforded additional protections to media defendants. The United States Supreme Court and this Court long ago shifted the burden of proving the truth defense to require the plaintiff to prove the defamatory statements were false when the statements were made by a media defendant over a public concern.

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[11] SACK, *supra* note 3, § 8.2.1 (citing *King v. Skinner*, 1 Lofft 55, 56, 98 Eng. Rep. 529, 530 (K.B. 1772), *quoted in Burns v. Reed*, 500 U.S. 478, 490 (1991)). We have long recognized this privilege in Texas. *Reagan v. Guardian Life Ins. Co.*, 166 S.W.2d 909, 912 (Tex. 1942).

Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 777 (1986); *McIlvain*, 794 S.W.2d at 15.[12] This distinction is less material at the summary judgment stage where, as here, the media defendant is the movant. *See Casso*, 776 S.W.2d at 555 n.3.

Additionally, the Legislature has crafted the official/judicial proceedings privilege, which shields periodical publications from republication liability for fair, true, and impartial accounts of judicial, executive, legislative, and other official proceedings.[13] TEX. CIV. PRAC. & REM. CODE § 73.002(b)(1). And the Legislature has also adopted the fair comment privilege, shielding periodical publications from republication liability for reasonable and fair comment on or criticism of official acts of public officials or other public concerns. *Id.* § 73.002(b)(2).

Notably, the Legislature has also added the due care provision for broadcasters, shielding them from liability unless the plaintiff proves the broadcaster failed to exercise due care to prevent publication of a defamatory statement. *Id.* § 73.004. The provision requires that:

> A broadcaster is not liable in damages for a defamatory statement published or uttered in or as a part of a radio or television broadcast by one other than the broadcaster unless the complaining party proves that the broadcaster failed to exercise due care to prevent the publication or utterance of the statement in the broadcast.

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[12] Neely admitted in his deposition that the public has a right to know about the Board's findings. The parties do not dispute that the defendants are members of the media. Thus, we hold that Neely must prove the falsity of the broadcast to recover damages. *Hepps*, 475 U.S. at 777.

[13] We previously noted that "we are reluctant to afford greater constitutional protection to members of the print and broadcast media than to ordinary citizens" because the "First Amendment affords equal dignity to freedom of speech and freedom of the press." *Casso*, 776 S.W.2d at 554. But this understanding of the constitution is no impediment to the Legislature crafting additional protections for media defendants, which it has done in Chapter 73 of the Civil Practice and Remedies Code.

Id. We have previously commented that, under the due care provision, "[b]roadcasters are generally not liable in defamation for broadcasts made by third parties." *Cain*, 878 S.W.2d at 582. A number of other jurisdictions have enacted a due care provision, although some states require the defendant broadcaster to prove it used due care (as opposed to our statute, which requires the plaintiff to prove the defendant broadcaster did not use due care).[14] KEYE did not raise the due care provision at the summary judgment stage, and thus it is not at issue in this proceeding.

Moreover, we note that this past regular session, the Legislature passed the Defamation Mitigation Act, which requires defamation plaintiffs to request a correction, clarification, or retraction from the publisher of a defamatory statement within the limitations period for the defamation claim. TEX. CIV. PRAC. & REM. CODE §§ 73.051, .054–.055 (added by H.B. 1759, 83d Leg., R.S., § 2). Under this provision, a defamation plaintiff may only recover exemplary damages if they serve the request for a correction, clarification, or retraction within 90 days of receiving knowledge of the publication.[15] *Id*. § 73.055(c).

D. Substantial Truth

Whether Neely raised a fact issue regarding the truth or falsity of the underlying statements is the primary issue in this appeal. We have developed the substantial truth doctrine to determine

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[14] *See, e.g.*, CAL. CIV. CODE § 48.5(1); COLO. REV. STAT. § 13-21-106; FLA. STAT. § 770.04; GA. CODE ANN. § 51-5-10(a); IOWA CODE § 659.5; KY. REV. STAT. ANN. § 411.062; NEB. REV. STAT. § 25-840.02(1); OR. REV. STAT. § 31.200(1); S.D. CODIFIED LAWS § 20-11-6; UTAH CODE ANN. § 45-2-7; VA. CODE ANN. § 8.01-49; WYO. STAT. ANN. § 1-29-101.

[15] The Defamation Mitigation Act only affects publications published after its effective date and does not apply to this proceeding. H.B. 1759, 83d Leg., R.S., § 3.

the truth or falsity of a broadcast: if a broadcast taken as a whole is more damaging to the plaintiff's reputation than a truthful broadcast would have been, the broadcast is not substantially true and is actionable. *Turner*, 38 S.W.3d at 115 ("the meaning of a publication, and thus whether it is false and defamatory, depends on a reasonable person's perception of the entirety of a publication and not merely on individual statements"); *McIlvain*, 794 S.W.2d at 16 ("The test used in deciding whether the broadcast is substantially true involves consideration of whether the alleged defamatory statement was more damaging to [the plaintiff's] reputation, in the mind of the average listener, than a truthful statement would have been. This evaluation involves looking to the 'gist' of the broadcast." (citations omitted)); *see also Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 516–17 (1991) (applying substantial truth defense under California law).

Assessing a broadcast's gist is crucial. A broadcast with specific statements that err in the details but that correctly convey the gist of a story is substantially true. *Turner*, 38 S.W.3d at 115. On the other hand, a broadcast "can convey a false and defamatory meaning by omitting or juxtaposing facts, even though all the story's individual statements considered in isolation were literally true or non-defamatory." *Id*. at 114. We determine a broadcast's gist or meaning by examining how a person of ordinary intelligence would view it.[16] *Id*. at 114–15. "If the evidence is disputed, falsity must be determined by the finder of fact." *Bentley v. Bunton*, 94 S.W.3d 561, 587 (Tex. 2002).

[16] We have also described this standard as the "average listener" standard. *McIlvain*, 794 S.W.2d at 16.

KEYE contends the trial court properly granted summary judgment because: (1) KEYE accurately reported third-party allegations, which satisfies our test for substantial truth; (2) the broadcast is privileged under the fair comment and official proceeding privileges; (3) Neely is a limited purpose public figure and there is no evidence of actual malice; (4) there is no evidence of negligence; and (5) Neely's professional association cannot maintain a defamation action. We address each argument in turn.

1. *McIlvain*

To address KEYE's first issue, we analyze our holding in *McIlvain*. KEYE contends that in *McIlvain*, we transformed the substantial truth doctrine to shield media defendants from defamation liability for publishing third-party allegations if the defendants show that the underlying allegations (1) were made, and (2) were accurately reported. We disagree.

McIlvain concerned a broadcast about an investigation by the City of Houston into alleged misconduct by employees in its water maintenance division. 794 S.W.2d at 15. The broadcast indicated that the public integrity section was investigating allegations that: (1) employees cared for the elderly father of a manager on city time; (2) employees were putting in for overtime to complete their city duties later; (3) authorities were looking for a gun at a water treatment facility; and (4) employees had been drinking on the job. *Id*. Two of the employees sued the broadcasters for defamation. *Id*. The city's investigation later found all the allegations to be true. *Id*. at 16. The trial court granted summary judgment in favor of the media defendants. *Id*. at 15. We affirmed the trial court's ruling because the "broadcast statements are factually consistent with [the government's]

investigation *and its findings*" and were thus "substantially correct, accurate, and not misleading." *Id*. at 16 (emphasis added).

Since *McIlvain*, several courts of appeals and the Fifth Circuit have interpreted it to mean that media reporting of third-party allegations under investigation is substantially true if the media accurately reports the allegations and the existence of any investigation.[17] KEYE similarly asserts that our holding in *McIlvain* created a substantial truth defense for accurately reporting third-party allegations. But the parties do not assert and we cannot locate such a rule in any other jurisdiction, and we did not establish it in *McIlvain*. Rather, *McIlvain* stands for the proposition that if a broadcast reports that allegations were made and an investigation proves those allegations to be true, the defamation claim is brought within the scope of the substantial truth defense. *Id*. In other words, a government investigation that finds allegations to be true is one method of proving substantial truth. *Cf.* RESTATEMENT (SECOND) OF TORTS § 581A, cmt. e (1977) (regarding the truth defense, "[i]t is necessary to find that the defamatory matter contained in the statement is true. When one person repeats a defamatory statement that he attributes to some other person, it is not enough for the person who repeats it to show that the statement was made by the other person. The truth of the defamatory charges that he has thus repeated is what is to be established"). Accordingly, we must

[17] *See Green v. CBS, Inc.*, 286 F.3d 281, 284 (5th Cir. 2002); 331 S.W.3d at 922; *Grotti v. Belo Corp.*, 188 S.W.3d 768, 775 (Tex. App.—Fort Worth 2006, pet. denied); *Associated Press v. Boyd*, No. 05-04-01172-CV, 2005 WL 1140369, at *3 (Tex. App.—Dallas May 16, 2005, no pet.); *UTV of San Antonio, Inc. v. Ardmore, Inc.*, 82 S.W.3d 609, 612 (Tex. App.—San Antonio 2002, no pet.); *Dolcefino v. Randolph*, 19 S.W.3d 906, 918 (Tex. App.—Houston [14th Dist] 2000, pet. denied); *Am. Broad. Cos., Inc. v. Gill*, 6 S.W.3d 19, 33 (Tex. App.—San Antonio 1999, pet. denied); *KTRK Television v. Felder*, 950 S.W.2d 100, 106 (Tex. App.—Houston [14th Dist.] 1997, no writ).

determine whether the gist of KEYE's broadcast was substantially true. *Turner*, 38 S.W.3d at 115; *McIlvain*, 794 S.W.2d at 16. A government investigation (by the Board here) proving allegations to be true is simply one method of doing so. *McIlvain*, 794 S.W.2d at 16.

2. Gist of the Broadcast

The broadcast at issue began by asking listeners if they would want to know "if your surgeon had been disciplined for prescribing himself and taking dangerous drugs."[18] The broadcast discusses the Jetton and Wu cases and then states that the Board "did discipline Neely." After discussing the Order, the broadcast contains the following statement by Paul Jetton:

> Narcotics, opiates, I mean it's just things that, I mean things that they don't even let people operate machinery or drive cars when they're, when they're taking them and this guy's doing brain surgery on people. I mean it's just, even now I'm just, it's just incredulous, you just can't even believe that it even happened.

Wilson then asked a Board representative how the Board would know Neely was not using the medications again: "But how would they know if he is using? He can get somebody else to prescribe him. I mean he could say, 'I've followed the order.'"

We determine the gist through the lens of a person of ordinary intelligence. *Turner*, 38 S.W.3d at 114–15. Neely asserts that a person of ordinary intelligence could conclude that the gist of the broadcast, based on the content and placement of these statements, was that Neely was disciplined for operating on patients while using dangerous drugs or controlled substances.[19] KEYE

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[18] We have previously stated that an introduction can be especially misleading. *See Turner*, 38 S.W.3d at 118.

[19] Neely also asserts the broadcast includes gists that he was performing unnecessary surgeries and was unsafely operating on patients while experiencing hand tremors. We need not

maintains that the gist of the broadcast "concerned controversies and allegations surrounding Neely's care of Jetton and Wu, the malpractice lawsuits filed by Jetton and Wu's ex-wife, an autopsy report by the Travis County [Medical Examiner], a public disciplinary action by the Medical Board, and Neely's responses to the allegations." We agree with Neely that a person of ordinary intelligence could conclude the gist of the broadcast was that Neely was disciplined for operating on patients while using dangerous drugs or controlled substances.

3. Substantial Truth of the Broadcast's Gist

To prevail at summary judgment on the truth defense, KEYE must conclusively prove that this gist is substantially true.[20] *Turner*, 38 S.W.3d at 114–15. As we explained in *Turner*, although the specific statements in a broadcast may be substantially true when viewed in isolation, the gist can be false by omitting or juxtaposing facts. *Id*. We examine whether the gist was more damaging to the plaintiff's reputation, in the mind of a person of ordinary intelligence, than a truthful statement would have been. *Id.*

A reasonable view of the gist of the broadcast is that Neely was disciplined for operating on patients while using dangerous drugs or controlled substances. Unlike in *McIlvain*, the government

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assess the substantial truth of the gist that Neely was performing unnecessary surgery because these statements are protected by the official/judicial proceedings privilege. *See infra* Part III.E. And we need not assess the gist regarding Neely's hand tremors in light of our disposition regarding the gist that he was disciplined for operating on patients while using dangerous drugs and controlled substances. *See infra* Part III.D.3–III.F.

[20] When a private figure sues a media defendant over defamatory statements that are of public concern, the plaintiff has the burden of proving falsity. *Hepps*, 475 U.S. at 777. But this distinction is less material at summary judgment. *Casso*, 776 S.W.2d at 555 n.3.

investigation (here from the Board Order) does not indicate that this allegedly defamatory statement was correct. The Order disciplined Neely for prescribing himself dangerous drugs or controlled substances. It did not discipline Neely for *taking or using* dangerous drugs or controlled substances. The Board found that Neely's medications were "legitimately and appropriately prescribed" by treating physicians but that Neely "began to refill the medications himself in lieu of scheduled visits." Further, section 164.051(a)(4) of the Occupations Code allows the Board to suspend a license if the physician is unable to practice medicine with reasonable skill and safety to patients because of "excessive use of drugs" or "mental or physical condition." TEX. OCC. CODE § 164.051(a)(4)(C)–(D). When citing to section 164.051(a)(4), the Order only noted Neely's "mental or physical condition" as grounds for discipline, not any excessive use of drugs. And rather than concluding that Neely's self-prescribing affected his ability to practice medicine (as it apparently did with his mental or physical condition), the Board concluded that Neely's self-prescribing instead violated a then newly-created rule that self-prescribing dangerous drugs or controlled substances in certain situations is not "an acceptable professional manner consistent with public health and welfare." 22 TEX. ADMIN. CODE § 190.8(1)(M) (Tex. State Bd. of Med. Examiners, Disciplinary Guidelines) (added by 28 Tex. Reg. 10496 (2003)). Thus, the Order reflects that Neely was disciplined for self-prescribing dangerous drugs or controlled substances, not for taking them.

In addition, Neely brought forth evidence that he was not operating on patients while taking or using dangerous drugs or controlled substances:

- Neely swore in an affidavit that he had "never abused drugs or been addicted to drugs, prescription or otherwise" and had "never performed surgeries while impaired by drugs."[21]
- Wilson reported not finding any independent evidence that Neely performed surgery while impaired.
- Neely retained Dr. Edgar Nace—a former vice president of the Board who was board certified in clinical, addiction, and forensic psychiatry—to conduct a psychiatric and substance abuse evaluation of Neely during the Board investigation. Among other things, Nace reviewed Neely's pharmacy records and performed a drug test. Nace determined that Neely "has not been and is not currently diagnosable with a substance use disorder—neither abuse nor dependence." Nace noted that Neely's dosage of hydrocodone was lower than with emerging patterns of abuse or addiction and Neely's use of only one pharmacy was inconsistent with a pattern of abuse or addiction. Nace concluded that Neely's "prescriptions and subsequent refills have been appropriate to his documented diagnosis" for a torn rotator cuff, diverticulitis, and asthma.
- Neely used hydrocodone primarily in 2000 and part of 2001 to treat a torn rotator cuff. He ceased using hydrocodone in April 2003.

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[21] Uncontroverted summary judgment evidence from an interested witness is only sufficient to raise a fact issue, unless the evidence is clear, direct, positive, can be readily controverted, and there are no circumstances tending to impeach or discredit the testimony. *See* TEX. R. CIV. P. 166a(c); *Great Am. Reserve Ins. Co. v. San Antonio Plumbing Supply Co.*, 391 S.W.2d 41, 47 (Tex. 1965). Because Neely's evidence is only used to raise a fact issue here, we need not assess whether his testimony is clear, direct, positive, can be readily controverted, or could be impeached or discredited.

- Neely ceased using steroids, prescribed for asthma, in 2000, when he began using an inhaler.
- As of October 2003, Neely was using medications for asthma (Advair, Ventolin), allergies (Actifed, Benadryl, Flonase), high blood pressure (Cardura), and colon issues (Lomotil), none of which are controlled substances.

Based on Neely's responsive evidence,[22] we hold that a there is a fact issue regarding the truth or falsity of the gist that Neely was disciplined for operating on patients while taking or using dangerous drugs or controlled substances. *Turner*, 38 S.W.3d at 117–18 (holding that, especially in light of a broadcast's introduction, a viewer could believe in a gist of the broadcast that was not substantially true); *McIlvain*, 794 S.W.2d at 16. As in *Turner*, we note that even an accurate account of Neely that did not create a false impression "may have raised troubling questions." 38 S.W.3d at 118. But because the factfinder may conclude that the gist results in a less favorable view of Neely to ordinary viewers than an accurate broadcast would have, the substantial truth defense cannot support the trial court's summary judgment.

[22] Neely also offered other evidence the trial court excluded, which Neely does not challenge on appeal. This evidence included: (1) the Board orders finding no wrongdoing with Neely's treatment in the Jetton and Wu cases; (2) Neely's statement that he only took narcotic medications at night; (3) the psychiatric evaluation conducted pursuant to the Board Order that concluded that Neely's "use of the self-prescribed opiates does not suggest that he ever had a problem with abuse or dependence;" and (4) the fact that the Board terminated its Order early, less than half way through the three-year probationary period.

E. Official/Judicial Proceedings Privilege

KEYE next asserts that the trial court's grant of summary judgment was proper because the broadcast was protected by the official/judicial proceedings privilege. The United States Supreme Court has long recognized a common law judicial privilege. *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 492 (1975). Underpinning the judicial privilege is the notion that a "trial is a public event. What transpires in the court room is public property. If a transcript of the court proceedings had been published, we suppose none would claim that the judge could punish the publisher for contempt." *Craig v. Harney*, 331 U.S. 367, 374 (1947). In Texas, the Legislature codified the judicial proceedings privilege and expanded it to other official proceedings. Section 73.002 of the Civil Practice and Remedies Code provides that publications are privileged if they are "a fair, true, and impartial account of" judicial or other proceedings to administer the law. TEX. CIV. PRAC. & REM. CODE § 73.002(b)(1).

There is a key difference between the substantial truth defense and the truth analysis in the official/judicial proceedings privilege. The substantial truth defense assesses whether the underlying allegations in the broadcast are substantially true. *See* Part III.D, *supra*. By contrast, the official/judicial proceedings privilege assesses whether the reporter's account of the proceedings (not the underlying allegations made in those proceedings) was fair, true, and impartial. *Denton Publ'g Co. v. Boyd*, 460 S.W.2d 881, 883 (Tex. 1971). When construing a substantially similar prior version of the official/judicial proceedings privilege, we held that "[t]he publication would be within the privilege provided by statute as long as it purported to be, and was, only a fair, true and impartial report of what was stated at the meeting, regardless of whether the facts under discussion at such

meeting were in fact true . . . ." *Id.* at 882; *see also Herald-Post Publ'g Co. v. Hill*, 891 S.W.2d 638, 639 (Tex. 1994) (comparing allegedly defamatory article to trial testimony to determine that judicial proceeding privilege applied).

But the privilege only extends to statements that: (1) are substantially true and impartial reports of the proceedings, and (2) are identifiable by the ordinary reader as statements that were made in the proceeding. *Boyd*, 460 S.W.2d at 884. In *Boyd*, there was a factual dispute as to whether a false statement that a contractor was bankrupt was made at a city council meeting. *Id*. at 884–85. When remanding to resolve the factual dispute, we concluded the privilege would apply if: (1) the statement was made at the city council meeting, and (2) an ordinary reader of the defendant's article would understand the statement was made at the meeting.[23] *Id*. at 885.

1. Unnecessary Surgery

One gist of the KEYE broadcast we have not previously addressed is that Neely was performing unnecessary surgeries.[24] This gist results from the inclusion of the statement by Sheila that "[e]very neurosurgeon that's looked at Paul's MRIs from before Neely operated on him have [sic] said they would have never done surgery. They would have watched him with MRIs over years." The placement of this statement within the broadcast was in the discussion of Neely's treatment of Paul and the resulting lawsuit. The allegation that Neely performed unnecessary surgery

[23] We see no substantive difference from our ordinary reader standard for the judicial proceedings privilege in *Boyd*, 460 S.W.2d at 884–85, and our person of ordinary intelligence standard for substantial truth in *Turner*, 38 S.W.3d at 114–15.

[24] *See supra* note 19.

was one basis for the lawsuit, in which the Jettons alleged that, "[a]t the time [Neely and a fellow doctor] performed such procedure, they ostensibly did so to treat symptomatic hydrocephalus in Paul Jetton. However, Paul Jetton did not have symptomatic hydrocephalus." We hold that an ordinary viewer could conclude that Sheila's allegation regarding unnecessary surgery in the broadcast was made in the Jetton lawsuit. *Id.* at 884. Thus, KEYE met its initial burden of proving this statement is protected by the conditional judicial proceedings privilege. *See id*. (holding that the defendant has the initial burden of proving a publication is privileged).

But Neely can rebut the privilege by proving it is inapplicable. *Id*. The judicial/official proceedings privilege "does not extend to the republication of a matter if it is proved that the matter was republished with actual malice after it had ceased to be of public concern." TEX. CIV. PRAC. & REM. CODE § 73.002(a). Actual malice means the defendant made the statement "'with knowledge that it was false or with reckless disregard of whether it was true or not;'" and reckless disregard means "'the defendant in fact entertained serious doubts as to the truth of his publication.'" *New Times, Inc. v. Isaacks*, 146 S.W.3d 144, 162 (Tex. 2004) (quoting *Huckabee v. Time Warner Entm't Co.*, 19 S.W.3d 413, 420 (Tex. 2000) and *Bentley*, 94 S.W.3d at 591); *see also Hearst Corp. v. Skeen*, 159 S.W.3d 633, 637 (Tex. 2005). Sheila's statement that every neurosurgeon would have not performed surgery was controverted by the two neurosurgeons who agreed with Neely's treatment of Paul and the Board order finding no wrongdoing in Neely's treatment of Paul. KEYE's inclusion of this disclaiming information negates any allegation that KEYE acted with actual malice as to the gist of the broadcast that Neely was performing unnecessary surgery and the record contains no other evidence that creates a fact issue on this point. Accordingly, the official/judicial

proceedings privilege shields this portion of the broadcast. TEX. CIV. PRAC. & REM. CODE § 73.002(a); *Boyd*, 460 S.W.3d at 884.

2. Disciplined for Operating on Patients While Taking Dangerous Drugs or Controlled Substances

We next analyze whether the gist of the broadcast that Neely was disciplined for operating on patients while taking dangerous drugs or controlled substances is protected by the official/judicial proceedings privilege. This gist is explained in part by the anchor's introduction to the broadcast, which asked:

> If you needed surgery would you want to know if your surgeon had been disciplined for prescribing himself and taking dangerous drugs . . . ?

As previously addressed, the evidence creates a fact issue as to whether the assertion that Neely had been disciplined for "taking dangerous drugs" is a fair, true, and impartial account of the Board Order. The Board found Neely's *self-prescribing* to be inappropriate—not his taking or using the medications. The Board found that the medications were "legitimately and appropriately prescribed" but that Neely "began to refill the medications himself in lieu of scheduled visits." Accordingly, a jury may conclude that the Order disciplined Neely for his "inappropriate prescription of dangerous drugs or controlled substances to oneself." Thus, we cannot say that—as a matter of law—the statement that Neely was disciplined for taking or using dangerous drugs or controlled substances was a fair, true, and impartial account of an official or judicial proceeding. *Boyd*, 460 S.W.3d at 883.

F. Fair Comment Privilege

KEYE also maintains that the fair comment privilege applies to the broadcast. Section 73.002(b)(2) provides that a broadcast is privileged if it is a "reasonable and fair comment on or

criticism of an official act of a public official or other matter of public concern published for general information." TEX. CIV. PRAC. & REM. CODE § 73.002(b)(2). Comments based on substantially true facts are privileged if fair; comments that assert or affirm false statements of fact are not privileged. We long ago stated that it "is the settled law of Texas, that a false statement of fact concerning a public officer, even if made in a discussion of matters of public concern, is not privileged as fair comment." *Bell Publ'g Co. v. Garrett Eng'g Co.*, 170 S.W.2d 197, 204 (Tex. 1943); *see also Barbouti v. Hearst Corp.*, 927 S.W.2d 37, 52 (Tex. App.—Houston [1st] 1996, writ. denied) (false statements not privileged as fair comments). The Legislature has extended the fair comment privilege to matters of public concern,[25] TEX. CIV. PRAC. & REM. CODE § 73.002(b)(2), and we have come to interpret the truth defense as requiring only substantial truth, *Turner*, 38 S.W.3d at 115. Substantial truth assesses whether the gist of the broadcast is substantially true, and a broadcast can convey a substantially false meaning by juxtaposing facts that, viewed in isolation, are true. *Id*. Joining these principles, we conclude that a comment based on a substantially true statement of fact can qualify as a fair comment. TEX. CIV. PRAC. & REM. CODE § 73.002(b)(2). But if a comment is based upon a substantially false statement of fact the defendant asserts or conveys as true, the comment is not protected by the fair comment privilege. *Bell*, 170 S.W.2d at 204.

KEYE's broadcast opened by asking viewers if they would want to know if their doctor "had been disciplined for prescribing himself and taking dangerous drugs . . . ." Wilson's questioning of whether the Order would prevent Neely from using the drugs was predicated on the statement that

[25] As we noted above, this broadcast addressed a matter of public concern. *See supra* note 12.

Neely had been disciplined for taking or using dangerous drugs or controlled substances—which the broadcast affirmed to be true. Because a fact issue exists on whether the statement was true, KEYE is not entitled to summary judgment based on the fair comment privilege. *Bell*, 170 S.W.2d at 204.

G. Limited Purpose Public Figure

KEYE also asserts that Neely was a limited purpose public figure who therefore had to prove malice. We disagree.

Public figure status is a question of law for the court. *McLemore*, 978 S.W.2d at 571. We use a three-part test to assess whether an individual is a limited purpose public figure:

> (1) the controversy at issue must be public both in the sense that people are discussing it and people other than the immediate participants in the controversy are likely to feel the impact of its resolution;
>
> (2) the plaintiff must have more than a trivial or tangential role in the controversy; and
>
> (3) the alleged defamation must be germane to the plaintiff's participation in the controversy.

Id. In *McLemore*, we expressly reserved the question of whether an individual may meet the public controversy requirement against her will. *Id*. at 571–72.

The distinction between public and private figures matters chiefly because public and limited purpose public figures must prove a defamation defendant acted with actual malice. *Gertz*, 418 U.S. at 342. The United States Supreme Court addressed this distinction in *Gertz*:

> [p]ublic officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.

> More important than the likelihood that private individuals will lack effective opportunities for rebuttal, there is a compelling normative consideration underlying the distinction between public and private defamation plaintiffs. An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case. . . .
>
> Those classed as public figures stand in a similar position. Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare. For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.

Id. at 344–45. Thus, the Court was concerned with both access to communication to rebut a defamatory statement and the normative considerations of public figures typically having "thrust themselves to the forefront of particular public controversies." *Id*. at 345. The Court later stated that "those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." *Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979). In other words, the allegedly defamatory statement cannot be what brought the plaintiff into the public sphere; otherwise, there would be no private figures defamed by media defendants.

The Court's forecast that it would be "exceedingly rare" for a person to become a public figure involuntarily has proven true: neither the United States Supreme Court nor this Court has found circumstances in which a person involuntarily became a limited-purpose public figure. *See, e.g.*, *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157, 166 (1979) (holding an individual to not be a limited-purpose public figure who was "dragged unwillingly into the controversy"); *Time, Inc. v.*

Firestone, 424 U.S. 448, 454–55 (1976) (holding an individual to not be a public figure, in part, because she had done nothing voluntary to assume special prominence).

On these facts, we cannot say this is the exceedingly rare case in which a person has become a limited-purpose public figure against his will. Before the broadcast in question, Neely was mentioned in a 1996 newspaper article about settling a malpractice lawsuit and a December 2003 newspaper statement that Neely was placed on probation for self-prescribing medications. Neely was not quoted in either article. Neely also refrained from talking to Wilson regarding the broadcast at issue. Because Neely is not a limited-purpose public figure, he need not prove actual malice, and this ground cannot support the trial court's summary judgment.

H. Evidence of Negligence

KEYE next argues that the trial court properly granted summary judgment because there was no evidence of negligence. For the purposes of defamation liability, a broadcaster is negligent if she knew or should have known a defamatory statement was false. *Foster v. Laredo Newspapers, Inc.*, 541 S.W.2d 809, 820 (Tex. 1976). But that liability may not be predicated on "a factual misstatement whose content [would] not warn a reasonable prudent editor or broadcaster of its defamatory potential.'" *Id*. (quoting *Gertz*, 418 U.S. at 348) (alteration in original).

The broadcast opened by asking viewers if they would want to know if their doctor "had been disciplined for prescribing himself and taking dangerous drugs . . . ." Neely raised a fact issue as to the truth or falsity of the gist that he was disciplined for taking medications. *See supra* Parts III.D.3 and III.E. This creates a fact issue regarding whether the statement in the broadcast that Neely had

been disciplined for taking medication would warn a reasonably prudent broadcaster of its defamatory potential. *Foster*, 541 S.W.2d at 820.

I. Professional Association

Finally, KEYE argues that professional associations cannot maintain defamation claims and thus the claim by Neely's professional association must be dismissed. We disagree.

Our precedent makes clear that corporations may sue to recover damages resulting from defamation. *Gen. Motors Acceptance Corp. v. Howard*, 487 S.W.2d 708, 712 (Tex. 1972); *Newspapers, Inc. v. Matthews*, 339 S.W.2d 890, 893 (Tex. 1960). In *Howard*, Howard Motor Company, Inc. and its owner, Hugh Howard, both sued General Motors Acceptance Corporation (GMAC), alleging it had libeled them in a letter to Howard's bank. 487 S.W.2d at 709–10. GMAC argued that our holding in *Matthews* precludes corporations from maintaining causes of action for libel. *Id*. at 712. We rejected that assertion, pointing out that *Matthews* specifically recognized that a corporation may be libeled. *Id*. Accordingly, we permitted Howard Motor Company, Inc., a corporate entity, to maintain a libel suit against GMAC. *See id*.

The Legislature has endowed professional associations with many of the same privileges that corporations enjoy. Indeed, the Business Organizations Code specifies that, "[e]xcept as provided by Title 7, a professional association has the same powers, privileges, duties, restrictions, and liabilities as a for-profit corporation." TEX. BUS. ORGS. CODE § 2.108. Nothing in Title 7 of the Business Organizations Code precludes professional associations from bringing defamation suits. *See id*. chs. 301–02. Because professional associations share the same rights as for-profit

corporations as to maintaining defamation claims, Texas law does not preclude the professional association, Byron D. Neely, M.D., P.A., from maintaining a libel suit.[26]

IV. Response to the Dissent

The dissent would hold that the broadcast was substantially true as a matter of law because there was circumstantial evidence that Neely could have been under the influence of dangerous drugs and controlled substances while operating on patients, and that the Board, though not expressly disciplining Neely for taking medications, implicitly did so. __ S.W.3d __, __ (Jefferson, C.J., dissenting). But at summary judgment, "[w]e must review the record '*in the light most favorable to the nonmovant, indulging every reasonable inference and resolving any doubts against the motion*.'" *Buck*, 381 S.W.3d at 527 (quoting *City of Keller*, 168 S.W.3d at 824) (emphasis added). The dissent disregards these principles in two ways. First, the dissent ignores Neely's evidence, which includes the Board Order indicating its discipline of him was not for his use of medications, evidence that Neely never performed surgery while impaired, that his evaluation prior to the Board Order indicated he never had a drug abuse or dependence problem, and that Wilson never found any independent evidence that Neely performed surgery while impaired.[27]

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[26] While professional associations may maintain defamation claims, recovery by the association and its members for the same particular injury is a precluded double recovery. *See 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 than one theory of liability[] does not modify this rule." (quoting *Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1, 8 (Tex. 1991)) (alterations in original)). Instead, it is for the trier of fact to simply determine what portion, if any, of the total damages inflicted were incurred by each entity.

[27] The dissent believes this evidence that Neely was not operating while impaired is immaterial to the gist of whether he was disciplined for operating on patients while taking dangerous

Second, the dissent inverts our time-honored summary judgment standard by indulging every reasonable inference and resolving every doubt against Neely. Its foremost implicit finding against Neely is that the Board disciplined him for taking medications. __ S.W.3d at __ (Jefferson, C.J., dissenting). The dissent indicates that it "is not hard to understand the Board's concerns" regarding Neely's use of medications. *Id*. But the Board Order did not discipline Neely for taking medications, it disciplined him for self-prescribing them. The Order states, in relevant part:

> FINDINGS OF FACT
>
> . . .
>
> 6. [Neely] suffered various injuries and ailments, which required a variety of medications. [Neely's] treating physician legitimately and appropriately prescribed a number of medications to treat these conditions. However, between 1999, and 2002, [Neely] began to refill the medications himself in lieu of scheduled visits.
>
> 7. Upon review of statements of [Neely] and the September 27, 2000 medical records of [Neely] obtained from his treating physician, the Panel concluded that [Neely] had a prior history of tremors.
>
> . . .
>
> CONCLUSIONS OF LAW
>
> . . .
>
> 2. [Neely] is subject to action by the Board under Sections 164.051(a)(4) and 164.056 of the Act due to [Neely's] inability to practice medicine with reasonable skill and safety to patients, *due to mental or physical condition*.

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drugs. __ S.W.3d at __ (Jefferson, C.J., dissenting). This is precisely why we first examined the Board Order itself to determine whether it disciplined Neely for the conduct the gist of the broadcast indicates. *See supra* Part III.D.3. Neely's additional evidence supports why the Order did not discipline him for operating on patients while taking dangerous drugs. And if evidence of Neely's use of medication is truly as irrelevant as the dissent suggests, one wonders why the dissent only finds support in this very type of evidence.

> 3. [Neely] is subject to disciplinary action pursuant to Section 164.051(a)(3) of the Act by committing a direct or indirect violation of a rule adopted under this Act, either as a principal, accessory, or accomplice, to wit, Board Rule 190.1(c)(1)(M)—*inappropriate prescription of dangerous drugs or controlled substances* to oneself, family members, or others in which there is a close personal relationship.

(Emphases added.) The first conclusion of law above references section 164.051(a)(4) of the Occupations Code, which allows the Board to discipline a person for illness, drunkenness, "excessive use of drugs, narcotics, chemicals, or another substance," or "a mental or physical condition." TEX. OCC. CODE § 164.051(a)(4). The Order states that it was disciplining Neely "due to mental or physical condition"—not excessive drug use as the dissent reads between the lines to infer.[28] At a minimum, the Order at least creates a fact issue in Neely's favor as to whether he was disciplined for taking medications. If one does endeavor to draw inferences and resolve doubts, they

[28] The dissent relies on a statement by a Board investigator in its "summary of allegations" that Neely could be subject to disciplinary action under section 164.051(a)(4) for "[i]nability to practice medicine with reasonable skill and safety because of illness *or* substance abuse"(emphasis added), and a statement on the Board's website that its investigation of Neely "was based on *allegations* that Dr. Neely had self-prescribed medications with the *potential* to interfere with his ability to perform surgery." __ S.W.3d at __ (Jefferson, C.J., dissenting) (emphases added). The Board Order ultimately did not discipline Neely under section 164.051(a)(4) for substance abuse but only for a "mental or physical condition," which was his hand tremor. Though the Board did not discipline Neely for taking medications, a reasonable view of the gist of the broadcast was that Neely had been so disciplined.

must be drawn and resolved in favor of Neely at this summary judgment stage.[29] *Buck*, 381 S.W.3d at 527.

In addition, the dissent further draws inferences against Neely by assuming that the Board's order for Neely to undergo a psychiatric evaluation indicates the Board must have been concerned about Neely's use of medications. On the contrary, the Board Order notes that Neely retained a doctor to perform a physical examination who detected no medically significant tremor but "felt unqualified to determine [Neely's] ability to perform surgery, and recommended a disability assessment or a Neuro-psyche evaluation." Neely then retained Dr. Nace to perform the psychiatric evaluation the physical examination recommended. The Board then followed the same model, "requesting independent physical and psychiatric evaluations to determine [Neely's] capacity to practice medicine in general, and specifically, to perform surgery." Far from disciplining Neely for operating on patients while taking medications, the Order simply confirmed a psychiatric evaluation was needed because a physical evaluation alone might not fully assess the impact of Neely's hand tremor on his ability to perform surgery.

Moreover, by inverting the standard of review for summary judgments, the dissent prematurely cuts off Neely's right to a trial on this reputational tort. Our constitution assures that

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[29] In its effort to indulge reasonable inferences against Neely, the dissent also relies on an Austin American Statesman article that indicates Neely was one of six Austin doctors the Board had recently disciplined for "violations involving either drug or alcohol abuse." __ S.W.3d at __ (Jefferson, C.J., dissenting). But the specific reference to Neely was that he was disciplined "for self-prescribing medications, according to board records." We find nothing questionable about this specific reference to Neely. To the extent that KEYE attempts to rely on the categorical statement in the newspaper article, the common law does not generally allow a defendant to escape defamation liability by claiming that another originated the statement. *See supra* note 3 and accompanying text.

the "right of trial by jury shall remain inviolate." TEX. CONST. art. I, § 15. Additionally, the Texas Constitution's free speech clause guarantees the right to bring reputational torts: "Every person shall be at liberty to speak, write or publish his opinions on any subject, *being responsible for the abuse of that privilege* . . . ." TEX. CONST. art. I, § 8 (emphasis added). Likewise, the open courts provision guarantees the right to bring reputational torts: "All courts shall be open, and every person for an injury done him, in his lands, goods, person or *reputation*, shall have remedy by due course of law." TEX. CONST. art. I, § 13 (emphasis added). As we observed in *Casso*,

> While we have recently recognized the possibility that our state free speech guarantee may be broader than the corresponding federal guarantee, *that broader protection, if any, cannot come at the expense of a defamation claimant's right to redress*. Unlike the United States Constitution, which contains no explicit guarantee of the right to sue for defamation, the Texas Constitution expressly protects the bringing of reputational torts.

776 S.W.2d at 556 (emphasis added) (citation omitted). In short, the dissent's upending of our time-honored summary judgment principles infringes upon Neely's constitutional right to bring suit for reputational torts and to have a jury trial.

The dissent also attempts to use a discrete portion of the broadcast that, standing alone, could appear to be substantially true to vindicate the remainder of the broadcast. The dissent focuses on the portion of the broadcast addressing Neely's hand tremors as justification for the broadcast being substantially true as a matter of law. But the broadcast references Neely's hand tremors twice in the seven-minute segment. Drugs or medications are expressly referenced eight times and discussed without naming those precise terms a number of other times. The dissent's analysis falls short of respect for our precedent dictating the manner in which we review substantial truth. *Turner*, 38

S.W.3d at 115 ("[T]he meaning of a publication, and thus whether it is false and defamatory, depends on a reasonable person's perception of the entirety of a publication and not merely on individual statements.").

Additionally, the dissent contends that a report about a government investigation is always substantially true. __ S.W.3d at __ (Jefferson, C.J., dissenting). In Texas, the Legislature long ago protected reports about government investigations under the official/judicial proceedings privilege. TEX. CIV. PRAC. & REM. CODE § 73.002(b)(1). But as explained above, the privilege only protects such reports if they are fair, true, and impartial accounts of such proceedings. *Id*. There is at least a fact issue on whether the broadcast was a fair, true, and impartial account of the Board Order because the gist of the broadcast to a person of ordinary intelligence could be that Neely was disciplined for taking dangerous drugs and controlled substances when the Order indicates he was not so disciplined.[30] *See* Part III.E, *supra*.

Finally, the dissent perceives that our holding "collides violently with the First Amendment." __ S.W.3d at __ (Jefferson, C.J., dissenting). But respectfully, the only collision is between the dissent's implicit findings and our time-honored standards for reviewing summary judgments.

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[30] The dissent's reliance on *Global Relief Foundation, Inc. v. New York Times Co.*, 390 F.3d 973 (7th Cir. 2004) only furthers our conclusion. There, the New York Times prevailed on the truth defense because it was substantially true that the government was suspicious about Global Relief funding terrorism. *Id*. at 986. Global Relief's affidavits indicating it did not fund terrorism did not render false the media statements about the government's suspicions. *Id*. at 983. The present case would be more akin to the New York Times reporting that Global Relief had been convicted of something it had not been convicted of. *See id*. at 987 ("none of the articles concluded that [Global Relief] was actually guilty of the conduct for which it was being investigated").

V. Conclusion

The key question in this appeal is whether Neely raised a fact issue as to the truth or falsity of the broadcast at issue in his defamation suit. It is well established that one may be liable for republishing the false and defamatory statements of another. Rather than abolishing this rule in *McIlvain*, we reaffirmed another long-standing rule that a media defendant may prevail against a defamation claim by proving that the statements were substantially true. We examine substantial truth based on what a person of ordinary intelligence would understand the gist or meaning of the broadcast to be. Here, a person of ordinary intelligence could conclude that the gist of the broadcast was that Neely was disciplined for operating on patients while using dangerous drugs and controlled substances. Neely raised a genuine issue of material fact as to the truth or falsity of that gist with evidence that he was not disciplined for taking dangerous drugs or controlled substances and he never performed surgery while using dangerous drugs or controlled substances. We further conclude: (1) there are fact issues on whether part of the broadcast is protected by the judicial/official proceedings or fair comment privileges; (2) Neely was not a limited purpose public figure; (3) Neely raised a fact issue as to KEYE's negligence; and (4) Neely's professional association may maintain a cause of action for defamation. We reverse the judgment of the court of appeals and remand the case to trial court for further proceedings consistent with this opinion.

_____

Eva M. Guzman
Justice

OPINION DELIVERED: June 28, 2013

Appendix A

KEYE January 19, 2004 Broadcast

Fred Cantu (Anchor): If you needed surgery would you want to know if your surgeon had been disciplined for prescribing himself and taking dangerous drugs, had a history of hand tremors and had been sued several times for malpractice in the last few years?

Judy Maggio (Anchor): A central Texas couple says they didn't learn about this until it was too late. They're outraged the [Texas Medical Board] is allowing Dr. Byron Neely to continue to practice. KEYE news investigative reporter Nanci Wilson tells us if you go to St. David's Hospital with a head injury you could be Dr. Neely's next patient.

Paul Jetton: I've been in, in and out of the hospital, you know, for the last four years. Uh, I had twelve, I believe, I've even lost count, I believe twelve brain surgeries, one spinal surgery.

Wilson: This is Paul Jetton's life.

Paul Jetton: I can't walk. You know, I still, I can walk with a walker, but I still can't walk on my own.

Wilson: Each step is a struggle, but it wasn't always this way. In 1982 Paul Jetton was a linebacker for the University of Texas. He was so good he went on to play in the pros. His first year with the Cincinnati Bengals the team went to the Super Bowl. But in 1999 . . .

Paul Jetton: I just wasn't feeling well. When I went, you know, for I just wanted to get a physical.

Wilson: Something unusual showed up on the MRI scan of his brain.

Paul Jetton: He told me that I had this, this tumor in my brain and, and that I had to, had to have it operated on.

Wilson: His doctor, Austin neurosurgeon Byron Neely, who has been in practice since 1977, said an operation would help.

Paul Jetton: You know it would only be a two hour surgery and that I'd be in, I'd only be in the hospital for two or three days and I'd go on with the rest of my life.

Wilson: The two hour surgery stretched into almost eight hours and Paul was in the hospital for six weeks. While in the hospital Paul developed an infection in his brain. However, he was discharged from the hospital anyway. The result: numerous surgeries and a life of disability. Paul's wife, Sheila, says what they learned from other doctors was the final blow.

Sheila Jetton: Every neurosurgeon that's looked at Paul's MRIs from before Neely operated on him have [sic] said they would have never done surgery. They would have watched him with MRIs over years.

Wilson: The Jettons aren't the only patients to raise questions about Dr. Neely. Wei Wu, a software engineer with two PhDs was referred to Dr. Neely. Neely explains the case in this deposition from 2002.

Dr. Neely: [From the video of his deposition] He came in very confused one day, uh, was found to have a uh, very major brain tumor thought to be a meningioma at the time because it, of the location in the brain. Uh, the patient was taken to the OR thereafter and found to malignant melanoma [sic].

Wilson: Peter Gao was a friend of Wei Wu's. Gao says Wu struggled with the diagnosis that Wu had only a few months to live.

Peter Gao: The doctor is more like persuasive say, well the doctor have seen when he open, when he opened your skull, seen everywhere. So, all we need to do right now I guess, is face, kind of like to face the music.

Wilson: It may have been too much for Wei Wu to handle. A few days later Gao found Wu's abandoned car near the 183 overpass at Mopac. Then discovered Wu had jumped off the overpass taking his own life. But when his body was sent to the Travis County Medical Examiner's office, analyzing Wu's brains, examiners noted no residual metastatic melanoma. Meaning Wei Wu did not have brain cancer. Both the Jetton and the Wu cases happened in 1999. Two other patients also filed suit against the doctor. The [Texas Medical Board] investigated Dr. Neely. The Board found Neely had a history of hand tremors and that between 1999 and 2002, Dr. Neely was writing prescriptions, not only for his patients but for himself as well. Narcotics, muscle relaxers and pain killers. Something former patient Paul Jetton finds shocking.

Paul Jetton: Narcotics, opiates, I mean it's just things that, I mean things that they don't even let people operate machinery or drive cars when they're, when they're taking them and this guy's doing brain surgery on people. I mean it's just, even now I'm just, it's just incredulous, you just can't even believe that it even happened.

Wilson: The [Texas Medical Board] did discipline Dr. Neely. This past December, they suspended his license but gave it right back by staying the suspension. Now he's on probation for three years. The only requirements are that he see a psychiatrist and not write prescriptions for himself or his family. A decision the Board defends.

Jill Wiggins [caption identifies her as a Board representative]: We have compliance officers and the compliance officers will definitely follow to make sure that he's doing the things that his order requires him to do.

Wilson: But how would they know if he is using? He can get somebody else to prescribe him. I mean he could say, "I've followed the order."

Wiggins: Right.

Wilson: I didn't prescribe myself.

Wiggins: Right, right.

Wilson: How do we, how do we know that he's, that we're not putting somebody right back out there to do the same thing he was doing before?

Wiggins: That's a very good question and why this order doesn't include drug testing, I, I honestly don't know the answer to that.

Paul Jetton: I think it's just deplorable, I mean if, if it was another profession, uh, the guy would be in jail.

Wilson: We contacted Dr. Neely for his side to the story. He declined to participate, but his attorney told us that two highly qualified neurosurgeons who reviewed the case agree with the medical decisions made by Dr. Neely. In addition, the [Texas Medical Board] investigated the Jetton case and found no wrong doing. We also contacted St. David's Medical Center, its chief medical officer believes they have a strong peer review process. That's where individual doctors review each other's work and decide who should have privileges.

Steve Berkowitz, M.D.: In this particular case the investigation is incomplete and when we actually find the, get the findings we will then be able to make a determination uh, as to whether the privileges should be continued or not. We strongly value quality of course, we value the due process and most importantly we value patient safety.

Wilson: Nanci Wilson, KEYE News investigates.

[The camera then returns to the anchors, Cantu and Maggio.]

Maggio: The Jettons settled their suit against Dr. Neely. The suit filed on behalf of Wu's son was dismissed because it was not filed by an attorney. The other suits are pending.

Cantu: The Texas Board of Medical Examiners does post final actions taken against doctors on its web site, but all other information about complaints is kept secret.

IN THE SUPREME COURT OF TEXAS

NO. 11-0228

BYRON D. NEELY, INDIVIDUALLY AND BYRON D. NEELY, M.D., P.A., PETITIONERS,

v.

NANCI WILSON, CBS STATIONS GROUP OF TEXAS, L.P., D/B/A KEYE-TV, AND VIACOM, INC., RESPONDENTS

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

CHIEF JUSTICE JEFFERSON, joined by JUSTICE GREEN and JUSTICE LEHRMANN, dissenting.

The Court holds that the broadcast presented a false impression, an untenable "gist," that the doctor was disciplined for operating on patients while taking dangerous drugs. But that gist is reasonably derived from the medical board's findings, the doctor's testimony, and witness observations. If the news report is damning, it is because it conveys substantial truth. The doctor performed brain surgeries during a time he was ingesting seven narcotics, eight other medications, and alcohol. He suffered hand tremors during the period he operated on patients' brains. The medical board investigator concluded that the doctor was subject to discipline based on his "[i]nability to practice medicine with reasonable skill and safety because of illness or substance abuse." The board not only suspended his medical license, but also ordered a psychiatric evaluation

focused on addictive disorders. It required the doctor to undergo a physical examination to confirm whether he was, or was not, physically capable of operating safely.

The doctor denies he was an addict or that his drug use impaired his surgical skills. That is enough, the Court says, to raise a genuine issue on the broadcast's substantial truth. But that evidence is immaterial to the gist the Court has identified: that the Board disciplined the doctor for taking dangerous drugs during a time he performed sensitive surgeries. Because "the underlying facts as to the gist of [that] charge are undisputed, . . . we can disregard any variance with respect to items of secondary importance and determine substantial truth as a matter of law." *McIlvain v. Jacobs*, 794 S.W.2d 14, 16 (Tex. 1990).

We must decide whether the broadcast was more damaging to the doctor's reputation, in the mind of an average viewer, than a truthful statement would have been. *Id*. Here, the literal truth is as caustic as the gist, and the gist reasonably depicts literal truth. Whether it rejected the doctor's gist contention, or found that the broadcast was substantially true, the trial court properly granted summary judgment. The court of appeals properly affirmed that judgment. I would also affirm. The Court's conclusion to the contrary sanctions constitutionally protected speech. For these and other reasons, I respectfully dissent.

I. The broadcast was substantially true.

"The common law of libel . . . . overlooks minor inaccuracies and concentrates upon substantial truth." *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 516 (1991) (internal citations omitted). Small discrepancies "do not amount to falsity so long as 'the substance, the gist, the sting, of the libelous charge be justified.'" *Id*. at 517; *see also Turner v. KTRK Television, Inc.*,

38 S.W.3d 103, 115 (Tex. 2000) (holding that substantial truth doctrine "precludes liability for a publication that correctly conveys a story's 'gist' or 'sting' although erring in the details"). "Put another way, the statement is not considered false unless it 'would have a different effect on the mind of the reader from that which the pleaded truth would have produced.'" *Masson*, 501 U.S. at 517 (quoting R. SACK, LIBEL, SLANDER, AND RELATED PROBLEMS 138 (1980)).

We must view the communication as a whole in light of the surrounding circumstances based upon how a person of ordinary intelligence would perceive it. *Turner*, 38 S.W.3d at 114. We determine falsity based on "the meaning a reasonable person would attribute to a publication, and *not to a technical analysis of each statement*." *New Times, Inc. v. Isaacks*, 146 S.W.3d 144, 154 (Tex. 2004) (emphasis added). Rather than consider the broadcast as a whole, the Court parses it into several different gists, and then addresses only two of them, ironically presenting a certain juxtaposition that the Court itself decries.

The Court states that the broadcast incorrectly characterized Neely's sanction as based on the Board's conclusion that Neely operated on patients while using dangerous drugs. ___ S.W.3d at ___. Because the Board's action was based only on self-prescribing, the Court holds that this gist was not substantially true.

We require substantial, not perfect, truth. With respect to substantiality, Neely admits he was using every one of the fifteen drugs identified in the Board order, plus a few more[1]:

Q. And—and these are actually drugs that you were, I assume, taking. Correct?

A. Yes, sir.

[1] Neely also admits taking Paxil, Flovent, and Singulair.

Q. I mean, you weren't prescribing them to yourself to throw away, correct?

A. No.[2]

Seven of these drugs are narcotics. Paregoric, a narcotic also known as camphorated tincture of opium,[3] contains morphine and is a controlled substance. The average adult dose is 5-10 milliliters one to four times per day; Neely concedes he was taking up to 70 milliliters daily. During 1999-2000 (the time of the Jetton and Wu surgeries), he took it regularly, at bedtime and again upon waking. He believes the effects wore off after two or three hours, and he believes he could perform surgery within three or four hours of taking morphine.

Neely tore his rotator cuff in 1999, and he admits during that time to taking "quite a bit" of Vicodin, also a narcotic and a controlled substance. He prescribed himself Darvocet, a pain medication, narcotic, and controlled substance; Darvon, Propoxyphene, and Norco, also narcotic pain relievers; Lomotil, another narcotic; Phenergan, an anti-nausea drug that can cause considerable drowsiness; Ventolin, a bronchodilator; Medrol and Azmacort, steroid treatments he used for asthma; Prilosec for acid indigestion; and Flonase. He was also taking Paxil, which his doctor had prescribed for acute depression.

Neely's self-refills were not isolated occurrences. Between August and October 1999—the time he was treating Paul Jetton—Neely self-refilled his Paregoric prescription twelve times.

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[2] Unless otherwise indicated, all of this information comes from the Board's investigation, the Board's order, or Neely's testimony. The Board's order is attached as an Appendix to this opinion.

[3] *See, e.g., Henley v. State*, 387 S.W.2d 877, 878 (Tex. Crim. App. 1965) (holding that paregoric "is, in fact, a narcotic drug known under the official drug name of 'camphorated tinture [sic] of opium' and that it contains morphine, which comes from opium").

During the same time, Neely drank alcohol every night that he was not on call. He admits to two drinks per night during 1999-2001, although he would sometimes have four or five at a time and would occasionally "overindulge." Neely admits that almost all of the drugs he was using, including alcohol, can cause withdrawal symptoms, although he denies any such symptoms, except with regard to Medrol. Neely also acknowledges that the drugs he was using can cause dizziness, visual disturbances, mental cloudiness, euphoria, sedation, and nervousness. Neely admits he was hypomanic, which he defines as "hyperactive," while on steroids, as he was in 1999. When the broadcast aired, Neely had been involved in seven malpractice cases, at least two of which alleged that he was addicted to prescription drugs and that he abused alcohol.

The Court emphasizes that the Board found that most of Neely's drugs were "legitimately and appropriately prescribed." ___ S.W.3d at ___. In fact, the Board found that Neely's treating physician appropriately prescribed the medications *initially*, but it did not conclude that Neely's extensive (and unmonitored) refills were part of a legitimate treatment plan:

> Respondent's *treating physician* legitimately and appropriately prescribed a number of medications to treat these conditions. However, between 1999 and 2002, Respondent began to refill the medications himself in lieu of scheduled visits.

Agreed Order, Finding of Fact 6 (emphasis added). The Board's investigator concluded that Neely should be disciplined for "[i]nability to practice medicine with reasonable skill and safety because of illness or substance abuse." The Board ordered Neely not to prescribe or "*administer* . . . controlled substances or dangerous drugs with addictive potential or potential for abuse" to himself. (Emphasis added.) The Board required Neely to undergo an examination by a psychiatrist who was board-certified in forensic or addiction psychiatry. That directive cannot seriously be thought to relate

to mental health issues unconnected to drug use. *See* TEX. OCC. CODE § 164.056(d) ("The board may not require a physician . . . to submit to an examination by a physician having a specialty specified by the board unless medically indicated."). It can only relate to a determination that the doctor was actually taking these drugs and could be addicted to them. It is not hard to understand the Board's concerns: patient safety may be negatively impacted by a doctor performing surgeries while under the influence of, or experiencing withdrawal from, narcotics. The Board's requirement that Neely undergo a physical examination could only relate to the Board's fear that Neely had a condition that may adversely affect his ability to safely practice medicine.

The Court concludes that the Board's reference to Neely's "inability to practice medicine with reasonable skill and safety to patients, due to mental or physical condition" related only to Neely's hand tremors, and not his drug use. ___ S.W.3d at ___ ("The Board Order ultimately did not discipline Neely under section 164.051(a)(4) for substance abuse but only for a 'mental or physical condition,' which was his hand tremor."). But there is nothing in the Board's order reflecting such a determination. To the contrary, the Order states that "the Board is requesting independent *physical and psychiatric evaluations to determine [Neely's] capacity to practice medicine in general, and specifically, to perform surgery*." (Emphasis added.) Although the physical examination would address the Board's concerns about the hand tremors, the psychiatric evaluation, by a board-certified addiction specialist, could only have been intended to address the Board's concerns about Neely's possible substance abuse. We are supposed to view the communication as a whole in light of the surrounding circumstances based upon how a person of ordinary intelligence would perceive it.

Turner, 38 S.W.3d at 114. No reasonable person would interpret the Board's order the way the Court has.

After Neely and the Board signed the Agreed Order, the Board posted the following on its website:

> ON 12-12-03 THE BOARD AND DR. NEELY ENTERED INTO AN AGREED ORDER SUSPENDING THE PHYSICIAN'S LICENSE; STAYING THE SUSPENSION, AND PLACING THE PHYSICIAN ON PROBATION FOR THREE YEARS. THIS ACTION WAS BASED ON ALLEGATIONS THAT DR. NEELY HAD SELF-PRESCRIBED MEDICATIONS WITH THE POTENTIAL TO INTERFERE WITH HIS ABILITY TO PERFORM SURGERY. THE TERMS OF THE ORDER FORBID DR. NEELY FROM SELF-PRESCRIBING MEDICATIONS, AND REQUIRE CONTINUING PHYSICAL AND PSYCHIATRIC EVALUATIONS TO VERIFY HIS FITNESS TO PERFORM SURGERY.

Shortly thereafter, and a month before the KEYE-TV broadcast, the Austin American Statesman reported on the Board's actions, noting that Neely was one of six physicians disciplined for "violations involving either drug or alcohol abuse."[4] *See* Mary Ann Roser, *6 physicians disciplined for substance abuse*, AUSTIN AMERICAN STATESMAN, Dec. 20, 2003.

The court of appeals accurately assessed the substantial truth of the "taking dangerous drugs" gist:

> Neely's use of self-prescribed medications was plainly a focus of the Board's order. The order prohibited Neely from prescribing, dispensing, or administering "controlled substances or dangerous drugs with addictive potential or potential for abuse" to himself. Furthermore, the order was consistent with a concern of the Board that Neely might have become addicted to medications he was self-administering. The order required him to be evaluated by a Board-appointed psychiatrist who was board-certified in forensic or addictive psychology. These evaluations had not yet been performed, or the underlying issues resolved, at the time of the broadcast. In short,

[4] The Board suspension also led Blue Cross Blue Shield to deny Neely's request to participate in their PPO, POF, and HMO networks.

> even if it was not literally true that Neely had been "disciplined for . . . taking dangerous drugs" in terms of the precise legal bases of the Board's order, that assertion would at least be substantially true because it would be no more damaging to Neely's reputation in the eyes of the ordinary viewer than a literally true recitation of the Board's order would have been.

331 S.W.3d at 924.

The Court reaches the opposite conclusion, isolating three portions of the broadcast: anchor Fred Cantu's introductory statement that Neely was disciplined for taking dangerous drugs and controlled substances, Paul Jetton's statement that one cannot take the medications Neely was taking and drive a vehicle, and Wilson's questioning of the Texas Medical Board representative regarding whether the order would prevent Neely from using dangerous drugs and controlled substances and thereby "do the same thing he was doing before." ___ S.W.3d ___.

But the Court's focus on a small portion of Cantu's introductory statement[5] is misplaced—even Neely admits that it was substantially true:

Q. We'll call this paragraph one. You can read it to yourself.

A. Yes.

Q. Is there anything in there that—that's false about you in there?

A. That's—that's fairly true.

The Court then turns to Paul Jetton's statement and concludes that "Paul's statement that one cannot take the medications Neely was 'taking' and drive a vehicle" contributed to the false gist. ___ S.W.3d at ___. But this conflicts with the Court's later holding that some of Sheila Jetton's

[5] Fred Cantu: If you needed surgery would you want to know if your surgeon had been disciplined for prescribing himself and taking dangerous drugs, had a history of hand tremors and had been sued several times for malpractice in the last few years?

statements were protected by the judicial proceedings privilege. Specifically, the Court identifies a second gist involving Sheila Jetton's statements that Neely performed unnecessary surgery. The Court decides that those statements were protected because "an ordinary viewer could conclude that Sheila's allegation regarding unnecessary surgery was made in the Jetton lawsuit." ___ S.W.3d at ___. I do not understand why this holding would not also apply to Paul Jetton's statements about Neely's drug use, which formed the basis of the same lawsuit. His petition, filed nine months before the broadcast, alleged:

> At all time [sic] material hereto, Byron Neely, M.D. was impaired from making good medical decisions and from performing neurosurgery because he was dependent on steroids and opiates and that he abused alcohol. Byron Neely, M.D. knew that he was not competent to perform neurosurgery because he had tremors in his hands as a result of the drugs that he was taking. *By providing medical treatment to Paul Jetton and surgery on Paul Jetton in an impaired state, Byron Neely, M.D. acted negligently and such negligence was a proximate cause of the complained of damages. Such impairment adversely affected Byron Neely, M.D.'s communication skills and attentiveness to Paul Jetton's infected shunt.*

(Emphasis added.)

But even if Paul's statement were not privileged, Neely acknowledges its factual truth: you should not drive a car after you've taken Vicodin, Darvocet, Paregoric, Phenergan, or Norco. Neely agrees that these drugs impact physical and mental abilities, and that a surgeon should not perform surgery after taking these drugs. He also confirms that he was taking all of them, although he denies that he operated while impaired.

Finally, Neely admits that Jetton's statement was his opinion, and nothing more:

Q. Now, this is Mr. Jetton's statement, right?

A. That is correct.

Q. And these are his views or opinions about some of the drugs that you were self-prescribing, right?

. . .

A. That's his opinion.

See, e.g., Greenbelt Coop. Publ'g Ass'n, Inc. v. Bresler, 398 U.S. 6, 14 (1970) (holding that article reporting that people had characterized a real estate developer's position as "blackmail" was protected expression; "even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered [the developer's] negotiating position extremely unreasonable"); *see also* ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS § 4:2.4[A] (4th ed. 2012)(noting that the Supreme Court has held that speech is not defamatory even if "literally containing assertions of fact [but] is intended to express only points of view").

The Court concludes that Wilson's questioning of the Board representative also contributed to the false perception that Neely was disciplined for operating on patients while using dangerous drugs. The disputed excerpt provides:

Wilson:	The [Board] did discipline Dr. Neely. This past December, they suspended his license but gave it right back by staying the suspension. Now he's on probation for three years. The only requirements are that he see a psychiatrist and not write prescriptions for himself or his family. A decision the Board defends.
Board representative:	We have compliance officers and the compliance officers will definitely follow to make sure that he's doing the things that his order requires him to do.

Wilson:	But how would they know if he's using? He can get somebody else to prescribe him. I mean, he could say, "I've followed the order."
Board representative: Right.	
Wilson	I didn't prescribe myself.
Board representative:	Right, Right.
Wilson:	How do we, how do we know that he's, that we're not putting somebody right back out there to do the same thing he was doing before?
Board representative:	That's a very good question, and why this order doesn't include drug testing, I, I honestly don't know the answer to that.

Wilson is not suggesting that the Board disciplined Neely for taking dangerous drugs, but rather that the Board did not do enough—that in the face of knowledge that a surgeon had hand tremors and had repeatedly self-prescribed numerous narcotics and controlled substances, the Board let Neely operate without requiring him to undergo drug testing. When asked whether Wilson's final question was true, Neely's response was not that her inquiries created the false impression that the Board had sanctioned him for using drugs, but that the Board would be able to obtain his medical and drug records to determine whether his confessed usage had ceased.

> Q. And then Nanci Wilson's asking about: "How would they know if he was using? He can get somebody else to prescribe for him. He could say I followed the order, and I didn't prescribe myself. How do you know that we are not putting somebody right back out there to do the same thing that he was doing before?" Do you see that?
>
> A. I see that, yes.
>
> Q. Is there anything false in there about you, in there?

. . .

A. You know, how would he know? They have the—the—they have the medical records and the drug records from, henceforth.

Q. And so you think that they would know from the drug records?

A. Absolutely.

Finally, the Court concludes that it need not address the third gist it identifies: that Neely was operating on patients while experiencing hand tremors. ___ S.W.3d at ___. But we must evaluate the substantial truth of the broadcast as a whole,[6] and the hand tremors are an inseparable part. That portion of the broadcast is also undeniably true.

Neely has tremors, although he denies that they impact his surgical skills. He has variously ascribed the tremors to (1) tapering off of Medrol (which occurred when he treated Jetton and Wu, and he admitted some of those tremors were "major"); (2) the Ventolin he was taking; (3) nervousness while meeting with a Board investigator; and (4) being "badgered" by the attorney deposing him. The Board's investigator witnessed the tremors, as did Sheila Jetton when Neely was injecting anesthetic into her husband's head.[7] The Board's order concluded that Neely had a history of tremors, and Neely's personal physician noted it in his medical records. The Board was concerned enough about the tremors that it ordered Neely to undergo a complete examination by a physician "to determine [Neely's] capacity to practice medicine in general, and specifically, to perform surgery."

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[6] *See City of Keller v. Wilson*, 168 S.W.3d 802, 811 (Tex. 2005) ("[P]ublications alleged to be defamatory must be viewed as a whole—including accompanying statements, headlines, pictures, and the general tenor and reputation of the source itself. A court reviewing legal sufficiency cannot disregard parts of a publication, considering only false statements to support a plaintiff's verdict or only true ones to support a defense verdict.").

[7] The Jettons fired Neely the next day.

The tremors, whether related to Neely's drug use or not, raise separate questions about Neely's fitness to perform surgeries. They formed part of the basis for the Board complaint and subsequent order, as well as the Jettons' lawsuit. We cannot consider the broadcast as a whole without including this portion of it.

The Court concludes that Neely has raised a fact issue on falsity because he denies operating while impaired and because the physician he hired after the Board instituted proceedings against him found that Neely did not have a substance abuse disorder. But Neely's controverting evidence goes to whether he was impaired or an addict, *not to whether the Board disciplined him for taking dangerous drugs during a time he was performing brain surgeries*.

A case from the United States Court of Appeals for the Seventh Circuit is instructive. *See Global Relief Found., Inc. v. New York Times Co.*, 390 F.3d 973 (7th Cir. 2004). Global Relief Foundation, Inc., an Illinois charity, sued several media defendants, alleging that news reports after the September 11, 2001 terror attacks falsely suggested that Global Relief had funded terrorism. *Id*. at 974-75. Global Relief complained that donations to the organization evaporated following these reports. *Id*. at 980-81. The media defendants moved for summary judgment, arguing that their reports were substantially true recitations of the government's suspicions about and actions against Global Relief. *Id*.

Global Relief opposed the motion and provided two affidavits, one from its executive director and another from its lead lawyer. *Id*. at 982-83. The executive director's affidavit denied that Global Relief engaged in violence or supported violence, terrorism, or military operations; he also denied that Global Relief ever provided weapons or military items to anyone or that it had provided humanitarian

aid to the families of suicide bombers. *Id*. at 983. Global Relief argued that this affidavit raised a fact issue, making summary judgment improper. *Id*.

Even in light of this evidence, the Seventh Circuit held that summary judgment was appropriate because the news reports were substantially true. *Id*. at 990. Although the executive director's affidavit "demonstrates a genuine issue on whether [Global Relief] has ever funded terrorist activity[, t]hat genuine issue . . . may not be material or relevant if the true gist or sting of the publications was not that [Global Relief] funded terrorism but that the government was investigating [Global Relief] for ties to terrorism and was considering blocking the group's assets." *Id*. at 983. The court ultimately concluded that Global Relief's evidence did not raise a fact issue on the substantial truth of the story's gist, which was the latter, and it affirmed summary judgment in the defendants' favor. *Id*. at 990. The court rejected Global Relief's "argument that these media defendants must be able to prove the truth of the government's charges before reporting on the investigation itself." *Id*. at 987. The court concluded that "[t]he fact of the investigation was true whether or not it was publicly known. That is all the defendants need to show for the defense of substantial truth. This they have done." *Id*. at 989.

The same applies to Neely's controverting evidence. Taking all of it as true, it demonstrates only a genuine issue on whether he was in fact impaired. That is immaterial to the story's gist: that the Board disciplined Neely for operating on patients while taking dangerous drugs. That gist was substantially true as a matter of law.

We come, then, to the literal truth. Even without reference to "gist," we know that the Board disciplined Neely for prescribing dangerous drugs to himself, drugs he admits taking. We know that

the Board ordered that Neely be supervised as a result. We know that Neely had hand tremors during a period of time in which he performed sensitive surgeries. The Board ordered psychiatric and physical evaluations that could only be tied to a concern for the safety of patients under Neely's care. We know that several of those patients experienced bad outcomes after Neely operated on them. We know that he had been involved in seven malpractice cases, at least two of which alleged that he was dependent on alcohol and drugs. These facts are not gist, only truth. Because the broadcast did not create a different effect on the average viewer's mind than the truth would have, I would hold that it is substantially true. *Masson*, 501 U.S. at 516; *Turner*, 38 S.W.3d at 114-15. I would go further. The "gist" that bothers the Court is actually an inference reasonably drawn from uncontested facts. The broadcast neither presents an inaccurate gist nor distorts the substantial truth.

II. Because the broadcast was substantially true, we need not revisit *McIlvain*.

The Court suggests that *McIlvain* stands only for the proposition that a broadcast's report of allegations are protected if those allegations are later proved to be true. ___ S.W.3d at ___. The Court rejects several Texas appellate courts' and the United States Court of Appeals for the Fifth Circuit's interpretation of *McIlvain*—that when a report is merely that allegations were made and were under investigation, proof that allegations were in fact made and under investigation establishes the report's substantial truth.[8] I disagree with the Court's restrictive view of *McIlvain*. But even if that case's precise limits are unclear, the speech here would be protected under the general rules

[8] *See, e.g.*, *Green v. CBS Inc.*, 286 F.3d 281, 284 (5th Cir. 2002); *Cox Tex. Newspapers, L.P. v. Penick*, 219 S.W.3d 425, 443 (Tex. App.—Austin 2007, pet. denied); *Grotti v. Belo Corp.*, 188 S.W.3d 768, 771 (Tex. App.—Fort Worth 2006, pet. denied); *Associated Press v. Boyd*, No. 05-04-01172-CV, 2005 WL 1140369, at *3 (Tex. App.—Dallas May 16, 2005, no pet.); *UTV of San Antonio, Inc. v. Ardmore, Inc.*, 82 S.W.3d 609, 611-12 (Tex. App.—San Antonio 2002, no pet.); *KTRK Television v. Felder*, 950 S.W.2d 100, 105 (Tex. App.—Houston [14th Dist.] 1997, no writ).

protecting reports of investigations, such as Texas' fair report privilege. *See* TEX. CIV. PRAC. & REM. CODE § 73.002(b)(1).[9] As a leading treatise notes,

> News reports that an investigation is underway by the police, by prosecutors, by other law enforcement agencies, or by other officials are common. Publication of the details of such inquiries is similarly common. Arguably such a report is, in substance, an implied allegation of the wrongdoing being leveled against the subject of the investigation. Readers or hearers may certainly interpret it as such; if there were no such allegation, presumably there would be no such investigation. The issue then arises as to whether the republisher of the charges is responsible for the truth thereof, that is, if the person is not guilty of the charges being investigated, does he or she have a defamation action against the republisher? . . .
>
> *The law treats these accounts as reports of events, not as republications of allegations of wrongdoing, so that as a general matter, if there is in fact an investigation, the report of its existence is "true."* Investigations are often important governmental occurrences. Permitting lawsuits for accurate reports of such events would threaten to black out significant news. "Doubtlessly, it is painful to be cast before the public as the target of an investigation where later events point to baseless or vexatious charges. The greater wrong, however, would be to shroud in secrecy, for want of publication, the government's scrutiny of its citizens."

ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS § 7.3.5[C] (4th ed. 2012) (emphasis added) (quoting *Sibley v. Holyoke Transcript-Telegram Publ'g Co.*, 461 N.E.2d 823, 826 (Mass. 1984)). The report here presented a "fair abridgement" of the Medical Board proceedings and the Jetton and Wu lawsuits, and I would conclude that it was privileged. *See* RESTATEMENT (SECOND) OF TORTS § 611 (1977). Apart from the constitutional considerations raised by restricting such speech, these are matters of public concern. *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (noting our "profound national commitment to the principle that debate on

[9] *See also* RESTATEMENT (SECOND) OF TORTS § 611 (1977) (noting that "[t]he publication of defamatory matter concerning another in a report of an official action or proceeding . . . is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported").

public issues should be uninhibited, robust, and wide-open"). Imposing liability for reporting on such issues will shield the truth, not expose it. As the *Felder* court noted:

> [T]he media would be subject to potential liability everytime [sic] it reported an investigation of alleged misconduct or wrongdoing by a private person, public official, or public figure. Such allegations would never be reported by the media for fear an investigation or other proceeding might later prove the allegations untrue, thereby subjecting the media to suit for defamation. Furthermore, when would an allegation be proven true or untrue for purposes of defamation? After an investigation? After a court trial? After an appeal? Undoubtedly, the volume of litigation and concomitant chilling effect on the media under such circumstances would be incalculable. First Amendment considerations aside, common sense does not dictate any conclusion other than the one we reach today.

KTRK Television v. Felder, 950 S.W.2d 100, 106 (Tex. App.—Houston [14th Dist.] 1997, no writ).

III. Conclusion

The broadcast is damning because it raises questions about Neely's fitness as a surgeon. But it is also substantially true. The Court's holding abridges the freedom to report on a matter of public concern. In that respect, it collides violently with the First Amendment. *See Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222 (7th Cir. 1993) ("The rule making substantial truth a complete defense and the constitutional limitations on defamation suits coincide."). I would answer anchor Fred Cantu's initial question in the broadcast "Yes." *See supra*, note 5. I respectfully dissent.

Wallace B. Jefferson
Chief Justice

OPINION DELIVERED: June 28, 2013

LICENSE NO. D9588

IN THE MATTER OF	BEFORE THE
THE COMPLAINT AGAINST	TEXAS STATE BOARD OF
BYRON DAVIS NEELY, M.D.	MEDICAL EXAMINERS

AGREED ORDER

On the 12 day of December, 2003, came on to be heard before the Texas State Board of Medical Examiners ("the Board" or "the Texas Board"), duly in session, the matter of the license of BYRON DAVIS NEELY, M.D. ("Respondent").

On August 22, 2003, Respondent appeared in person and with counsels, Dan Ballard and Stacey J. Simmons, at an Informal Show Compliance Proceeding and Settlement Conference in response to a letter of invitation from the staff of the Board. Walter Mosher represented Board Staff. The Board's Representatives were David E. Garza, D.O., a member of the Board, and Kevin R. Smith, M.D., a member of the District Review Committee.

Upon the recommendation of the Board's Representatives and with the consent of Respondent, the Board makes the following Findings of Fact and Conclusions of Law and enters this Agreed Order.

FINDINGS OF FACT

The Board finds that:

1. Respondent received all notice required by law. All jurisdictional requirements have been satisfied. Respondent waives any defect in notice and any further right to notice or hearing under TEX. OCC. CODE ANN. Title 3, Subtitle B (Vernon's 2002) (the "Act") or the Rules of the Board.

2. Respondent currently holds Texas Medical License No. D9588. Respondent was originally issued this license to practice medicine in Texas on August 21, 1972. Respondent is also licensed to practice in Colorado.

3. Respondent is primarily engaged in the practice of Neurological Surgery. Respondent is Board Certified by the American Board of Neurological Surgery.

4. Respondent is 57 years of age.

5. Respondent has not previously been the subject of disciplinary action by the Board.

6. Respondent suffered various injuries and ailments, which required a variety of medications. Respondent's treating physician legitimately and appropriately prescribed a number of medications to treat these conditions. However, between 1999 and 2002, Respondent began to refill the medications himself in lieu of scheduled visits. The list of medications Respondent has self-prescribed include Hydrocodone, Soma, Darvocet, Paregoric, Propoxyphene, Carisoprodol, Medrol, Phenergan, Azmacort, Cardura, Prilosec, Lomotil, Ventolin, Norco, and Flonase.

7. Upon review of statements of Respondent and the September 27, 2000 medical records of Respondent obtained from his treating physician, the Panel concluded that Respondent had a prior history of tremors.

8. The Panel took notice of the fact that the Board's investigator claims to have witnessed a tremor during the 2002 interview. Respondent asserted the tremor was the result of nervousness about the interview.

9. Respondent presented evidence he has undergone a full physical examination by R. Russell Thomas, D.O., Board certified Family Practitioner. Dr. Thomas found Respondent to be in relatively good health, with no need of chronic medications. Dr. Thomas did not detect a medically significant tremor, however, felt unqualified to determine Respondent's ability to perform surgery, and recommended a disability assessment or a Neuro-psyche evaluation. Additionally, Respondent presented evidence of a psychiatric evaluation by Edgar Nance, M.D., Board certified Psychiatrist and Addictionologist to determine the possibility of substance abuse or addiction. Dr. Nance found no underlying psychiatric condition that would inhibit

Respondent's ability to practice medicine. The Board is requesting independent physical and psychiatric evaluations to determine Respondent's capacity to practice medicine in general, and specifically, to perform surgery.

10 Respondent has cooperated in the investigation of the allegations related to this Agreed Order. Respondent's cooperation, through consent to this Agreed Order, pursuant to the provisions of Section 164.002 of the Act, will save money and resources for the State of Texas. To avoid further investigation, hearings, and the expense and inconvenience of litigation, Respondent agrees to the entry of this Agreed Order and to comply with its terms and conditions.

CONCLUSIONS OF LAW

Based on the above Findings of Fact, the Board concludes that:

1. The Board has jurisdiction over the subject matter and Respondent pursuant to the Act.

2. Respondent is subject to action by the Board under Sections 164.051(a)(4) and 164.056 of the Act due to Respondent's inability to practice medicine with reasonable skill and safety to patients, due to mental or physical condition.

3. Respondent is subject to disciplinary action pursuant to Section 164.051(a)(3) of the Act by committing a direct or indirect violation of a rule adopted under this Act, either as a principal, accessory, or accomplice, to wit, Board Rule 190.1(c)(1)(M) - inappropriate prescription of dangerous drugs or controlled substances to oneself, family members, or others in which there is a close personal relationship.

4. Section 164.001 of the Act authorizes the Board to impose a range of disciplinary actions against a person for violation of the Act or a Board rule. Such sanctions include: revocation, suspension, probation, public reprimand, limitation or restriction on practice, counseling or treatment, required educational or counseling programs, monitored practice, public service, and an administrative penalty.

5. Section 164.002(a) of the Act authorizes the Board to resolve and make a disposition of this matter through an Agreed Order.

6. Section 164.002(d) of the Act provides that this Agreed Order is a settlement agreement under the Texas Rules of Evidence for purposes of civil litigation.

ORDER

Based on the above Findings of Fact and Conclusions of Law, the Board ORDERS that:

1. Based on the above Findings of Fact and Conclusions of Law, the Board ORDERS that Respondent's Texas license is hereby SUSPENDED; however, the suspension is STAYED and Respondent is placed on PROBATION under the following terms and conditions for 3 years from the date of the signing of this Order by the presiding officer of the Board:

2. Except as otherwise provided for by the terms of this Order, Respondent shall not treat or otherwise serve as a physician for Respondent 's immediate family, and Respondent shall not prescribe, dispense, administer or authorize controlled substances or dangerous drugs with addictive potential or potential for abuse to Respondent or Respondent's immediate family. Respondent may self-administer or administer to Respondent's immediate family only such drugs as prescribed by another physician for a legitimate medical purpose and in compliance with the orders and directions of such physician.

3. A psychiatrist board certified in forensic or addiction psychiatry shall be appointed by the Executive Director to serve as the evaluating psychiatrist. Within thirty (30) days of notification by the Director of Compliance of appointed evaluating psychiatrist, Respondent shall submit to and obtain a complete forensic evaluation from the approved evaluating psychiatrist.

The psychiatric evaluation will include at a minimum: social history and background information, history of present illness, mental status exam, review of records and other pertinent collateral information, DSM IV multiaxial diagnosis, and treatment recommendations. The Board and Respondent shall furnish a copy of this Order to the approved evaluating psychiatrist as authorization to make a full report to the Board regarding Respondent's evaluation and any

subsequent reports regarding Respondent's compliance with this Order. Respondent shall follow all recommendations made by the evaluating psychiatrist regarding continued care and treatment.

If the evaluating psychiatrist recommends continued psychiatric care and treatment, within thirty (30) days of that recommendation, Respondent shall submit in writing to the Director of Compliance of the Board, for approval by the Executive Director, the names of three (3) psychiatrists board certified in psychiatry to serve as the treating psychiatrist. Respondent may submit the name of his current treating psychiatrist. Respondent shall begin the recommended care and treatment with the approved treating psychiatrist within thirty (30) days of notification of approval by the Director of Compliance. The Board and Respondent shall furnish a copy of this Order to the approved treating psychiatrist as authorization for the treating psychiatrist to make reports to the evaluating psychiatrist regarding Respondent's compliance with the terms of this Order. Respondent shall follow all recommendations made by the treating psychiatrist regarding continued care and treatment.

During any continued care and treatment, Respondent shall be monitored for purposes of compliance with this Order. The evaluating forensic psychiatrist will monitor Respondent's treatment and rehabilitation, and provide progress reports to the Board every six (6) months. The reports are due on March 15 and September 15. The monitoring reports shall include current mental status examinations; pertinent history and social background information; progress with treatment and rehabilitation; and updated recommendations for Respondent's care. Respondent shall authorize the evaluating and treating psychiatrists to obtain any collateral information necessary for preparation of the monitoring reports from any third party, including the treating psychiatrist. The collateral information obtained shall be strictly limited to the minimum information necessary to ensure adequate assessment of Respondent's rehabilitation and compliance with the terms of this Order.

Board staff may furnish to each approved psychiatrist any Board information that it determines in its discretion may be helpful or required for the evaluation and treatment of Respondent.

Respondent's failure to cooperate with either approved psychiatrist or failure to follow the recommendations of either approved psychiatrist shall constitute a violation of this Order.

4. Within thirty (30) days of the signing of this Order by the presiding officer of the Board, Respondent shall undergo a complete examination by a physician approved in advance in writing by the Executive Director of the Board, and Respondent shall undergo continuing care and treatment by the approved physician for the treatment of any condition which, without adequate treatment, could adversely affect Respondent's ability to safely practice medicine.

Respondent shall authorize and request in writing that the approved physician provide written periodic reports no less than once each quarter during Respondent's treatment which reflect the status of Respondent's physical and mental condition, as well as Respondent's efforts at cooperation with treatment. Respondent shall authorize and request in writing that the approved physician provide such other written or oral reports as Board representatives and staff may request regarding Respondent's care and treatment within seven (7) days of the request. Respondent shall follow all recommendations of the approved physician to the extent that the recommendations are consistent with the terms of this Order as determined by the Board. Respondent shall not unilaterally withdraw from treatment, and shall request and authorize in writing that the approved physician report to the Board within forty-eight (48) hours any unilateral withdrawal from treatment by Respondent. Respondent shall provide a copy of this Order to the approved physician as a reference for evaluation and treatment, and as authorization for the physician to provide to the Board any and all records and reports related to the evaluation and treatment conducted pursuant to this paragraph. Upon request, Respondent shall execute any and all releases for medical records necessary to effectuate the provisions of this paragraph and this Order.

5. The time period of this Order shall be tolled if (a) Respondent subsequently resides or practices outside the State of Texas, (b) Respondent subsequently is in official retired status with the Board, (c) Respondent's license is subsequently cancelled for nonpayment of licensure fees, or (d) this Order is stayed or enjoined by Court Order. If Respondent leaves Texas to live or practice elsewhere, Respondent shall immediately notify the Board in writing of the dates of Respondent's departure from and subsequent return to Texas. When the period of tolling ends, Respondent shall be required to comply with the terms of this Order for the period of time remaining on the Order. Respondent shall pay all fees for reinstatement or renewal of a license covering the period of tolling.

6. Respondent shall comply with all the provisions of the Act and other statutes regulating the Respondent's practice.

7. Respondent shall fully cooperate with the Board and the Board staff, including Board attorneys, investigators, compliance officers, consultants, and other employees or agents of the Board in any way involved in investigation, review, or monitoring associated with Respondent's compliance with this Order. Failure to fully cooperate shall constitute a violation of this order and a basis for disciplinary action against Respondent pursuant to the Act.

8. Respondent shall inform the Board in writing of any change of Respondent's mailing or practice address within ten days of the address change. This information shall be submitted to the Permits Department and the Director of Compliance for the Board. Failure to provide such information in a timely manner shall constitute a basis for disciplinary action by the Board against Respondent pursuant to the Act.

9. Any violation of the terms, conditions, or requirements of this Order by Respondent shall constitute unprofessional conduct likely to deceive or defraud the public, and to injure the public, and shall constitute a basis for disciplinary action by the Board against Respondent pursuant to the Act.

10. Respondent is permitted to supervise physician assistants, advanced nurse practitioners, and surgical assistance.

11. The above-referenced conditions shall continue in full force and effect without opportunity for amendment, except for clear error in drafting, for 12 months following entry of this Order. If, after the passage of the 12-month period, Respondent wishes to seek amendment or termination of these conditions, Respondent may petition the Board in writing. The Board may inquire into the request, and may, in its sole discretion, grant or deny the petition without further appeal or review. Petitions for modifying or terminating may be filed only once a year thereafter.

RESPONDENT WAIVES ANY FURTHER HEARINGS OR APPEALS TO THE BOARD OR TO ANY COURT IN REGARD TO ALL TERMS AND CONDITIONS OF THIS AGREED ORDER. RESPONDENT AGREES THAT THIS IS A FINAL ORDER.

THIS ORDER IS A PUBLIC RECORD.

I, BYRON DAVIS NEELY, M.D., HAVE READ AND UNDERSTAND THE FOREGOING AGREED ORDER. I UNDERSTAND THAT BY SIGNING, I WAIVE CERTAIN RIGHTS. I SIGN IT VOLUNTARILY. I UNDERSTAND THIS AGREED ORDER CONTAINS THE ENTIRE AGREEMENT AND THERE IS NO OTHER AGREEMENT OF ANY KIND, VERBAL, WRITTEN OR OTHERWISE.

DATED: 12/4, 2003.

BYRON DAVIS NEELY, M.D.
RESPONDENT

STATE OF TEXAS §
§
COUNTY OF TRAVIS §

SWORN TO AND ACKNOWLEDGED BEFORE ME, the undersigned Notary Public, on this 4th day of December, 2003.

HOPE TELLO NOTARY PUBLIC (Notary Seal) STATE OF TEXAS EXPIRES 6-10-2004

Hope Tello
Signature of Notary Public

HOPE TELLO
Printed or typed name of Notary Public
My commission expires:
6/10/2004

SIGNED AND ENTERED by the presiding officer of the Texas State Board of Medical Examiners on this 12 day of December, 2003.

Lee S. Anderson, M.D., President
TEXAS STATE BOARD OF MEDICAL EXAMINERS

STATE OF TEXAS
COUNTY OF TRAVIS

I, Sally Durocher, certify that I am an official assistant custodian of records for the Texas Medical Board, and that this is a true and correct Copy of the original, as it appears on file in this office.

Witness my official hand and seal of the Board, this 30th day of JANUARY, 2008

Sally Durocher
Assistant Custodian of Records

IN THE SUPREME COURT OF TEXAS

NO. 11-0252

AARON FELTON, PETITIONER,

v.

BROCK LOVETT, D.C., RESPONDENT

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

Argued September 13, 2012

JUSTICE HECHT delivered the opinion of the Court.

JUSTICE JOHNSON did not participate in the decision.

Health care must be based on a patient's informed consent. A health care provider may be liable for failing to disclose to a patient the risks inherent in proposed treatment. The issue in this case is whether the possibility that a patient, due to an undetectable physical condition, will suffer a severe, negative reaction to a procedure is a risk that is inherent in the procedure. We hold that it is and therefore reverse the court of appeals' judgment[1] for respondent and remand the case to the court of appeals.

[1] 333 S.W.3d 389 (Tex. App.–Amarillo 2011).

Aaron Felton sought treatment for neck pain from Brock Lovett, a doctor of chiropractic. Lovett obtained a history, x-rayed Felton's cervical spine, and on two occasions, manipulated his neck. When the treatments did not provide relief, Lovett performed a more forceful manipulation on Felton's third visit. Felton immediately began experiencing blurred vision, nausea, and dizziness. Lovett called an ambulance, which took Felton to the hospital, where doctors determined that he had suffered a stroke resulting from a vertebral artery dissection.

Lovett was well aware of the risk of stroke from chiropractic neck manipulation. Just that morning, he had been reading an article on the subject. And, he previously had a patient who suffered a vertebral dissection.

Felton sued, alleging that Lovett had failed to disclose the risks associated with the neck manipulations and was negligent in treating him.

At trial, Felton offered expert testimony that:

- vertebral artery dissection is a known risk of neck adjustments but occurs only if the patient's artery is unhealthy or if the adjustment is performed improperly;
- chiropractors have been aware of the risk for a long time;
- there are safer alternatives to manual adjustment that do not run the risk of stroke;
- about 10 to 20% of vertebral dissections are preceded by chiropractic manipulation of the spine;
- it was "much more likely than not" that Felton's vertebral dissection resulted from Lovett's chiropractic treatment;
- the standard of care calls for a chiropractor to inform a patient of the risks associated with neck adjustments; and

- Lovett breached this standard of care by not disclosing to Felton the risk of vertebral artery dissection.

Lovett's expert testimony was to the contrary.

The jury failed to find that Lovett's "negligence . . . proximately cause[d] the injury in question", but found, in answer to three other questions, that:

- "Lovett fail[ed] to disclose to [Felton] such risks and hazards inherent in the chiropractic treatment that could have influenced a reasonable person in making a decision to give or withhold consent to such treatment";

- "a reasonable person [would] have refused such treatment if those risks and hazards had been disclosed"; and

- "Felton [was] injured by the occurrence of the risk or hazard of which he was not informed."

Based on the verdict, the trial court rendered judgment awarding Felton $742,701.90 — the damages found by the jury, less offsets, plus prejudgment interest.

Lovett appealed. For the law governing Felton's claim for lack of informed consent, the court of appeals looked to Section 74.101 of the Medical Liability Act ("MLA"),[2] which states:

> *In a suit against a physician or health care provider* involving a health care liability claim that is *based on the failure* of the physician or health care provider *to disclose* or adequately disclose *the risks and hazards involved in the medical care or surgical procedure rendered by the physician or health care provider*, the only theory on which recovery may be obtained is that of negligence in failing to disclose the risks or hazards that could have influenced a reasonable person in making a decision to give or withhold consent.[3]

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[2] *Id.* at 390-391.

[3] TEX. CIV. PRAC. & REM. CODE § 74.101 (emphasis added).

This is the theory the trial court submitted to the jury at Felton's request and without objection.[4] But as Lovett argues, under the MLA, while a chiropractor is a "health care provider",[5] he is not a physician,[6] and "medical care" can be provided only by physicians.[7] Also, Lovett did not (and legally could not[8]) perform surgery. Thus, Felton's suit was not based on a failure to disclose the risks of "medical care or surgical procedure" and was not covered by Section 74.101.[9]

But when Section 74.101 does not apply, the common law does.[10] It imposes on "[p]hysicians and surgeons [the] duty to make a reasonable disclosure to a patient of risks that are

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[4] *See* COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES PJC 51.10 (2008).

[5] TEX. CIV. PRAC. & REM. CODE § 74.001(a)(12)(A) (defining "health care provider" to include a chiropractor but not a physician).

[6] *Id.* § 74.001(a)(23) ("'Physician' means . . . an individual licensed to practice medicine in this state [and certain entities].").

[7] *Id.* § 74.001(a)(19) ("'Medical care' means 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 . . . ."); *see* TEX. OCC. CODE § 151.002(13) ("'Practicing medicine' means 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: (A) publicly professes to be a physician or surgeon; or (B) directly or indirectly charges money or other compensation for those services.").

[8] *Id.* § 201.002(b) ("A person practices chiropractic . . . if the person . . . (2) performs nonsurgical, nonincisive procedures, including adjustment and manipulation . . . .").

[9] The court of appeals refused to consider Lovett's argument because "he did not raise this theory prior to trial." 333 S.W.3d 389, 390 n.1 (Tex. App.–Amarillo 2011). But a purely legal issue which does not affect the jury's role as fact-finder, raised for the first time post-verdict, may preserve error. *Waffle House, Inc. v. Williams*, 313 S.W.3d 796, 802 (Tex. 2010); *Hoffmann-La Roche Inc. v. Zeltwanger*, 144 S.W.3d 438, 450 (Tex. 2004); *Holland v. Wal-Mart Stores, Inc.*, 1 S.W.3d 91, 94 (Tex. 1999).

[10] Whether a statute modifies or abrogates the common law depends on legislative intent. *Energy Serv. Co. v. Superior Snubbing Servs., Inc.*, 236 S.W.3d 190, 194 (Tex. 2007). Section 74.101 does not purport to affect the common law in cases other than those the statute covers, and nothing in the MLA suggests a different intent.

incident to medical diagnosis and treatment."[11] Chiropractors in Texas have long been held to a standard of ordinary care — that of a reasonable chiropractor[12] — including the duty to reasonably disclose risks of treatment.[13] Lovett argues that the common law's focus on what a reasonable health care provider would disclose is materially different from the statute's focus on what a reasonable patient would want to know,[14] and that this difference makes the jury's findings that the statutory duty was breached immaterial to whether the common-law duty was breached. We agree that "the common law focus[es] on the physician, rather than the patient",[15] as the statute does, but we disagree that this difference is material in assessing liability.

The common-law duty

> is based upon the patient's right to information adequate for him to exercise an informed consent to or refusal of the procedure. The nature and extent of the disclosure depends upon the medical problem as well as the patient. In some medical procedures the dangers are great; in others they are minimal. It has been suggested that some disclosures may so disturb the patient that they serve as hindrances to

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[11] *Wilson v. Scott*, 412 S.W.2d 299, 301 (Tex. 1967).

[12] *See Nicodeme v. Bailey*, 243 S.W.2d 397, 401 (Tex. Civ. App.–El Paso 1951, writ ref'd n.r.e.); TEX. CIV. PRAC. & REM. CODE § 74.402(b) ("In a suit involving a health care liability claim against a health care provider, a person may qualify as an expert witness on the issue of whether the health care provider departed from accepted standards of care only if the person: (1) is practicing health care in a field of practice that involves the same type of care or treatment as that delivered by the defendant health care provider . . . ; (2) has knowledge of accepted standards of care for health care providers for the diagnosis, care, or treatment of the illness, injury, or condition involved in the claim; and (3) is qualified on the basis of training or experience to offer an expert opinion regarding those accepted standards of health care.").

[13] *See Hartfiel v. Owen*, 618 S.W.2d 902, 905 (Tex. Civ. App.–El Paso 1981, writ ref'd n.r.e.). This appears to be the majority, though not universal, rule in the country. *See* Annotation, *Liability of Chiropractors and Other Drugless Practitioners for Medical Malpractice*, 77 A.L.R. 4th 273 § 14 (1989).

[14] *Compare* COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES PJC 51.09 (2008) (common-law claim) *with id.* PJC 51.10 (statutory claim).

[15] *Peterson v. Shields*, 652 S.W.2d 929, 930 (Tex. 1983).

> needed treatment. Certain disclosures in some instances may even be bad medical practice.[16]

In sum, a reasonable health care provider must disclose the risks that would influence a reasonable patient in deciding whether to undergo treatment but not those that would be unduly disturbing to an unreasonable patient. The common-law duty was defined not only for a school of practice but for a community, and the statutory duty abandons the latter factor — the "locality rule".[17] The abandonment is not based on principle as much as the recognition that standards of health care have ceased to be a matter of local practice, and for the same reason, it is doubtful whether the "locality rule" survives for the common law. In any event, no one argues in this case that the standard of care for Lovett, practicing in Amarillo, was different from that for chiropractors in other parts of the state. In this case, certainly, and probably in all cases, the common-law and statutory duties are congruent.[18]

Both require disclosure of risks "inherent" in treatment.[19] An inherent risk, as the court of appeals in this case noted, is one that "exists in and is inseparable from the procedure itself".[20] Pointing to the testimony of Felton's own expert that Lovett's manipulation could not have caused

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[16] *Wilson*, 412 S.W.2d at 301 (internal citations omitted).

[17] *Peterson*, 652 S.W.2d at 931 (construing the MLA's predecessor, Act of May 30, 1977, 65th Leg., R.S., ch. 817, § 6.02, 1977 Tex. Gen. Laws 2039, 2050, formerly TEX. REV. CIV. STAT. ANN. art. 4590i, § 6.02 (Vernon 1977)).

[18] Of course, the jury charge for a statutory claim should track the statutory language. *Spencer v. Eagle Star Ins. Co. of Am.*, 876 S.W.2d 154, 157 (Tex. 1994).

[19] *Compare Wilson*, 412 S.W.2d at 306 (common-law duty) *with Barclay v. Campbell*, 704 S.W.2d 8, 9 (Tex. 1986) (statutory duty).

[20] 333 S.W.3d 389, 391 (Tex. App.–Amarillo 2011) (citing *Barclay*, 704 S.W.2d at 10).

a vertebral artery dissection unless Felton's artery was unhealthy or the manipulation was done improperly, the court reasoned that the risk arose "only when some other factor or condition was present" and "did not exist in the procedure itself[,] nor was it inseparable from the procedure."[21] "Simply put," the court concluded, the risk of a vertebral artery dissection was not inherent in the procedure Lovett performed.[22] Accordingly, the court reversed judgment for Felton and rendered judgment for Lovett.[23]

We granted Felton's petition for review.[24]

Health care gives few guarantees; usually there is a risk — commonly defined as a "chance of injury"[25] — even if treatment is proper and properly administered. Such a risk is inherent in health care. Other risks are extraneous. Malpractice, for example, is an extraneous risk, one that inheres in the *practice* of health care, not in the care itself.[26] Thus, the inherent risks of surgery do not include the possibility that it may be based on an erroneous diagnosis or prognosis,[27] or that it

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[21] 333 S.W.3d at 391-392.

[22] *Id.* at 392.

[23] *Id.*

[24] Tex. Sup. Ct. J. (Feb. 17, 2012).

[25] BLACK'S LAW DICTIONARY 1442 (9th ed. 2009); *accord* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1961 (3d ed. 2002) ("the possibility of loss, injury").

[26] *Binur v. Jacobo*, 135 S.W.3d 646, 655 (Tex. 2004).

[27] *Id.*

is negligently performed.[28] Another example is the risk that a drug used in treatment may be defective; that risk inheres in the drug's manufacture, not in its use in treatment.[29] On the other hand, the risk that surgery may result in injury, even if properly performed, is inherent in the procedure itself. An example is cutting or traumatizing a nerve adherent to a lymph gland being biopsied.[30] Inherent risks of treatment are those which are directly related to the treatment and occur without negligence.[31] They do not include eventualities or non-treatment-specific injuries, such as the possibility of hospital infections, or complications which occur without particular regard to the treatment the patient receives. They do include side effects and reactions, whether likely or only possible, that are directly related to the treatment provided. The MLA charges the Texas Medical Disclosure Panel with the responsibility "to determine which . . . treatments and procedures do and do not require disclosure of the risks and hazards".[32] The Panel's lengthy lists of procedures for

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[28] *See Tajchman v. Giller*, 938 S.W.2d 95, 99-100 (Tex. App.–Dallas 1996, writ denied) (negligently cutting a vein is not an inherent risk of depth electrode placement procedure); *Jones v. Papp*, 782 S.W.2d 236, 240 (Tex. App.–Houston [14th Dist.] 1989, writ denied) (surgical intervention is not an inherent risk of the diagnostic procedure of a coronary angiography).

[29] *Barclay v. Campbell*, 704 S.W.2d 8, 10 (Tex. 1986).

[30] *Peterson v. Shields*, 652 S.W.2d 929, 931 (Tex. 1983).

[31] *Cf. Scientifc Image Ctr. Mgmt., Inc. v. Brewer*, 282 S.W.3d 233, 239 (Tex. App.–Dallas 2009, no pet.) (poor healing is an inherent risk of reconstructive surgery); *Knoll v. Neblett*, 966 S.W.2d 622, 628-629 (Tex. App.–Houston [14th Dist.] 1998, pet. denied) (post-operative worsening pain, numbness, weakness, bladder and bowel problems, paralysis, spinal fluid leak and infection, and hematoma are inherent risks of laser lumbar laminectomy); *Beal v. Hamilton*, 712 S.W.2d 873, 877 (Tex. App.–Houston [1st Dist.] 1986, no writ) (thrombophlebitis is an inherent risk of taking the estrogen drug Premarin).

[32] TEX. CIV. PRAC. & REM. CODE § 74.103.

which disclosure either must or need not be made, and of the risks that must be disclosed,[33] largely define the scope of the statutory duty to disclose and inform the scope of the common-law duty.

The court of appeals concluded that because, by the undisputed evidence, Felton's injury would not have occurred but for his own physical condition — an unhealthy vertebral artery — the risk could not have been inherent in Lovett's treatment.[34] But this ignores the evidence that Felton's injury also would not have occurred but for Lovett's treatment, that chiropractic neck manipulation can result in vertebral artery dissection and does so in a significant number of cases, and that dissection and stroke are known risks of chiropractic treatment that should be disclosed. Felton's injury occurred during treatment, as a direct result of treatment. The same kind of injury may occur in other patients undergoing the same kind of treatment. The risk that a patient will not respond well to treatment is clearly one that inheres in the treatment. And as the evidence indicated, and the jury found, the possibility of vertebral artery dissection and stroke is precisely the kind of information a reasonable patient would be expected to want to know before deciding whether to risk such severe consequences in order to alleviate neck pain.

Lovett argues that the jury's failure to find that his negligence caused Felton's injury precludes liability for nondisclosure of the risks of treatment, or at least conflicts with the jury's finding of nondisclosure. But as we have explained, the jury's nondisclosure finding — that "Lovett

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[33] 25 Tex. Admin. Code § 601.1-.3. When a procedure has not been addressed by the Panel, as is the case with the chiropractic treatment performed by Lovett, the provider must still comply with the common-law duty to inform patients of risks "inherent" in the procedure to be performed. TEX. CIV. PRAC. & REM. CODE § 74.106(b); *see Binur v. Jacobo*, 135 S.W.3d 646, 654 (Tex. 2004).

[34] 333 S.W.3d 389, 391-392 (Tex. App.–Amarillo 2011).

fail[ed] to disclose . . . such risks and hazards inherent in the chiropractic treatment that could have influenced a reasonable person in making a decision to give or withhold consent to such treatment" — amounted to a finding of nondisclosure, the statutory and common-law causes of action being essentially the same. Failures to disclose what a reasonable patient should know, and what a reasonable care provider would disclose, are both negligence. As for any conflict in the jury's answers, it must be reconciled "if reasonably possible in light of the pleadings and evidence, the manner of submission, and the other findings considered as a whole."[35] Whether Lovett was negligent in his treatment of Felton is a distinct legal question from whether Lovett was negligent in failing to disclose the risks of treatment to Felton.[36] We think it sufficiently clear from the charge that the jury was to consider the specific questions on disclosure separately from the more general question on negligence.

We therefore reverse the judgment of the court of appeals. Issues remain for that court to address, and we remand the case for it to do so.

Nathan L. Hecht
Justice

Opinion delivered: November 30, 2012

[35] *Bender v. S. Transp. Co.*, 600 S.W.2d. 257, 260 (Tex. 1980).

[36] *Compare* TEX. CIV. PRAC. & REM. CODE § 74.001 (negligence in treatment) *with Wilson v. Scott*, 412 S.W.2d 299, 301 (Tex. 1967) (nondisclosure).

IN THE SUPREME COURT OF TEXAS

NO. 11-0255

IN RE THE OFFICE OF THE ATTORNEY GENERAL

ON PETITION FOR WRIT OF MANDAMUS

Argued February 27, 2012

JUSTICE LEHRMANN delivered the opinion of the Court.

"The court may not find a respondent in contempt of court for failure to pay child support if the respondent appears at the hearing with . . . evidence . . . showing that the respondent is current in the payment of child support as ordered by the court." TEX. FAM. CODE § 157.162(d). We are called upon to interpret this section of the Texas Family Code, which provides a mechanism by which an obligor who has violated a child support order may avoid a contempt finding. We hold that this language is unambiguous and means what it says: an obligor must be current on court-ordered child support payments due at the time of the enforcement hearing, regardless of whether those payments have been pled in the motion for enforcement, in order to invoke section 157.162(d) to avoid a finding of contempt where contemptuous conduct has otherwise been properly pled and established. Holding otherwise would contravene the statute's plain language and allow a recalcitrant obligor to escape a valid contempt finding by paying only those payments pled in a

motion to enforce while continuing to disobey the prior order before the enforcement hearing. We therefore hold that the trial court did not abuse its discretion in entering a contempt order in this case. We conditionally grant relief and instruct the court of appeals to vacate its judgment, thereby reinstating the trial court's contempt order.

I. Facts

Noble Ezukanma, M.D. (Noble) was ordered to pay $5,400 each month to Njideke Lawreta Ezukanma (Lawreta) for the support of their six children. Noble only made partial payments in the months of December 2007 through February 2008, and he failed to make any payment at all in March, April, and June of 2008, resulting in an arrearage of $23,044.78 on June 9, 2008. The Tarrant County Domestic Relations Office filed a motion to enforce the support order in June 2008.[1] The motion asserted six counts of contempt, specifically alleging each payment failure, the amount of any partial payments made, and the total outstanding arrearage as of June 9, 2008. In the motion, the Office requested that Noble be held in contempt for each of six violations of the support order and that the court recognize the total outstanding arrearage at the time of the hearing on the motion.

Although a hearing on the motion was initially set for the following month, it was not held until February 2009. In late June 2008, Noble paid off the entire pled arrearage with a lump sum

[1] Chapter 231 of the Family Code designates the Office of the Attorney General as the agency responsible for implementing federal Title IV-D requirements regarding child support. TEX. FAM. CODE § 231.001. That chapter also allows the Office to delegate its Title IV-D duties to other agencies. *Id.* § 231.002(c). Chapter 203 provides for the creation of domestic relations offices to collect, monitor, and enforce child support in their respective jurisdictions. *Id.* §§ 203.001–.007. The Tarrant County Domestic Relations Office, acting as a Title IV-D Child Support Monitoring Program for Tarrant County, filed the motion to enforce in this case on Lawreta's behalf, pursuant to its statutory powers. *See id.* § 203.004(a)(3)(B). Under the terms of the agreement between the County Domestic Relations Office and the Attorney General's Office, the Domestic Relations Office provides trial court Title IV-D services, while the Attorney General handles both trial court and appellate matters. For a discussion of Title IV-D, see footnote 2 and accompanying text.

payment. But after making this payment, Noble immediately reverted to making only partial payments during the remaining intervening months between the filing of the motion and the hearing. By the time the hearing was held in February 2009, Noble had accumulated a new arrearage of $28,656.56, which the trial court reduced to a money judgment. The trial court also held Noble in contempt for the failures to make timely child support payments that were due under the support order on March 1, 2008, April 1, 2008, and June 1, 2008, and sentenced him to serve 174 days in jail on the second and fourth weekends of every month.

Noble filed a petition for writ of mandamus in the court of appeals, arguing that section 157.162(d) of the Texas Family Code precluded a finding of contempt by the trial court. Section 157.162(d) provides:

> The court may not find a respondent in contempt of court for failure to pay child support if the respondent appears at the hearing with a copy of the payment record or other evidence satisfactory to the court showing that the respondent is current in the payment of child support as ordered by the court.

TEX. FAM. CODE § 157.162(d).[2] Noble argued that this provision prohibits a finding of contempt for missed payments alleged in the motion to enforce that, though untimely under the support order, had been satisfied prior to the hearing. In a divided decision, the court of appeals adopted this interpretation and held that Noble could invoke the statute at the hearing, despite the outstanding $28,656.56 arrearage, because he had become "current" on the missed payments for March, April, and June that were pled in the motion. The court granted mandamus and habeas corpus relief,[3] ordering the trial court to vacate its contempt order. Both Lawreta and the Office of the Attorney General petitioned this Court for mandamus relief, arguing that the court of appeals abused its discretion in granting mandamus relief and seeking reinstatement of the trial court's contempt order.

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[2] This subsection is part of a section of the Family Code dealing with "Proof" at an enforcement hearing. The provision further provides, in pertinent part:

> (c) The movant may attach to the motion a copy of a payment record. The movant may subsequently update that payment record at the hearing. If a payment record was attached to the motion as authorized by this subsection, the payment record, as updated if applicable, is admissible to prove:
>
> (1) the dates and in what amounts payments were made;
> (2) the amount of any accrued interest;
> (3) the cumulative arrearage over time; and
> (4) the cumulative arrearage as of the final date of the record.
>
> (c-1) A respondent may offer evidence controverting the contents of a payment record under Subsection (c).
>
> . . .
>
> (e) Notwithstanding Subsection (d), the court may award the petitioner costs of court and reasonable attorney's fees in a proceeding described by that subsection if the court finds that:
>
> (1) on the date the motion for enforcement was filed, the respondent was not current in the payment of child support as ordered by the court; and
> (2) the respondent made the child support payments described by Subsection (d) after the date the respondent was served notice of the motion or otherwise discovered that the motion for enforcement had been filed.

[3] Because Noble was only technically imprisoned on some weekends, he sought both habeas corpus and mandamus relief from the trial court's contempt order.

II. Discussion

Child support collection is serious business; so much so that the federal government has enacted legislation requiring states to abide by certain mandates to help struggling parents obtain child support in order to receive federal funding. *See* 42 U.S.C. §§ 654, 666 (2006) (called Title IV-D).[4] No less serious are the rights of those accused of contemptuously failing to pay child support, invoking due process protections when findings of contempt are sought. Recognizing the importance of both, the Legislature has carefully crafted a framework for ensuring compliance with child support orders through contempt and other enforcement mechanisms.

A. Contempt as a Child Support Enforcement Mechanism

One of the primary tools that child support enforcement agencies depend on to encourage obligors to timely pay child support is the contempt power of the court. The prevalence of this enforcement mechanism has its roots in the historical lineage of child-related orders, which were originally matters of equity, enforceable only by contempt rather than by damages. *See* Margaret M. Mahoney, *The Enforcement of Child Custody Orders By Contempt Remedies*, 68 U. PITT. L. REV. 835, 843–44 (2007). Contempt is an inherent power of the court, *Ex parte Gorena*, 595 S.W.2d 841, 843 (Tex. 1979) (orig. proceeding), and chapter 157 of the Family Code provides the statutory framework for utilizing this power as a mechanism to enforce child support orders and other final

[4] The goal of the Title IV-D child support enforcement program is to help single parents obtain child support for their children. The mission is to enhance the well-being of children by assuring that assistance in receiving financial support is available through various mechanisms, including enforcement of child support obligations. *See generally* Janelle T. Calhoun, *Interstate Child Support Enforcement System: Juggernaut of Bureaucracy*, 46 MERCER L. REV. 921 (1995). Many of the provisions set out in Chapter 157 of the Texas Family Code were adopted pursuant to this federal mandate. *See* Doretha Smith Henderson, *Title IV-D and Child Support Enforcement: Confusion and Misinformation Abound*, 65 TEX. B.J. 504, 506 (2002).

orders in family court proceedings. Chapter 157 provides for the filing of a motion to enforce requesting contempt and other relief, TEX. FAM. CODE § 157.001, specifies what must be included in this request, *id.* § 157.002(b)(2), enumerates available affirmative defenses, *id.* § 157.008, and explains the procedures for a hearing on the motion, *id.* §§ 157.061–.066.

Upon finding an obligor in contempt, the trial court may, in its discretion, impose a sentence that is either civil or criminal, or both. *See id.* § 157.166 (discussing the required contents of an enforcement order). Civil contempt is prospective, involving measures to encourage a contemnor to pay child support arrearages, while criminal contempt is punitive, usually imposing jail time for past failures to pay. *See In re Reece*, 341 S.W.3d 360, 365 (Tex. 2011). Chapter 157 also provides a third option: a court may find an obligor in contempt and impose a jail sentence, but suspend commitment and place the obligor on community supervision. TEX. FAM. CODE § 157.165. The obligor may avoid incarceration and remain on community supervision so long as he or she complies with statutorily authorized conditions set by the trial court. *Id.* § 157.211. This third option is an extremely effective tool for the enforcement of child support because it (1) encourages obligors to pay to avoid serving their jail sentences, and (2) keeps them out of jail, thereby enabling them to work and avoid further arrearages, for so long as they comply with the court order. Significantly, utilization of this tool is dependent upon a finding of contempt.

A contempt order is void if it is beyond the power of the court or violates due process. *Ex parte Barnett*, 600 S.W.2d 252, 254 (Tex. 1980). If the trial court's contempt order in this case is not void, there was no abuse of discretion. *In re Am. Homestar of Lancaster, Inc.*, 50 S.W.3d 480, 483 (Tex. 2001).

B. The Purging Provision in Section 157.162(d)

In 2007, the Legislature enacted Family Code section 157.162(d), a purging provision[5] that allows a child support obligor to escape a valid finding of contempt if the obligor demonstrates at the enforcement hearing that he or she is "current in the payment of child support as ordered by the court." Absent the operation of section 157.162(d), an obligor could be held in contempt for failing to make payments in a timely fashion as required by the support order, regardless of the obligor's payment history since the filing of the motion to enforce. *See Ex parte Stephens*, 734 S.W.2d 761, 764 n.5 (Tex. App.—Fort Worth 1987, orig. proceeding); *In re Miller*, 584 S.W.2d 907, 908 (Tex. Civ. App.—Dallas 1979, orig. proceeding); *Ex parte Grothe*, 581 S.W.2d 296, 298 (Tex. Civ. App.—Austin 1979, orig. proceeding); *Ex parte Boyle*, 545 S.W.2d 25, 27 (Tex. Civ. App.—Houston [1st Dist.] 1977, orig. proceeding) ("The fact that relator was not in arrears at the time of the hearing does not render the court's judgment void; the relator repeatedly failed to comply with the time provisions of the divorce decree."). Section 157.162(d) thus offers a person who has willfully disobeyed a support order a way to avoid a finding of contempt as an incentive to encourage obligors to pay back-due arrearages. The disputed issue in this case involves the scope of conduct that is necessary for an obligor to demonstrate compliance with, and therefore invoke the benefit of, the purging provision.

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[5] By "purging provision," we refer to the fact that the subsection allows an obligor to purge himself or herself of the consequences of conduct that would otherwise be subject to a finding of contempt by fulfilling the conditions of the statute. *Cf. Ex parte Chambers*, 898 S.W.2d 257, 266 (Tex. 1995) (Gonzalez, J., dissenting) (describing the use of a purging provision in a coercive contempt sentence, where a contemnor is sent to prison but "carries the keys of [his] prison in [his] own pocket" (quoting *Shillitani v. United States*, 384 U.S. 364, 368 (1966)) (alteration in original)).

Under Lawreta's interpretation, this statute would apply only if the respondent demonstrated he or she had strictly complied with the support order by timely making all payments when they became due. Noble, on the other hand, contends that a respondent may invoke the purging provision by showing at the hearing that he or she has caught up on the specific missed payments pled in the motion to enforce. Thus, Noble asserts, the time period between the filing of the motion to enforce and the hearing on that motion acts as a grace period, allowing an obligor to avoid contempt by paying all pled amounts owed, even though he or she has accrued additional arrearages by the date of the hearing. Finally, the Office interprets section 157.162(d) to purge a respondent from contempt for willful failure to timely make properly pled payments only if he or she is current in the payment of all amounts that have become due under the support order as of the date of the enforcement hearing, regardless of whether such payments were pled in the motion. We conclude that the Office's interpretation is the only one that comports with the plain language of the statute and therefore hold that an obligor may invoke the purging provision in section 157.162(d) by demonstrating that he or she has no outstanding child support obligations as of the date of the enforcement hearing.

C. The Plain Meaning of Section 157.162(d)

Legislative intent is best revealed in legislative language: "Where text is clear, text is determinative." *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437 (Tex. 2009). We take the Legislature at its word, and the truest measure of what it intended is what it enacted. *See Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson*, 209 S.W.3d 644, 651–52 (Tex. 2006). This text-based approach requires us to study the language of the specific section at issue, as well as the statute as

a whole. *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 866 (Tex. 1999). We must endeavor to read the statute contextually, giving effect to every word, clause, and sentence. *Tex. Dep't of Ins. v. Am. Nat'l Ins. Co.*, ___ S.W.3d ___, ___ (Tex. 2012). Because the statute itself is what constitutes the law, we have held that unambiguous text equals determinative text (barring an absurd result). *Summers*, 282 S.W.3d at 437. At this point, "the judge's inquiry is at an end," *Sheshunoff*, 209 S.W.3d at 652, and extratextual forays are improper: "When a statute's language is clear and unambiguous, it is inappropriate to resort to rules of construction or extrinsic aids to construe the language." *City of Rockwall v. Hughes*, 246 S.W.3d 621, 626 (Tex. 2008).

Section 157.162(d) allows a respondent to avoid a finding of contempt when the respondent shows at the enforcement hearing that he or she "is current in the payment of child support as ordered by the court." The parties do not dispute, and we so hold, that the date relevant to the application of this provision—i.e., the date on which the respondent must demonstrate that he or she is "current"—is the date of the hearing. In turn, the plain language of the provision requires the respondent to show that no outstanding arrearage exists as of that date. The statute's language does not support Noble's suggestion that the "child support" on which an obligor must be current at the time of the hearing includes only the payments pled in the motion to enforce.[6] The statute requires that an obligor be current on child support payments "as ordered by the court." The only "order" in

[6] Nor does it support Lawreta's interpretation, under which the purging provision would apply only if the respondent had strictly complied with the support order by timely making all payments when they became due. Because an obligor who has not violated the support order has not engaged in contemptuous conduct in the first place and has no need for the purging provision, this interpretation would render section 157.162(d) meaningless—a result we must avoid. *Mid-Century Ins. Co. of Tex. v. Ademaj*, 243 S.W.3d 618, 621 (Tex. 2007) ("[W]e read the statute as a whole and interpret it to give effect to every part.").

effect at the time of an enforcement hearing is the prior court order setting out the obligor's child support obligations. Thus, the phrase "as ordered by the court" necessarily refers to that earlier order, which specifies all child support payments owed by the obligor, including those to be paid after the motion to enforce is filed. Noble's interpretation would require us to interpret "as ordered by the court" in section 157.162(d) to have no meaning at all, which violates the rules of statutory construction. *See Tex. Dep't of Ins.*, ___ S.W.3d at ___.

Moreover, had the Legislature intended to require payment only of the amounts pled in the motion to enforce, it had a number of ways to say so. It could have required proof that the respondent "is current in the payment of child support pled in the motion to enforce" or that respondent "has paid all arrearages listed in the motion to enforce." It did not do so, and we assume the Legislature meant what it said.[7] *See Fitzgerald*, 996 S.W.2d at 865–66. We therefore hold that, to be "current in the payment of child support as ordered by the court" and thereby invoke the benefit of the purging provision, an obligor must be current on all child support obligations as of the date of the hearing.[8] The missed payments alleged in the motion to enforce serve as the basis for the

[7] Noble contends that his interpretation is supported by the Legislature's enactment of section 157.162(e), which authorizes an attorney's fees award to the movant if the respondent invokes the purging provision in subsection (d), but was not current on his or her support obligations on the date the motion was filed and made the required payments only after being notified that the motion had been filed. TEX. FAM. CODE § 157.162(e). We disagree. This provision merely serves to compensate the movant for some of the costs associated with enforcing support obligations even where the purging provision may be utilized. It neither narrows nor widens the scope of that provision.

[8] We also observe that, in many states, any impingement by the legislature on courts' inherent contempt powers is seen as a violation of the separation of powers doctrine. *See* Paul A. Grote, Note, *Purging Contempt: Eliminating the Distinction Between Civil and Criminal Contempt*, 88 WASH. U. L. REV. 1247, 1277–79 (2011) (discussing the position of various states and the federal courts on legislative reform of contempt powers). We have recognized the Legislature's authority to establish some limitations on a court's criminal contempt power. *See In re Reece*, 341 S.W.3d at 366 n.9 (citing TEX. GOV'T CODE § 21.002(b), which provides that punishment for criminal contempt may not exceed $500 or confinement for more than six months in jail). Nevertheless, the separation-of-powers concerns raised by other courts further convince us of the propriety of interpreting subsection (b)'s purging provision as being triggered only in narrow

contempt finding, but they do not limit the payments that must be current to obtain the protection of the purging provision.

D. The Purging Provision Does Not Implicate Notice Requirements

Noble argues that the Office's interpretation of the purging provision violates his rights to notice and due process because it allows a contempt finding to be based on a respondent's failure to make payments that were not specifically pled in the motion to enforce. We agree that specific violations of a court order must be pled to support a contempt finding. However, the purging provision does not affect the basis of the contempt finding; rather, it provides a basis for escaping an otherwise valid finding of contempt. We therefore disagree that the purging provision implicates notice requirements.

Noble's argument erroneously conflates the conduct that is the basis of a contempt finding, for which there must be specific notice in the motion for enforcement, and the conduct required to invoke the purging provision to escape such a finding. The pleading requirements for a motion to enforce are set out in section 157.002 of the Family Code. This provision requires such a motion to include the amount owed, the amount paid, and the amount of arrearages. TEX. FAM. CODE § 157.002(b)(1). If contempt is requested, the motion must also include "the portion of the order allegedly violated and, for each date of alleged contempt, the amount due and the amount paid, if any." *Id.* § 157.002(b)(2). Thus, a respondent may be found in contempt only for violations that are specifically pled in the motion for enforcement under section 157.002. Tellingly, the purging

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circumstances, reserving as much of the court's inherent contempt power as possible. *See Quick v. City of Austin*, 7 S.W.3d 109, 115 (Tex. 1998) (noting that courts should interpret statutes to avoid constitutional infirmities).

provision contains *no* such pleading requirements. This lack of specificity in section 157.162(d) makes sense because specific violations do not form the basis for its use.[9] Rather, it can only be utilized as a means to avert contempt findings for properly pled violations by becoming "current" in the payment of support.

In turn, while respondents are clearly entitled to notice of the specific alleged conduct on which the motion for enforcement by contempt is based, they are not entitled to notice of all the ways they may *avoid* such a finding. The purging provision at issue is akin to an affirmative defense; as discussed above, it allows a respondent to avoid the consequences of his or her contemptuous acts, but does not govern the underlying violations for which contempt findings are sought.[10] In the context of criminal proceedings,[11] a charging instrument like an indictment must "charge[] the commission of the offense in ordinary and concise language in such a manner as to enable a person of common understanding to know what is meant, and with that degree of certainty that will give the defendant notice of the particular *offense with which he is charged*." TEX. CODE CRIM. PROC. art. 21.11 (emphasis added); *see also id.* art. 21.03 ("Everything should be stated in an indictment which

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[9] *Cf. Ex parte Chambers*, 898 S.W.2d at 259 (explaining that criminal contempt conviction requires, *inter alia*, "violation" of "a reasonably specific order").

[10] We recognize that the purging provision is not contained in the statute expressly listing affirmative defenses to an allegation of contempt in a motion for enforcement. *See* TEX. FAM. CODE § 157.008. But it is analogous to an affirmative defense in that it precludes a contempt finding notwithstanding a proven violation of a prior order and places the burden of proof on the respondent to show that it applies. *See* BLACK'S LAW DICTIONARY 482 (9th ed. 2009) (defining an affirmative defense as "[a] defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all the allegations in the complaint are true," and noting that "[t]he defendant bears the burden of proving an affirmative defense").

[11] We have recognized that, because "contempt proceedings are quasi-criminal in nature," such proceedings "should conform as nearly as practicable to those in criminal cases." *Ex parte Sanchez*, 703 S.W.2d 955, 957 (Tex. 1986).

is necessary to be proved."). In contrast to these specific notice requirements with respect to the underlying offense, there is no requirement that a charging instrument provide notice of the affirmative defenses that may be available to a criminal defendant. Similarly, the notice to which respondents in contempt proceedings are entitled extends only to the violations for which they may be found in contempt, so that they can adequately prepare a defense to such allegations.

Further, even if our interpretation of the purging provision invoked due process concerns, which it does not, Noble's solution—interpreting the provision to require payment of only those amounts alleged in the motion for enforcement—does not address those concerns. Such allegations do not inform an obligor of the necessary conduct—being current on child support—that would invoke the purging provision. For example, a respondent served with a motion to enforce alleging specific violations of a support order would have sufficient notice to rebut the alleged violations or prove that he or she was unable to make the alleged payments when they were due. *See* TEX. FAM. CODE § 157.008(c). But the motion would not put the obligor on notice of how to invoke the purging provision even with respect to those violations that were specifically pled, as it would not inform the obligor that he or she will not be found in contempt as long as those amounts are paid up by the date of the hearing. To truly put an obligor on notice of what is necessary to avoid contempt under the purging provision, the motion to enforce would need to repeat the requirements that are already contained in the provision: that the obligor must bring "evidence satisfactory to the court showing that the respondent is current in the payment of child support as ordered by the court." *Id.* § 157.162(d). The statute simply does not and should not contain such a requirement. After all, the

original order establishing the support obligation, in conjunction with the statute itself, already informs the obligor of the amounts that must be paid in order to be current by the date of the hearing.

In this case, Noble was held in contempt for the failure to make timely support payments due on March 1, 2008, April 1, 2008, and May 1, 2008—arrearages that were specifically pled in the motion for enforcement and proven at the hearing. He had the opportunity to rebut those allegations and to raise the defense that he was unable to pay those pled arrearages when they were due. *See id.* § 157.008(c). The payments he missed after the motion for enforcement was filed form no part of the basis for contempt, but rather are relevant only in that they prevented Noble from invoking the benefit of the purging provision in section 157.162(d). And since the contempt findings comported with due process, the Legislature was within its province to require full payment of child support, including payments not specified in the motion to enforce, for Noble or any other respondent to avoid the consequences of his contemptuous acts.

III. Conclusion

The plain language of section 157.162(d) of the Texas Family Code, the best guide to the statute's meaning, confirms that the purging provision is only activated if an obligor is current on *all* child support obligations at the time of the enforcement hearing, not just those pled in the motion to enforce. This interpretation is consistent with the statutory framework for enforcement of support orders and poses no due process concerns. Accordingly, the trial court did not abuse its discretion

in holding Noble in contempt. We conditionally grant a writ of mandamus and order the court of appeals to vacate its judgment, thereby reinstating the trial court's contempt order. The writ will issue only if the court of appeals fails to comply.

_____
Debra H. Lehrmann
Justice

OPINION DELIVERED: March 8, 2013

IN THE SUPREME COURT OF TEXAS

NO. 11-0261

SUSAN COMBS, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, AND GREG ABBOTT, ATTORNEY GENERAL OF THE STATE OF TEXAS, PETITIONERS,

v.

ROARK AMUSEMENT & VENDING, L.P., RESPONDENT

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

Argued October 15, 2012

JUSTICE WILLETT delivered the opinion of the Court.

Roark Amusement & Vending, L.P. brought this tax-refund suit against the Comptroller of Public Accounts, seeking to recoup sales taxes it paid on "plush toy" prizes used to stock its coin-operated amusement machines. The court of appeals held the toys were exempt from sales tax under the Tax Code's sale-for-resale exemption. We agree and affirm the court of appeals' judgment.

I. Factual and Procedural Background

The facts are undisputed, having been established below in a stipulation of facts or in uncontested affidavits. Roark owns and leases coin-operated amusement crane machines that are found in supermarkets, restaurants, and shopping malls throughout Texas. Customers aim to win

plush toys by using a joystick to maneuver a mechanical claw to grab the toys and drop them into a prize chute. Successful customers keep the prizes, and eventually all the toys become property of customers in this manner (except for those lost, stolen, or damaged).

Roark sought a refund of the sales taxes it paid on the toys it purchased to stock its machines for the period October 1, 2000 through February 29, 2004.[1] It argued that the toys were exempt under the sale-for-resale exemption discussed below. The Comptroller disputed that the exemption applied.

The trial court granted the Comptroller's motion for summary judgment and denied Roark's refund request. The court of appeals reversed, concluding the toys were exempt, and remanded the case to the trial court for a determination of the refund amount due Roark.[2] We granted the Comptroller's petition for review.

II. Discussion

Our decision turns on the interplay of various Tax Code provisions found in chapter 151.

- The Sales Tax Generally: Section 151.051(a) imposes a sales tax "on each sale of a taxable item in this state." "'Taxable item' means tangible personal property and taxable services."[3] The plush toys are "tangible personal property," a term that captures "personal property that can be seen, weighed, measured, felt, or touched or that is perceptible to the senses in any

[1] The parties stipulated that Roark pays an occupation tax on the machines themselves under chapter 2153 of the Occupations Code. *See* TEX. OCC. CODE § 2153.401. The Tax Code has since been amended in a manner that is not relevant to the time period in issue in this case, but may be relevant to the legal issues raised. *See* Act of June 28, 2011, 82d Leg., 1st C.S., ch. 4, § 12.01, 2011 Tex. Gen. Laws 5263 (adding new subsection (c) to TEX. TAX CODE § 151.006).

[2] ___ S.W.3d ___, ___.

[3] TEX. TAX CODE § 151.010.

other manner."[4] A "taxable service" refers to certain services enumerated in section 151.0101, including "amusement services," which covers "the provision of amusement, entertainment, or recreation."[5]

- The Sale-For-Resale Exemption: Provisions found in subchapter H set out numerous exemptions. Section 151.302(a) states: "The sale for resale of a taxable item is exempted from the taxes imposed by this chapter." This provision is qualified by section 151.302(b), which states: "Tangible personal property used to perform a taxable service is not considered resold unless the care, custody, and control of the tangible personal property is transferred to the purchaser of the service." A "sale for resale" is further refined in section 151.006. Section 151.006(a)(3) provides that a sale for resale includes a sale of "tangible personal property to a purchaser who acquires the property for the purpose of transferring it . . . as an integral part of a taxable service."

- Coin-Operated Machines Specifically: Section 151.335 creates an exemption for coin-operated machines. Section 151.335(a) states: "Amusement and personal services provided through coin-operated machines that are operated by the consumer are exempt from the taxes imposed by this chapter." However, section 151.335(b) states: "This section does not apply to the sale of tangible personal property . . . through the use of a coin-operated machine."

When construing a statute, our chief objective is effectuating the Legislature's intent, and ordinarily, the truest manifestation of what lawmakers intended is what they enacted.[6] This voted-on language is what constitutes the law, and when a statute's words are unambiguous and yield but one interpretation, "the judge's inquiry is at an end."[7] We give such statutes their plain meaning without resort to rules of construction or extrinsic aids.[8] On the other hand, "[i]f a statute is vague or

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[4] *Id.* § 151.009.

[5] *Id.* § 151.0028.

[6] *First Am. Title Ins. Co. v. Combs*, 258 S.W.3d 627, 632 (Tex. 2008).

[7] *Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson*, 209 S.W.3d 644, 651–52 (Tex. 2006).

[8] *Tex. Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 635, 637 (Tex. 2010) (branding such reliance "improper," because "[w]hen a statute's language is clear and unambiguous, it is inappropriate to resort to rules of construction or extrinsic aids to construe the language" (quoting *City of Rockwall v. Hughes*, 246 S.W.3d 621, 626 (Tex. 2008))).

ambiguous, we defer to the agency's interpretation unless it is plainly erroneous or inconsistent with the language of the statute."[9]

We agree with Roark that under a plain-meaning review of the relevant statutes, it qualifies for a sales-tax exemption on the plush toys that fill its crane machines. The machines provide a taxable amusement service under sections 151.0028 and 151.0101, in that they provide for "amusement, entertainment, or recreation" under section 151.0028. The toys are subject to the sale-for-resale exemption because under section 151.006(3), the toys are "tangible personal property" acquired by Roark "for the purpose of transferring" the toys "as an integral part of a taxable service." Indeed, the toys are more than integral to the machines' amusement service—they are *indispensable*. There would be no point (or profit) to the game—and thus no game—if customers had no chance of winning a toy. Roark contends in its principal brief, and the Comptroller does not dispute, that "[c]ustomers would not pay to play an empty machine (i.e., they would not pay to move a crane's claw around an empty glass case), nor would they pay to play if the machines contained toys that were impossible to retrieve."

The Comptroller makes two arguments that are incompatible with the statutory text, and thus unpersuasive.[10]

A. Do Roark's Crane Machines Provide a "Taxable Service"?

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[9] *Tex. Dep't of Ins. v. Am. Nat'l Ins. Co.*, ___ S.W.3d ___, ___ (Tex. 2012).

[10] *See First Am. Title Ins. Co.*, 258 S.W.3d at 632 (deferring to Comptroller's interpretation "so long as the construction is reasonable and does not contradict the plain language of the statute" (quoting *Tarrant Appraisal Dist. v. Moore*, 845 S.W.2d 820, 823 (Tex. 1993))).

The Comptroller argues that the sale-for-resale exemption fails because the amusement service provided by Roark is not a "taxable service" under section 151.006(3). That is, since section 151.335(a) exempts amusement services provided by coin-operated machines, the service here is not taxable. We disagree with this construction, and instead find persuasive the court of appeals' analysis of this issue.

Taxable service is a defined term under chapter 151. If a term is expressly defined by statute we must follow that definition.[11] Section 151.0101 defines "taxable service" to include "amusement services," whether provided by coin-operated machines or otherwise. The fact that section 151.335(a) sets out an *exemption* for amusement services provided by coin-operated machines does not alter the fact that the machines provide a taxable service as defined in section 151.0101. Indeed, there would be no need to provide an exemption for this particular service if it were not a taxable service in the first instance. As noted above, under section 151.010, "taxable item" refers to "tangible personal property and taxable services." Section 151.301, the first provision of subchapter H, which sets out exemptions, provides: "If a *taxable item* is *exempted* from the taxes imposed by this chapter, the sale, storage, use, or other consumption of the item is not subject to the sales tax imposed by Section 151.051 of this code . . ." (emphasis added). This section confirms that under chapter 151 an item exempt from taxation may nevertheless be included in the universe of taxable

[11] *See* TEX. GOV'T CODE § 311.011(b) ("Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.").

items.[12] Taxable items in turn include taxable services, and taxable services include amusement services, under the provisions discussed above. Similarly, section 151.005 defines a "sale" or "purchase" to include "the performance of a taxable service . . . or, in the case of an *amusement service* . . . the use of a coin-operated machine" (emphasis added). Again, even though amusement services provided via coin-operated machines are later exempted in section 151.335(a), the definitional language of chapter 151 itself confirms that the performance of an amusement service through a coin-operated machine—the precise situation presented here—is a taxable service. Examining chapter 151 as a cohesive, integrated whole confirms that Roark's construction is the correct one.[13]

B. Is the Chance to Win an "Integral Part of a Taxable Service"?

Alternatively, in looking to language in section 151.006(a)(3), requiring that the transfer of toys be an "integral part" of the service provided, the Comptroller argues that the sale-for-resale exemption in section 151.006(3) does not apply unless a toy is conveyed each and every time a customer plays the game. The Comptroller urges that section 151.302(b) imposes such a

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[12] *See also 7-Eleven, Inc. v. Combs*, 311 S.W.3d 676, 690 (Tex. App.—Austin 2010, pet. denied) ("The sale-for-resale statute simply requires that the service to which the transfer of tangible personal property is integral be a *taxable* service—not that it actually *be taxed* in the particular instance in question.").

[13] *See City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 25 (Tex. 2003) ("We determine legislative intent from the entire act and not just its isolated portions. Thus, we read the statute as a whole and interpret it to give effect to every part.") (citations and internal quotation marks omitted); *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 493 (Tex. 2001) ("Additionally, we must always consider the statute as a whole rather than its isolated provisions. We should not give one provision a meaning out of harmony or inconsistent with other provisions, although it might be susceptible to such a construction standing alone.") (citation omitted). The Comptroller likewise urges the Court to view the Code as a whole, arguing for example in her principal brief that sections 151.006 and 151.302, discussed above, "are necessarily read in tandem," and advocating what she sees as "a reasonable and harmonious implementation of tax code sections 151.006, 151.302, and 151.335."

requirement by stating that tangible personal property is not considered resold unless the care, custody, and control of the property is "transferred to *the* purchaser of the service." We disagree. These provisions do not impose, either explicitly or implicitly, any such extra-statutory requirement, and we decline to engraft one—revising the statute under the guise of interpreting it.

We believe that in the area of tax law, like other areas of economic regulation, a plain-meaning determination should not disregard the economic realities underlying the transactions in issue.[14] Here, the summary-judgment evidence shows that all the toys placed in Roark's machines eventually become customers' property, except for those lost, stolen, or damaged. Further, the economic reality of the game is such that customers simply would not part with their money but for the *possibility* of winning a toy. In this practical sense, under section 151.006(a)(3), the transfer of toys is "an integral part" of the amusement service offered by Roark's machines. The Comptroller acknowledged at oral argument that no one would play the game without the possibility of winning a toy. Nothing in section 151.302(b) suggests that every single customer must walk away with a toy. That provision requires that "care, custody, and control of the tangible personal property" be

[14] The United States Supreme Court has long observed that statutory determinations in tax disputes should reflect the economic realities of the transactions in issue. *See, e.g., Boulware v. United States*, 552 U.S. 421, 429 (2008) ("The colorful behavior described in the allegations requires a reminder that tax classifications like 'dividend' and 'return of capital' turn on 'the objective economic realities of a transaction rather than . . . the particular form the parties employed.'") (citation omitted); *Frank Lyon Co. v. United States*, 435 U.S. 561, 573 (1978) ("In applying this doctrine of substance over form, the Court has looked to the objective economic realities of a transaction rather than to the particular form the parties employed. The Court has never regarded 'the simple expedient of drawing up papers' . . . as controlling for tax purposes when the objective economic realities are to the contrary.") (citation omitted); *Comm'r v. Sw. Exploration Co.*, 350 U.S. 308, 315 (1956) (noting that "the tax law deals in economic realities, not legal abstractions"). We have similarly recognized, in deciding whether a tax is due, that we should consider the "essence of the transaction" or "the true object of [the] transaction" in issue. *Bullock v. Statistical Tabulating Corp.*, 549 S.W.2d 166, 167–68 (Tex. 1977).

"transferred to the purchaser of the service." This transfer in fact occurs and is integral to the success of the game as an amusement service.

The Comptroller's argument that reference to "the purchaser" rather than *a* purchaser requires that the customer must always, inexorably win a toy simply puts too much weight on the commonest article of speech. The wording of the statute and the economic realities of the transaction do not require this "everyone's a winner" result. Indeed the game would lose all intrigue, and thus all profitability, if customers won each and every time. No profit-seeking businessperson would rationally offer such a sure thing. The game would cease to be a game, and thus cease to amuse, and thus cease altogether.

The Comptroller contends that her position is set out in Comptroller Rule 3.301(b)(2),[15] which provides: "The operators of games, or other concessions, in which each participant does not receive some merchandise or prize, become the consumers of merchandise so used by them and are liable to the State of Texas for tax based on the sales price or use of the taxable items purchased for use by them." As explained in her principal brief, the Comptroller's position is that, under Rule 3.301(b)(2), "when each participant does not receive a prize, the game operator—or concessionaire—is not a retailer, but a consumer of the items it purchases to provide its service; such game operators are therefore not eligible to claim the resale exemption on purchases of toy prizes." Roark disputes that this Rule applies to its machines, describing it as outdated or alternatively invalid, and arguing that other rules apply instead, specifically Rules 3.301(c)(1) ("For an

[15] 34 TEX. ADMIN. CODE § 3.301(b)(2).

explanation of the taxability of an item purchased for use as a prize when the winning of the prizes depends upon chance or skill, see § 3.298(f)(1) of this title (relating to Amusement Services)."), 3.298(f)(1) ("Sellers of service may issue a resale certificate in lieu of tax to suppliers of tangible personal property only if care, custody, and control of the property is transferred to the client."), and 3.298(f)(2) ("A service will be considered an integral part of a taxable service if the service purchased is essential to the performance of the taxable service, and without which the taxable service could not be rendered.").[16] The Comptroller disputes the applicability of these Rules to this case. Regardless of which Comptroller Rule applies, the Comptroller cannot through rulemaking impose taxes that are not due under the Tax Code; the question of statutory construction presented in this case ultimately is one left to the courts.

III. Conclusion

We affirm the court of appeals' judgment and remand the case to the trial court for further proceedings consistent with this opinion.

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Don R. Willett
Justice

OPINION DELIVERED: March 8, 2013

[16] *Id.* §§ 3.301(c)(1), 3.298(f)(1)–(2).

IN THE SUPREME COURT OF TEXAS

NO. 11-0265

THE EPISCOPAL DIOCESE OF FORT WORTH, ET AL., PETITIONERS,

v.

THE EPISCOPAL CHURCH, ET AL., RESPONDENTS

ON DIRECT APPEAL FROM THE 141ST
DISTRICT COURT, TARRANT COUNTY, TEXAS

Argued October 16, 2012

JUSTICE JOHNSON delivered the opinion of the Court, in which JUSTICE HECHT, JUSTICE GREEN, and JUSTICE GUZMAN joined, and in Parts I, II, III, and IV-A of which CHIEF JUSTICE JEFFERSON joined.

JUSTICE WILLETT filed a dissenting opinion, in which JUSTICE LEHRMANN, JUSTICE BOYD, and JUSTICE DEVINE joined.

This direct appeal involves the same principal issue we addressed in *Masterson v. Diocese of Northwest Texas*, ___ S.W.3d ___ (Tex. 2013): what methodology is to be used when Texas courts decide which faction is entitled to a religious organization's property following a split or schism? In *Masterson* we held that the methodology referred to as "neutral principles of law" must be used. But, in this case the trial court granted summary judgment on the basis of the "deference" or "identity" methodology, and the record does not warrant rendition of judgment to either party based on neutral principles of law.

We reverse and remand to the trial court for further proceedings.

I. Background

The Episcopal Church (TEC) is a religious organization founded in 1789. It has three structural tiers. The first and highest is the General Convention. The General Convention consists of representatives from each diocese and most of TEC's bishops. It adopts and amends TEC's constitution and canons. The second tier is comprised of regional, geographically defined dioceses. Dioceses are governed by their own conventions. Each diocese's convention adopts and amends its own constitution and canons, but must accede to TEC's constitution and canons. The third tier is comprised of local congregations. Local congregations are classified as parishes, missions, or congregations. In order to be accepted into union with TEC, missions and congregations must subscribe to and accede to the constitutions and canons of both TEC and the Diocese in which they are located.

In 1982 the Episcopal Diocese of Fort Worth (the Diocese or Fort Worth Diocese) was formed after the Episcopal Diocese of Dallas voted to divide into two parts. The Fort Worth Diocese was organized "pursuant to the Constitution and Canons of the Episcopal Church" and its convention adopted a constitution and canons. The Diocese's constitution provided that all property acquired for the Church and the Diocese "shall be vested in [the] Corporation of the Episcopal Diocese of Fort Worth." The canons of the Diocese provided that management of the affairs of the corporation "shall be conducted and administered by a Board of Trustees of five (5) elected members, all of whom are either Lay persons in good standing of a parish or mission in the Diocese, or members of the Clergy canonically resident in the Diocese." The Bishop of the Diocese was designated to serve

as chair of the board of the corporation. After adopting its constitution and canons the Diocese was admitted into union with TEC at TEC's December 1982 General Convention.

In February 1983, the Fort Worth Diocese filed articles of incorporation for the Fort Worth Corporation. That same year the Dallas and Fort Worth Dioceses filed suit in Dallas County and obtained a judgment transferring part of the Dallas Diocese's real and personal property to the Fort Worth Diocese. The 1984 judgment vested legal title of the transferred property in the Fort Worth Corporation, except for certain assets for which the presiding Bishop of the Dallas Diocese and his successors in office had been designated as trustee. The judgment transferred the latter assets to the Bishop of the Fort Worth Diocese and his successor in office as trustee.

Doctrinal controversy arose within TEC, leading the Fort Worth Corporation to file amendments to its articles of incorporation in 2006 to, in part, remove all references to TEC. The corporate bylaws were similarly amended. The 2007 and 2008 conventions of the Fort Worth Diocese voted to withdraw from TEC, enter into membership with the Anglican Province of the Southern Cone, and adopt amendments to the Diocese's constitution removing references to TEC.[1]

TEC responded. It accepted the renunciation of Jack Iker, Bishop of the Fort Worth Diocese, and TEC's Presiding Bishop removed Iker from all positions of authority within TEC. In February 2009, TEC's Presiding Bishop convened a "special meeting of Convention" for members of the Fort Worth Diocese who remained loyal to TEC. Those present at the meeting elected Edwin Gulick as Provisional Bishop of the Diocese and Chair of the Board of Trustees for the Fort Worth

[1] Three parishes in the Diocese did not agree with the actions and withdrew from the Diocese. The Fort Worth Corporation transferred property used by the withdrawing parishes to them.

Corporation. The 2009 Convention also voted to reverse the constitutional amendments adopted at the 2007 and 2008 Conventions and declared all relevant offices of the Diocese to be vacant. Bishop Gulick then appointed replacements to the offices declared vacant, including the offices of the Trustees of the Corporation. TEC recognized the persons elected at the 2009 Convention as the duly constituted leadership of the Diocese.

TEC, Rev. C. Wallis Ohls, who succeeded Bishop Gulick as Provisional Bishop of the Episcopal Diocese of Fort Worth, and clergy and lay individuals loyal to TEC (collectively, TEC) filed suit against The Episcopal Diocese of Fort Worth, the Fort Worth Corporation, Bishop Iker, the 2006 trustees of the corporation, and former TEC members (collectively, the Diocese), seeking title to and possession of the property held in the name of the Diocese and the Fort Worth Corporation.[2] Both TEC and the Diocese moved for summary judgment. A significant disagreement between the parties was whether the "deference" (also sometimes referred to as the "identity") or "neutral principles of law" methodology should be applied to resolve the property issue. TEC contended that pursuant to this Court's decision in *Brown v. Clark*, 116 S.W. 360 (Tex. 1909), the deference methodology has been applied in Texas for over a century and should continue to be applied. Under that methodology, it argued, TEC was entitled to summary judgment because it recognized Bishops Gulick and Ohls, the leaders elected at the 2009 convention, and the appointees of the Bishops as the true and continuing Episcopal Diocese. TEC also contended that even if the

[2] The defendants sought mandamus in the court of appeals regarding whether the attorneys for TEC had authority to file suit on behalf of the Corporation and the Diocese. *See In re Salazar*, 315 S.W.3d 279 (Tex. App.—Fort Worth 2010, orig. proceeding). The court of appeals conditionally granted mandamus relief, holding they did not. *Id.* at 285-86.

neutral principles methodology were applied, it would be entitled to summary judgment. The Diocese, on the other hand, contended that in *Brown* this Court effectively applied the neutral principles methodology without specifically calling it by that name, and Texas courts have continued to substantively apply that methodology to resolve property issues arising when churches split. Under the neutral principles methodology, the Diocese argued, it was entitled to summary judgment affirming its right to the property. The Diocese also maintained that even if the deference methodology were applied, it would still be entitled to summary judgment.[3]

The trial court agreed with TEC that deference principles should apply, applied them, and granted summary judgment for TEC. The Diocese sought direct appeal to this Court and we noted probable jurisdiction. We had previously granted the petition for review in *Masterson*, and we heard oral arguments for both cases on the same day.

II. Jurisdiction

The Government Code provides that "[a]n appeal may be taken directly to the supreme court from an order of a trial court granting or denying an interlocutory or permanent injunction on the ground of the constitutionality of a statute of this state." TEX. GOV'T CODE § 22.001(c). The trial court granted summary judgment and issued injunctions ordering the defendants to surrender all Diocesan property and control of the Diocesan Corporation to the Episcopal Diocese of Fort Worth, and ordering the defendants to desist from holding themselves out as leaders of the Diocese. While

[3] The Diocese also asserts that we should dismiss certain tort claims TEC brought against individual defendants. The Diocese moved for summary judgment to dismiss these claims and argues that if we conclude the trial court erred in determining who was entitled to the property at issue, we should render the judgment the trial court should have rendered and dismiss the tort claims. Because of our disposition of the issue regarding who is entitled to the property, we do not address those claims.

the trial court order did not explicitly address the constitutionality of a statute, "[t]he effect of the trial court's order . . . is what determines this Court's direct appeal jurisdiction." *Tex. Workers' Compensation Comm'n v. Garcia*, 817 S.W.2d 60, 61 (Tex. 1991).

In its motion for summary judgment TEC argued, in part, that the actions of the Board of Trustees in amending the Fort Worth Corporation's articles of incorporation were void because the actions went beyond the authority of the corporation, which was created and existed as an entity subordinate to a Diocese of TEC. TEC argued that "[t]he secular act of incorporation does not alter the relationship between a hierarchical church and one of its subordinate units" and that finding otherwise "would risk First Amendment implications." The Diocese, on the other hand, argued that the case was governed by the Texas Non-Profit Corporation Act[4] and the Texas Uniform Unincorporated Nonprofit Association Act[5]; under those statutes a corporation may amend its articles of incorporation and bylaws; and TEC had no power to limit or disregard amendments to the Corporation's articles and bylaws.

In its summary judgment order the trial court cited cases it said recognized "that a local faction of a hierarchical church may not avoid the local church's obligations to the larger church by amending corporate documents or otherwise invoking nonprofit corporations law." The trial court substantively ruled that because the First Amendment to the United States Constitution deprived it of jurisdiction to apply Texas nonprofit corporation statutes, applying them to determine the parties' rights would violate Constitutional provisions. The court's injunction requiring defendants to

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[4] TEX. REV. CIV. STAT. arts. 1396-1.01 to 1396-11.02

[5] TEX. REV. CIV. STAT. art. 1396-70.01

surrender control of the Fort Worth Corporation to the Episcopal Diocese of Fort Worth was based on that determination. The effect of the trial court's order and injunction was a ruling that the Non-Profit Corporation Act would violate the First Amendment if it were applied in this case. Accordingly, we have jurisdiction to address the merits of the appeal.

III. "Deference" and "Neutral Principles"

In *Masterson* we addressed the deference and neutral principles methodologies for deciding property issues when religious organizations split. ___ S.W.3d at ___. Without repeating that discussion in full, suffice it to say that generally courts applying the deference approach to church property disputes utilize neutral principles of law to determine where the religious organization has placed authority to make decisions about church property. *See Jones v. Wolf*, 443 U.S. 595, 603-04 (1979). Once a court has made this determination, it defers to and enforces the decision of the religious authority if the dispute has been decided within that authority structure. *Id.* But courts applying the neutral principles methodology defer to religious entities' decisions on ecclesiastical and church polity issues such as who may be members of the entities and whether to remove a bishop or pastor, while they decide non-ecclesiastical issues such as property ownership and whether trusts exist based on the same neutral principles of secular law that apply to other entities. *See Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708-09 (1976). We concluded in *Masterson* that the neutral principles methodology was the substantive basis of our decision in *Brown v. Clark*, 116 S.W. 360 (Tex. 1909), and that Texas courts should utilize that methodology in determining which faction of a religious organization is entitled to the property when the organization splits. ___ S.W.3d at ___. We also concluded that even though both the deference and neutral principles

methodologies are constitutionally permissible, Texas courts should use only the neutral principles methodology in order to avoid confusion in deciding this type of controversy. *Id.*

IV. Application

A. Summary Judgment—Deference

Based on our decision in *Masterson*, we hold that the trial court erred by granting summary judgment to TEC on the basis of deference principles. ___ S.W.3d at ___.

B. Summary Judgment—Neutral Principles

TEC asserts that application of neutral principles may violate free-exercise protections if, for example, the Diocese is permitted to void its commitments to church laws because the specific formalities of Texas law governing trusts were not followed or if they are applied retroactively. *See Jones*, 443 U.S. at 606 (noting that the case did not "involve a claim that retroactive application of a neutral-principles approach infringes free exercise rights"). But TEC recognizes that whether application of the neutral principles approach is unconstitutional depends on how it is applied. *See id.* at 606 ("It remains to be determined whether the Georgia neutral-principles analysis was constitutionally applied on the facts of this case."). Because neutral principles have yet to be applied in this case, we cannot determine the constitutionality of their application. Further, TEC does not argue that application of procedural matters such as summary judgment procedures and burdens of proof are unconstitutional. Thus, we address the arguments of the parties regarding who is entitled to summary judgment pursuant to neutral principles and conclude that neither TEC nor the Diocese is. *See Gilbert Tex. Constr., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 124 (Tex. 2010) (noting that when both parties move for summary judgment and the trial court grants one

motion and denies the other, appellate courts consider the summary-judgment evidence, determine all questions presented, and render the judgment the trial court should have rendered).

Under the neutral principles methodology, ownership of disputed property is to be determined by considering evidence such as deeds to the properties, terms of the local church charter (including articles of incorporation and bylaws, if any), and relevant provisions of governing documents of the general church. *E.g.*, *Jones*, 443 U.S. at 602-03; *see Presbyterian Church v. E. Heights*, 167 S.E.2d 658, 659-60 (Ga. 1969). TEC points out that deeds to the properties involved were not part of the summary judgment record when the trial court ruled. Thus, TEC argues, if we do not sustain the summary judgment in its favor, we should remand the case so the trial court may consider the record on the basis of neutral principles and the four factors referenced in *Jones*: (1) governing documents of the general church, (2) governing documents of the local church entities, (3) deeds, and (4) state statutes governing church property. *See Jones*, 443 U.S. at 602-03. We agree that the case must be remanded for further proceedings under neutral principles.

Although deeds to the numerous properties involved were not before the trial court when it granted summary judgment, the Diocese asserts that there is no dispute about its holding title to and having control of the properties. But TEC disagrees with that position. And absent agreement or conclusive proof of title to the individual properties and the capacities in which the titles were taken, fact questions exist under neutral principles of law, at a minimum, about who holds title to each

property and in what capacity.[6] Accordingly, we cannot render judgment on the basis of neutral principles.

C. Remand

Because the trial court must apply neutral principles on remand, for its guidance we address certain arguments made by the parties relating to that methodology. *See Edinburg Hosp. Auth. v. Trevino*, 941 S.W.2d 76, 81 (Tex. 1997) ("Although resolution of this issue is not essential to our disposition of this case, we address it to provide the trial court with guidance in the retrial . . . .").

We first note that on remand the trial court is not limited to considering only the four factors listed in *Jones*. As we said in *Masterson*, *Jones* did not purport to establish a federal common law of neutral principles to be applied in this type of case. ___ S.W.3d at ___. Rather, the elements listed in *Jones* are illustrative. If it were otherwise and courts were limited to applying some, but not all, of a state's neutral principles of law in resolving non-ecclesiastical questions, religious entities would not receive equal treatment with secular entities. We do not believe the Supreme Court intended to say or imply that should be the case.

Next we address the Diocese's argument that under neutral principles courts do not defer to TEC's decisions about non-ecclesiastical matters such as the identity of the trustees of the Fort Worth Corporation. The Diocese argues that under the Non-Profit Corporation Act the trustees are the 2006 trustees who are named as defendants in this suit. TEC responds that the trustees are

[6] Deeds filed after the trial court granted summary judgment were dated both before and after the 1984 judgment transferring properties from the Dallas Diocese. The deeds dated after the judgment reflect various grantees. Some properties were deeded to the Fort Worth Corporation or local entities, while others were deeded in trust to the Corporation, local entities, or various other persons and entities.

required by the corporate bylaws to be lay persons in "good standing," the Diocese rules require them to be loyal Episcopalians, and the bylaws provide that trustees do not serve once they become disqualified. Those determinations, TEC argues, were made by Bishops Gulick and Ohls and the 2009 convention, and courts must defer to those determinations because they are ecclesiastical decisions.

While we agree that determination of who is or can be a member in good standing of TEC or a diocese is an ecclesiastical decision, the decisions by Bishops Gulick and Ohls and the 2009 convention do not necessarily determine whether the earlier actions of the corporate trustees were invalid under Texas law. The corporation was incorporated pursuant to Texas corporation law and that law dictates how the corporation can be operated, including determining the terms of office of corporate directors, the circumstances under which articles and bylaws can be amended, and the effect of the amendments. *See* TEX. BUS. ORG. CODE §§ 22.001–.409. We conclude that this record fails to show that, as a matter of law, the trustees had been disqualified from serving as corporate trustees at the relevant times. Nor does the record conclusively show whether the 2009 appointments to the corporation board by Bishop Ohl were valid or invalid under Texas law, or whether, under Texas law, the actions taken by the trustees appointed by Bishop Ohl in 2009 were valid or invalid.

Third, the Diocese argues that TEC has no trust interest in the property. TEC Canon I.7.4, also known as the Dennis Canon, provides:

> All real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church and the Diocese thereof in which such Parish, Mission or Congregation is located. The existence of this trust, however, shall in no way limit the power and authority of the Parish, Mission or Congregation otherwise existing over such property so long as the particular Parish, Mission or

> Congregation remains a part of, and subject this Church and its Constitution and Canons.

The Diocese asserts that this canon does not create a trust under Texas law, but that even if it does, it was revocable and the Diocese revoked it when the Diocesan canons were amended to state:

> Property held by the Corporation for the use of a Parish, Mission or Diocesan School belongs beneficially to such Parish, Mission or Diocesan School only. No adverse claim to such beneficial interest by the Corporation, by the Diocese, or by The Episcopal Church of the United States of America is acknowledged, but rather is expressly denied.

TEC counters that the Dennis Canon creates a trust because the corporation acceded to it and the Diocese could not have adopted a canon revoking the trust. TEC also asserts that the statutes applicable to charitable trusts apply, but if they do not, a resulting trust or other trust may be applied here because the history, organization, and governing documents of the Church, the Diocese, and the parish support implication of a trust. The Diocese responds to TEC's arguments by referencing Texas statutory law requiring a trust to be in writing and providing that trusts are revocable unless they are expressly made irrevocable. *See* TEX. PROP. CODE § 112.004, .051. These issues were not addressed by the trial court because it granted summary judgment based on deference principles. Upon remand the parties will have the opportunity to develop the record as necessary and present these arguments for the trial court to consider in determining the rights of the parties according to neutral principles of law. But regarding the trial court's consideration of the issue, we note that in *Masterson* we addressed the Dennis Canon and Texas law. There we said that even assuming a trust was created as to parish property by the Dennis Canon and the bylaws and actions of a parish non-profit corporation holding title to the property, the Dennis Canon "simply does not contain language

making the trust *expressly* irrevocable.... Even if the Canon could be read to imply the trust was irrevocable, that is not good enough under Texas law. [Texas Property Code § 112.051] requires *express* terms making it irrevocable." *Masterson*, ___ S.W.3d at ___.

Finally, as to the argument that application of neutral principles may pose constitutional questions if they are retroactively applied, we note that over a century ago in *Brown v. Clark*, 116 S.W. 360 (Tex. 1909), our analysis and holding substantively reflected the neutral principles methodology.

V. Conclusion

We reverse the judgment of the trial court and remand the case to that court for further proceedings consistent with this opinion.

_____

Phil Johnson
Justice

OPINION DELIVERED: August 30, 2013

IN THE SUPREME COURT OF TEXAS

NO. 11-0265

THE EPISCOPAL DIOCESE OF FORT WORTH, ET AL., PETITIONERS,

v.

THE EPISCOPAL CHURCH, ET AL., RESPONDENTS

ON DIRECT APPEAL FROM THE 141ST
DISTRICT COURT, TARRANT COUNTY, TEXAS

JUSTICE WILLETT, joined by JUSTICE LEHRMANN, JUSTICE BOYD and JUSTICE DEVINE, dissenting.

Until 1940, when Texans amended their constitution, the Supreme Court of Texas lacked any authority to decide direct appeals (i.e., appeals that leapfrog the court of appeals and pass directly to this Court). Four years later, the Legislature first exercised its new power to permit direct appeals, and in the sixty-nine years since, this Court has exercised that jurisdiction sparingly, only forty-three times. The reason is simply stated: Our direct-appeal jurisdiction is exceedingly narrow and only proper if the trial court granted or denied an injunction "on the ground of the constitutionality of a statute of this state."[1]

Today's direct appeal is directly unappealable. The trial court's order nowhere mentions any constitution or statute, much less the constitutionality of a statute. Indeed, the trial court stated

[1] TEX. GOV'T CODE § 22.001(c).

verbally that it was not pivoting on the constitutionality of state law. This dispute undoubtedly has a First Amendment overlay, but for a direct appeal, constitutionality must exist not just in the ether, but in the order.

As the trial court did not determine "the constitutionality of a statute of this state," its injunction could hardly be issued "on the ground of the constitutionality of a statute of this state." Accordingly, we lack jurisdiction. As I have underscored before (albeit, like today, in a dissent):

> 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.[2]

The merits in this case are unquestionably important—and thankfully they are resolved today in a companion case[3]—but here the Court can only reach them by overreaching. We have no jurisdiction to decide this case as a direct appeal. I would dismiss for want of jurisdiction, and because the Court does otherwise, I respectfully dissent.

I. Background

The trial court in this case issued two injunctions, requiring the defendants (now styling themselves as the Episcopal Diocese of Fort Worth):

1. "to surrender all Diocesan property, as well as control of the Diocesan Corporation" to the Episcopal Church and other plaintiffs; and

2. "to desist from holding themselves out as leaders of the Diocese."

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[2] *In re Allcat Claims Serv., L.P.*, 356 S.W.3d 455, 474 (Tex. 2011) (Willett, J., concurring in part and dissenting in part).

[3] *Masterson v. Diocese of N.W. Tex.*, __ S.W.3d __ (Tex. 2013).

The court's reasons for granting the injunctions are laid out in paragraphs one through three of its order:

> 1. The Episcopal Church (the "Church") is a hierarchical church as a matter of law, and since its formation in 1983 the Episcopal Diocese of Fort Worth (the "Diocese") has been a constituent part of the Church. Because the Church is hierarchical, the Court follows Texas precedent governing hierarchical church property disputes, which holds that in the event of a dispute among its members, a constituent part of a hierarchical church consists of those individuals remaining loyal to the hierarchical church body. Under the law articulated by Texas courts, those are the individuals who remain entitled to the use and control of the church property.
>
> 2. As a further result of the principles set out by the Supreme Court in *Brown* and applied in Texas to hierarchical church property disputes since 1909, the Court also declares that, because The Episcopal Church is hierarchical, all property held by or for the Diocese may be used only for the mission of the Church, subject to the Church's Constitution and canons.
>
> 3. Applying those same cases and their recognition that a local faction of a hierarchical church may not avoid the local church's obligations to the larger church by amending corporate documents or otherwise invoking nonprofit corporations law, the Court further declares that the changes made by the Defendants to the articles and bylaws of the Diocesan Corporation are *ultra vires* and void.

(citations omitted).

There are no findings of fact or conclusions of law attached. The order does not mention the United States Constitution, the Texas Constitution, or any particular state statute. The only possible allusion to a statute is to "nonprofit corporations law," which the trial court found the defendants could not "invok[e]" to "avoid [their] obligations to the larger church." The trial court's legal support for this conclusion was a string citation to a number of cases, not a citation to any constitutional provision.

What is more, the defendants asked the trial court to amend the order to specify that the court had held a statute unconstitutional. The court declined to do so, orally stating that its ruling was based not on constitutionality, but rather on its application of *Brown v. Clark*[4]:

> I still can't just craft something to make it go to the Supreme Court. I mean, it – my understanding was that the – the trust laws that you were talking about don't apply in this situation because of *Brown*, not because they're not constitutional.

Our decision in *Brown* relied heavily on *Watson v. Jones*.[5] *Watson*, in turn, "appl[ied] not the Constitution but a 'broad and sound view of the relations of church and state under our system of laws.'"[6]

Nonetheless, the defendants filed a direct appeal. We noted probable jurisdiction and heard oral argument. But jurisdictional defects do not heal with age, no matter how novel, pressing, or consequential the issues at stake or how many judicial and party resources have been expended. The most fundamental restraint on judicial power is jurisdiction—our very authority to decide cases in the first place—and if we lack it, we lack it.

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[4] 116 S.W. 360 (Tex. 1909).

[5] 80 U.S. 679 (1871).

[6] *Hosana-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, __U.S.__, 132 S. Ct. 694, 704 (2012) (quoting *Watson*, 80 U.S. at 727).

II. Discussion

A. History of Direct Appellate Jurisdiction

A 1940 constitutional amendment gave the Legislature power to grant direct appeals to this Court.[7] Not until 1944, though, did the Legislature do so.[8] The original conferral allowed direct appeals from injunctions based on two grounds, either (1) the constitutionality or unconstitutionality of a state statute, or (2) the validity or invalidity of certain state administrative orders.[9] Today, the statutory grant of direct-appeal jurisdiction covers just one situation: "[A]n order of a trial court granting or denying an interlocutory or permanent injunction on the ground of the constitutionality of a statute of this state."[10]

I have found only forty-three cases where we have exercised direct-appeal jurisdiction. That is, while such jurisdiction has existed for nearly seventy years, we have exercised it stintingly. In twenty-four of the forty-three cases, our opinion made clear that the trial court either made a direct holding about a statute's constitutionality or issued declaratory relief that a statute was or was not

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[7] *See R.R. Comm'n of Tex. v. Shell Oil Co.*, 206 S.W.2d 235, 238 (Tex. 1947).

[8] *Id.*

[9] *Id.*

[10] TEX. GOV'T CODE § 22.001(c). The Constitution still allows the Legislature to provide for direct appeal from injunctions based on the validity of administrative orders, however. TEX. CONST. art. V, § 3-b. But the express constitutional grant of direct-appeal jurisdiction in Article 5, Section 3-b of the Constitution is arguably now unnecessary given the broadened wording of the general jurisdictional provision in Article 5, Section 3. *See Perry v. Del Rio*, 67 S.W.3d 85, 98 n.4 (Tex. 2001) (Phillips, C.J., dissenting) ("Since 1981, the Court's appellate jurisdiction has extended to all civil cases 'as . . . provided . . . by law,' TEX. CONST. art. V, § 3, so that the Legislature could now provide for direct appeals without a specific constitutional grant of authority."). Accordingly, the Legislature has now provided for direct appeal from certain trial court rulings that involve Public Utility Commission financing orders. TEX. UTIL. CODE § 39.303(f).

constitutional.[11] In eleven other cases, the trial court's order clearly must have been based on constitutional grounds, either because the opinion implies that only constitutional issues were raised to the trial court[12] or because the trial court granted an injunction enforcing a statute over constitutional objection, thus implicitly upholding the statute against constitutional attack.[13] In two other cases, we summarily stated that the trial court granted or denied the injunction on the ground of a statute's constitutionality.[14] But in at least six direct-appeal cases, we did not make it clear why

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[11] *See Neeley v. West Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 753–54 (Tex. 2005); *State v. Hodges*, 92 S.W.3d 489, 493 (Tex. 2002); *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 872 (Tex. 2000); *Owens Corning v. Carter*, 997 S.W.2d 560, 567–68 (Tex. 1999); *Maple Run at Austin Mun. Util. Dist. v. Monaghan*, 931 S.W.2d 941, 945 (Tex. 1996); *Barshop v. Medina Cnty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 623, 625 (Tex. 1996); *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 727 (Tex. 1995); *Richards v. League of United Latin Am. Citizens*, 868 S.W.2d 306, 308 (Tex. 1993); *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 442 (Tex. 1993); *Orange Cnty. v. Ware*, 819 S.W.2d 472, 473 (Tex. 1991); *O'Quinn v. State Bar of Tex.*, 763 S.W.2d 397, 398 (Tex. 1988); *LeCroy v. Hanlon*, 713 S.W.2d 335, 336 (Tex. 1986); *Wilson v. Galveston Cnty. Cent. Appraisal Dist.*, 713 S.W.2d 98, 99 (Tex. 1986); *Spring Branch Indep. Sch. Dist. v. Stamos*, 695 S.W.2d 556, 558 (Tex. 1985); *Shaw v. Phillips Crane & Rigging of San Antonio, Inc.*, 636 S.W.2d 186, 187 (Tex. 1982); *Gibson Distrib. Co. v. Downtown Dev. Ass'n of El Paso, Inc.*, 572 S.W.2d 334, 334 (Tex. 1978); *Tex. Antiquities Comm. v. Dallas Cnty. Cmty. Coll. Dist.*, 554 S.W.2d 924, 925–27 (Tex. 1977) (plurality opinion); *Smith v. Craddick*, 471 S.W.2d 375, 375–76 (Tex. 1971); *State v. Scott*, 460 S.W.2d 103, 105 (Tex. 1970); *State v. Spartan's Indus., Inc.*, 447 S.W.2d 407, 409 (Tex. 1969); *Jordan v. State Bd. of Ins.*, 334 S.W.2d 278, 278–80 (Tex. 1960); *Smith v. Decker*, 312 S.W.2d 632, 633 (Tex. 1958); *Rodriguez v. Gonzales*, 227 S.W.2d 791, 792–93 (Tex. 1950); *Dodgen v. Depuglio*, 209 S.W.2d 588, 591–92 (Tex. 1948).

[12] *See Conlen Grain & Mercantile, Inc. v. Tex. Grain Sorghum Producers Bd.*, 519 S.W.2d 620, 621–22 (Tex. 1975); *Robinson v. Hill*, 507 S.W.2d 521, 523 (Tex. 1974); *Itz v. Penick*, 493 S.W.2d 506, 508 (Tex. 1973); *Smith v. Davis*, 426 S.W.2d 827, 829 (Tex. 1968); *Shepherd v. San Jacinto Junior Coll. Dist.*, 363 S.W.2d 742, 742–43 (Tex. 1962); *King v. Carlton Indep. School Dist.*, 295 S.W.2d 408, 409 (Tex. 1956); *Dallas Cnty. Water Control & Improvement Dist. No. 3 v. City of Dallas*, 233 S.W.2d 291, 292 (Tex. 1950).

[13] *See Gibson Prods. Co. v. State*, 545 S.W.2d 128, 129 (Tex. 1976); *Dancetown, U.S.A., Inc. v. State*, 439 S.W.2d 333, 334 (Tex. 1969); *Schlichting v. Tex. State Bd. of Med. Exam'rs*, 310 S.W.2d 557, 558–59 (Tex. 1958); *H. Rouw Co. v. Tex. Citrus Comm'n*, 247 S.W.2d 231, 231–32 (Tex. 1952).

[14] *See State v. Project Principle, Inc.*, 724 S.W.2d 387, 389 (Tex. 1987); *Duncan v. Gabler*, 215 S.W.2d 155, 156–57 (Tex. 1948).

we thought the trial court's injunction was based on constitutional grounds.[15] These cases address jurisdiction rather cursorily, and only one of the opinions garnered a dissent on the jurisdictional issue,[16] to which the majority opinion declined to respond.[17]

But in the vast majority of cases where we have exercised direct-appeal jurisdiction, it has been abundantly clear that the trial court issued or denied an injunction on the ground of a statute's constitutionality.

We have also issued at least eleven opinions in which we *dismissed* attempted direct appeals for want of jurisdiction because the statutory test was not met.[18] We have variously explained that our direct-appeal jurisdiction "is a limited one,"[19] that we have been "strict in applying" or have "strictly applied" direct-appeal jurisdictional requirements,[20] and that "[w]e have strictly construed our direct appeal jurisdiction."[21] Therefore, we have held that to meet the jurisdictional

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[15] *See Del Rio*, 67 S.W.3d 85 (majority opinion); *Tex. Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454 (Tex. 1997); *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.*, 826 S.W.2d 489 (Tex. 1992); *Ass'n of Tex. Prof'l Educators v. Kirby*, 788 S.W.2d 827 (Tex. 1990); *Parker v. Nobles*, 496 S.W.2d 921 (Tex. 1973); *Dobard v. State*, 233 S.W.2d 435 (Tex. 1950).

[16] *Del Rio*, 67 S.W.3d at 98–100 (Phillips, C.J., dissenting).

[17] *Id.* at 89, 95 (majority opinion).

[18] *See Tex. Workers' Comp. Comm'n v. Garcia*, 817 S.W.2d 60 (Tex. 1991); *Querner Truck Lines, Inc. v. State*, 652 S.W.2d 367, 368 (Tex. 1983); *Mitchell v. Purolator Sec., Inc.*, 515 S.W.2d 101 (Tex. 1974); *Holmes v. Steger*, 339 S.W.2d 663 (Tex. 1960); *Standard Sec. Serv. Corp. v. King*, 341 S.W.2d 423 (Tex. 1960); *Gardner v. R.R. Comm'n of Tex.*, 333 S.W.2d 585 (Tex. 1960); *Bryson v. High Plains Underground Water Conservation Dist. No. 1*, 297 S.W.2d 117 (Tex. 1956); *Corona v. Garrison*, 274 S.W.2d 541 (Tex. 1955); *Lipscomb v. Flaherty*, 264 S.W.2d 691 (Tex. 1954); *Boston v. Garrison*, 256 S.W.2d 67 (Tex. 1953); *McGraw v. Teichman*, 214 S.W.2d 282 (Tex. 1948).

[19] *Gardner*, 333 S.W.2d at 588.

[20] *Querner Truck*, 652 S.W.2d at 368; *Mitchell*, 515 S.W.2d at 103.

[21] *Garcia*, 817 S.W.2d at 61.

prerequisites, a trial court must actually "pass upon the constitutionality of [a] statute,"[22] "determin[e]" a statute's constitutionality,[23] or "base its decision" on constitutional grounds.[24] Indeed, "[i]t is not enough that a question of the constitutionality of a statute may have been raised in order for our direct appeal jurisdiction to attach in injunction cases; in addition the trial court must have made a holding on the question based *on the grounds* of the constitutionality or unconstitutionality of the statute."[25]

A close examination of the eleven cases where we dismissed for want of jurisdiction reveals strict adherence to the Legislature's restricted framework. For example, we held "no jurisdiction" where the trial court made the injunction decision based on res judicata[26] or where the trial court was directed to do so by a writ of prohibition by the court of civil appeals.[27] That is, because the trial court did not decide the merits of the constitutional issue, we lacked direct-appeal jurisdiction.[28] Similarly, we held that we did not have such jurisdiction where the trial court denied an injunction because the plaintiffs lacked "the necessary justiciable interest" to sue.[29] We even held that we lacked jurisdiction over a direct appeal of a temporary injunction involving a "serious question" of

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[22] *Corona*, 274 S.W.2d at 541–42.

[23] *King*, 341 S.W.2d at 425; *Bryson*, 297 S.W.2d at 406.

[24] *Holmes*, 339 S.W.2d at 663–64.

[25] *Mitchell*, 515 S.W.2d at 103 (emphasis in original).

[26] *Lipscomb*, 264 S.W.2d at 691–92.

[27] *Gardner*, 333 S.W.2d at 589.

[28] *Corona*, 274 S.W.2d at 541–42.

[29] *Holmes*, 339 S.W.2d at 664.

the constitutionality of a statute, because the real purpose of the temporary injunction was merely to preserve the status quo, and the trial court did not make any holdings finally determining the constitutional issue.[30]

B. Application

Given our long, consistent history of cautiously and narrowly construing our direct-appeal jurisdiction, the outcome of this case seems essentially predetermined: We lack jurisdiction. The Legislature allows parties to skip the court of appeals in one extraordinarily limited circumstance: where the trial court's injunction turned "on the ground of the constitutionality of a [state] statute."[31] The crux and rationale of the trial court's order is dispositive. Here, the trial court did not "pass upon the constitutionality of a statute,"[32] "determin[e]" a statute's constitutionality,[33] or "base its decision" on constitutional grounds.[34] While the constitutional issues may have been *raised* in the trial court, that alone is "not enough."[35]

At most, the trial court's order only vaguely alludes to nonprofit-related statutes, and there is certainly no indication in the order that the trial court was making a constitutional determination. The trial court order refers generally to nonprofit law and says the defendants cannot rely on this law

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[30] *Mitchell*, 515 S.W.2d at 103–04.

[31] TEX. GOV'T CODE § 22.001(c).

[32] *Corona*, 274 S.W.2d at 541–42.

[33] *King*, 341 S.W.2d at 425; *Bryson*, 297 S.W.2d at 119.

[34] *Holmes*, 339 S.W.2d at 663–64.

[35] *Mitchell*, 515 S.W.2d at 103.

to escape the deference principle, providing a string citation as support. But only one of the cases in the string citation even refers to constitutional principles, and that case does not hold that only the deference approach is constitutional.[36] Moreover, that case was decided two years before the United States Supreme Court clarified in *Jones v. Wolf* that the "deference" rule is not mandated by the First Amendment.[37]

A diaphanous hint that a statute was viewed through a constitutional prism is not enough to justify exercising our "limited"[38] and "strictly construed"[39] direct-appeal jurisdiction. And here, the trial judge orally eschewed such a ruling, making it doubly clear that its order was not based on constitutional grounds. In light of *Jones* (that the deference approach is *not* constitutionally required) and the trial court's comments (that it was holding the statutes inapplicable but not unconstitutional), it seems an impressive stretch to transform the trial court's citation to an ambiguous pre-*Jones* case into a constitutional holding striking down state law.

Perhaps the order's silence and the judge's disavowal are beside the point if unconstitutionality was the inescapable basis for the trial court's ruling, as the majority concludes. Indeed, the defendants contend the order makes no sense unless it turned on a constitutional holding. As the defendants interpret the order, the trial court effectively held certain statutes unconstitutional if applied to local churches of hierarchical religions. In their Statement of Jurisdiction, the

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[36] *See Presbytery of the Covenant v. First Presbyterian Church of Paris, Inc.*, 552 S.W.2d 865, 870–71 (Tex. Civ. App.—Texarkana 1977, no writ).

[37] 443 U.S. 595, 605 (1979).

[38] *Gardner*, 333 S.W.2d at 588.

[39] *Garcia*, 817 S.W.2d at 61.

defendants argue that a court can only reject statutes like this on "constitutional grounds." This assertion rests on the faulty premise that any time a court deems a statute inapplicable, it's because the statute would be unconstitutional if applied. Not true.

A court can refuse to apply a statute for various non-constitutional reasons. For example, if a statute purports to change long-standing common law, a court closely examines whether the Legislature truly intended to supplant the settled rule.[40] The trial court in this case may have applied (or misapplied) this kind of analysis, finding that pertinent statutes did not indicate legislative intent to abandon the common-law deference principle that we declared in *Brown*. Perhaps the trial court looked at a century of legislative inaction after *Brown* and took it as legislative acquiescence. There are other non-constitutional reasons to deem a statute ineffective, like the absurdity doctrine.[41] So even if a trial court implicitly invalidates a statute or finds it inapplicable, its reason for doing so is not necessarily because the Constitution demands it.

Thus, it cannot be true that by following *Brown v. Clark*, the trial court implicitly held that any statute that might apply under neutral principles is necessarily unconstitutional if applied to a church-property dispute in a hierarchical setting. This argument is foreclosed by *Jones v. Wolf*. If states are free, consistent with the First Amendment, to choose either approach, then choosing the deference test cannot equate to an implicit holding that applying statutes relevant under neutral

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[40] *See Energy Serv. Co. of Bowie v. Superior Snubbing Servs., Inc.*, 236 S.W.3d 190, 194 (Tex. 2007) ("Of course, 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.").

[41] *See, e.g.*, *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011).

principles would be unconstitutional. Nobody can argue that Texas courts are *required* to adopt neutral principles—*Jones* precludes that argument.

Tellingly, the defendants do not attempt to analogize this case to any other in which the Court has exercised direct-appeal jurisdiction. None is comparable. No constitutional question was presented (or decided) in the trial court, and none is presented (or decided) here.[42]

Undoubtedly, we have already noted probable jurisdiction, heard argument on the merits, and committed substantial judicial resources to resolving the issues—to say nothing of the effort and cost expended by the parties. But to assert jurisdiction simply because it would be inconvenient to do otherwise betrays the deeply rooted constitutional principle that our jurisdiction is conferred ultimately from the People, directly through our Constitution and indirectly through our elected representatives.

Dismissing this case for want of jurisdiction would be sure to furrow brows, but there is no more principled reason to dismiss a case than to decide, even belatedly, that you lack the power to decide. Besides, and this is some consolation, the core merits issue presented—deciding which legal

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[42] The Rules of Civil Procedure previously specified that we could not accept such jurisdiction unless the case presented a constitutional question to *this* Court. *Lipscomb*, 264 S.W.2d at 691–92, quotes the former rule (TEX. R. CIV. P. 499a(b)) as providing (emphasis added):

> An appeal to the Supreme Court directly from such a trial court may present only the constitutionality or unconstitutionality of a statute of this State, or the validity or invalidity of an administrative order issued by a state board or commission under a statute of this State, *when the same shall have arisen by reason of the order of a trial court granting or denying an interlocutory or permanent injunction*.

Accordingly, we said that one of the prerequisites for direct-appeal jurisdiction was that a constitutional "question is presented to this Court for decision." *Bryson*, 297 S.W.2d at 119. Admittedly, our Rules (which have since migrated to the Rules of Appellate Procedure) no longer specify that a direct appeal must present an actual constitutional question to this Court. TEX. R. APP. P. 57; *see also Del Rio*, 67 S.W.3d at 98–99 (Phillips, C.J., dissenting). But the Legislature's limited grant of such jurisdiction has not wavered, and we simply cannot accept a direct appeal unless a statute has been declared constitutional or unconstitutional. That did not happen here.

test should govern church-property disputes—is squarely resolved in today's companion case,[43] so a dismissal here would not unduly delay authoritative resolution or work any irreparable harm.

III. Conclusion

Our characterizations of direct-appeal jurisdiction, something we have "strictly construed," are not ambiguous:

- "rare"
- "restricted"
- "very limited"

In light of this consistent clarity, the Court's exercise of jurisdiction has an unfortunate *ipse dixit* quality to it. The statutory test for direct-appeal jurisdiction is whether the trial court made its decision "on the ground of the constitutionality of a [state] statute." A statute, for example, must be invalidated, not just implicated. Direct-appeal jurisdiction is a rare (as it should be) short-circuiting of the usual rules, and I respectfully take exception to broadening the exception.

The power of judicial review—the authority to declare laws unconstitutional—is a genuinely stunning one, and one that judges exercise with surpassing trepidation. Given the stakes, it is difficult to imagine a judge striking down a legislative enactment stealthily, using gauzy language that requires reading between the lines. This judge certainly didn't believe he had declared anything unconstitutional, and he said as much—on the record and unequivocally.

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[43] *Masterson*, __ S.W.3d __.

Today marks the second time this Court has stretched our direct-appeal jurisdiction beyond its statutory bounds.[44] The objective in both cases has apparently been to let the Court fast-forward to the merits of an important case. But an issue's importance and our commendable desire to resolve it swiftly does not give us license to enlarge our jurisdictional powers by fiat. In language that could have been written with today's case in mind, Chief Justice Phillips wrote in dissent over a decade ago:

> Dismissing a case on jurisdictional grounds may be frustrating to judges and litigants alike, particularly when issues of statewide import are involved . . . . However, the Legislature has chosen to make direct appeal an uncommon remedy, available only in rare and specific situations. Regardless of the day's exigencies, our highest and only duty is to respect the appropriate limits of our power . . . . I fear that our Court has allowed a hard case to make bad law today.[45]

The Court may come to rue its decision to assert direct-appeal jurisdiction in this case. Our rules seem to *mandate* our exercise of such jurisdiction in cases where a *permanent* injunction is based on the constitutionality of a statute (because our rules make direct-appeal jurisdiction discretionary only in *temporary* injunction cases).[46] Therefore, in addition to encroaching on the Legislature's constitutional prerogative to define our direct-appeal jurisdiction, the Court's decision may perversely *require* this Court to immediately hear all direct appeals of permanent injunctions that even vaguely implicate a statute's constitutionality.

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[44] *See Del Rio*, 67 S.W.3d at 89 (majority opinion).

[45] *Id.* at 100 (Phillips, C.J., dissenting).

[46] *See* TEX. R. APP. P. 57.2.

I would dismiss this case for want of jurisdiction, and because the Court does otherwise, I respectfully dissent.

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Don R. Willett
Justice

OPINION DELIVERED: August 30, 2013

IN THE SUPREME COURT OF TEXAS

NO. 11-0270

SOUTHERN CRUSHED CONCRETE, LLC, PETITIONER,

v.

CITY OF HOUSTON, RESPONDENT

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

Argued October 15, 2012

JUSTICE LEHRMANN delivered the opinion of the Court.

We must decide whether the Texas Clean Air Act (TCAA) preempts a Houston ordinance. The City denied Southern Crushed Concrete's (SCC) municipal permit application to move a concrete-crushing facility to a new location, even though the Texas Commission on Environmental Quality had previously issued a permit authorizing construction of the facility at the proposed location, because the concrete-crushing operations would violate the Ordinance's location restriction. The TCAA provides that "[a]n ordinance enacted by a municipality . . . may not make unlawful a condition or act approved or authorized under [the TCAA] or the [C]ommission's rules or orders." TEX. HEALTH & SAFETY CODE § 382.113(b). Because the Ordinance makes it unlawful to build a concrete-crushing facility at a location that was specifically authorized under the Commission's

orders by virtue of the permit, we hold that the Ordinance is preempted. Accordingly, we reverse the judgment of the court of appeals and render judgment for SCC.

I. Factual and Procedural Background

In October 2003, SCC applied to the Commission for an air quality permit to move an already-permitted concrete-crushing facility to a new location in Houston. While the application was pending, the Presbyterian School Outdoor Education Center was built near the property SCC proposed to use for its facility. In May 2007, after nearly four years of permit proceedings in which the City participated and opposed SCC's application, the City passed an ordinance requiring concrete-crushing facility operators to obtain a municipal permit. HOUS., TEX., CODE OF ORDINANCES ch. 21, art. VI, div. 3, § 21-168.

Under the Ordinance, new concrete-crushing operations must meet certain location requirements, which are more restrictive than those imposed under the TCAA and the Commission rules. *Id.* §§ 21-168, -170. Specifically, the Ordinance prohibits concrete-crushing operations within 1,500 feet of a school facility and other enumerated land uses, measured from property line to property line, *id.* §§ 21-167 to -170, while the TCAA and Commission rules prohibit the operation of a concrete-crushing facility within 1,320 feet of any school and other enumerated land uses, measured from the nearest points of the buildings in question, TEX. HEALTH & SAFETY CODE § 382.065(a); 30 TEX. ADMIN. CODE § 116.112(b)(2).

Despite the Ordinance, the Commission granted SCC's requested air quality permit in August 2008, concluding that the concrete-crushing operations would not violate the location requirements contained in the TCAA and Commission rules. SCC then applied to the City for a municipal permit,

which was denied because the concrete-crushing operations would violate the Ordinance's location restriction.

SCC sued the City, seeking both a declaration that the Ordinance is preempted and an injunction against its enforcement. SCC contended that the Ordinance is preempted under the Texas Constitution because it is impermissibly inconsistent with the TCAA. *See* TEX. CONST. art. XI, § 5 ("[N]o . . . ordinance . . . shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State."). SCC also argued that the Ordinance is preempted by the TCAA, which provides that a city ordinance "may not make unlawful a condition or act approved or authorized under [the TCAA] or the [C]ommission's rules or orders." TEX. HEALTH & SAFETY CODE § 382.113(b). SCC further asserted that the Local Government Code's uniformity-of-requirements provision bars enforcement of the Ordinance because the Ordinance was adopted after SCC filed its permit application with the Commission. *See* TEX. LOC. GOV'T CODE § 245.002. The parties filed cross-motions for summary judgment, and the trial court granted the City's motion, denied SCC's motion, and dismissed SCC's claims with prejudice.

The court of appeals, with one justice dissenting, affirmed, holding that the Ordinance is neither preempted nor unconstitutional and does not violate the uniformity-of-requirements provision. __ S.W.3d __. SCC raises the same arguments in this Court as it did in the trial court. Because the dispositive question is whether the Ordinance makes unlawful an act approved or authorized under the TCAA or the Commission's rules or orders, we need only address that issue.

II. Preemption of Ordinances Enacted by Home-Rule Cities

When both parties move for summary judgment and the trial court grants one motion and denies the other, as here, we review both sides' summary judgment evidence and render the judgment the trial court should have rendered. *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 872 (Tex. 2000). SCC argues that the Ordinance is preempted by the TCAA because the Ordinance makes unlawful an act approved or authorized under the TCAA or the Commission's rules or orders in violation of section 382.113(b) of the Health and Safety Code. We agree.

The City of Houston is a home-rule city, deriving its power from article XI, section 5 of the Texas Constitution. TEX. CONST. art. XI, § 5. Home-rule cities have the full power of self-government and look to the Legislature, not for grants of power, but only for limitations on their powers. *Lower Colo. River Auth. v. City of San Marcos*, 523 S.W.2d 641, 643 (Tex. 1975) (citing *Forwood v. City of Taylor*, 214 S.W.2d 282 (Tex. 1948)). "[I]f the Legislature decides to preempt a subject matter normally within a home-rule city's broad powers, it must do so with 'unmistakable clarity.'" *In re Sanchez*, 81 S.W.3d 794, 796 (Tex. 2002) (quoting *Dallas Merchant's & Concessionaire's Ass'n v. City of Dallas*, 852 S.W.2d 489, 491 (Tex. 1993)).

III. The Ordinance is Preempted by the Plain Language of the TCAA

The TCAA's policy and purpose is "to safeguard the state's air resources from pollution by controlling or abating air pollution and emissions of air contaminants." TEX. HEALTH & SAFETY CODE § 382.002(a). Accordingly, any person who plans to construct a facility that may emit air contaminants, such as a concrete-crushing facility, must obtain a permit from the Commission. *Id.* § 382.0518; 30 TEX. ADMIN. CODE § 116.110. The TCAA lists general considerations the

Commission may take into account in determining whether to grant a permit. TEX. HEALTH & SAFETY CODE § 382.0518. In issuing a permit, the Commission determines that the permit application satisfies the TCAA and applicable rules.

Section 382.113(b) states that a city ordinance "may not make unlawful a condition or act approved or authorized under [the TCAA] or the [C]ommission's rules or orders." TEX. HEALTH & SAFETY CODE § 382.113(b). The plain language of section 382.113(b) unmistakably forbids a city from nullifying an act that is authorized by either the TCAA or, as in this case, the Commission's rules or orders. Here, the Commission's authorization is evident from the face of the permit:

A PORTABLE PERMIT IS HEREBY ISSUED TO
Southern Crushed Concrete, Inc.
AUTHORIZING THE CONSTRUCTION AND OPERATION OF
Concrete Crushing Facility
Regulated Entity Number: RN100904838

The City counters that the Ordinance does not make unlawful an act authorized by the Commission, arguing that the permit merely removed one government-imposed barrier to operations but did not affirmatively authorize anything. We disagree. As Justice Brown noted in his dissent in the court of appeals, the City effectively argues that "the permit the Commission issued to [SCC] 'authorizing the construction and operation of' a concrete-crushing facility is not actually that." __ S.W.3d __ (Brown, J., dissenting). The City's argument is inconsistent not only with the permit language, but also with Texas law, which defines permit to mean "an *authorization* by a license, certificate, registration, or other form that is required by law or state agency rules to engage in a particular business." TEX. GOV'T CODE § 2005.001(1) (emphasis added).

The City further contends that, even if the permit represents the Commission's authorization or approval, such authorization or approval is only for the purpose of protecting air quality, not for general purposes. And, because the Ordinance purports to regulate land use, not air quality, the Ordinance does not actually abrogate the permit. But, the statute does not draw that distinction, nor should it if state regulation is to be effective. If the City's contention were true, a city could almost always circumvent section 382.113(b) and vitiate a Commission permit that it opposes by merely passing an ordinance that purports to regulate something other than air quality.

IV. Conclusion

We do not decide whether a city may more restrictively regulate an activity that the State also regulates, as that issue is not before us. But, the express language of section 382.112(b) compels us to give effect to the Legislature's clear intent that a city may not pass an ordinance that effectively moots a Commission decision. We hold that the Ordinance makes unlawful an "act approved or authorized under . . . the [C]ommission's . . . orders" and is thus preempted by the TCAA and unenforceable. TEX. HEALTH & SAFETY CODE § 382.113(b). We therefore reverse the judgment of the court of appeals and render judgment for SCC.

_____

Debra H. Lehrmann
Justice

OPINION DELIVERED: February 15, 2013

IN THE SUPREME COURT OF TEXAS

NOS. 11-0283, 11-0652

SUSAN COMBS, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, AND GREG ABBOTT, ATTORNEY GENERAL OF THE STATE OF TEXAS, PETITIONERS,

v.

HEALTH CARE SERVICES CORPORATION, RESPONDENT

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

Argued February 27, 2013

JUSTICE WILLETT delivered the opinion of the Court.

This tax-refund case concerns the Tax Code's sale-for-resale exemption, which grants purchasers of taxable goods and services a sales-tax exemption if they resell the items (since the ultimate purchaser will pay any tax due). Here, a government contractor seeks sales-tax refunds for purchases used to administer federal health-insurance programs. The question is one of scope: What categories of purchases qualify for the exemption?

Applying the Legislature's sale-for-resale definition and exemption language, we believe the contractor here is entitled to most of the claimed refunds. There are three main categories of goods and services for which refunds are claimed: tangible personal property, taxable services, and leases of tangible personal property. We hold that the exemption applies to the tangible personal property and taxable services, but not to the leases of tangible personal property, for the following reasons:

- Tangible Personal Property. The exemption applies even when, as here, the resale consists of bare title transfer of tangible personal property that is consumed by the taxpayer to perform nontaxable services. This holding reaffirms long-standing precedent that allowed federal contractors to claim the sale-for-resale exemption for tangible personal property subject to automatic title transfer. We hasten to note, however, that a 2011 Tax Code amendment likely alters this result moving forward.

- Taxable Services. Sale-for-resale of a taxable service can occur, as here, by directing that the service be performed for another party in return for consideration from that party.

- Leases of Tangible Personal Property. These fall outside the sale-for-resale exemption, as they are not resold unless they are re-leased or transferred in some other way to another purchaser.

Finally, we hold that reimbursement of a tax is not the same as collection of a tax. Thus, the requirement that a taxpayer who claims a refund show he has not collected the tax from someone else does not also require the taxpayer to show he has not been reimbursed for the tax. Accordingly, we affirm the court of appeals' judgment on all but the lease issue, which we reverse and remand to the trial court for further proceedings.

I. Background

Health Care Services Corporation and its predecessor-in-interest, Blue Cross and Blue Shield of Texas, Inc. (collectively HCSC), contracted with the federal government to administer two health-insurance programs.[1] While performing these contracts, HCSC incurred expenses that were reimbursed by the federal government.

[1] HCSC performed administrative services for two types of health insurance programs: Medicare and the Federal Employees Health Benefits Program. However, the contracts for both programs were virtually identical for the purposes of this opinion. So, all references in this opinion to "the contracts" are references to all contracts related to both programs, unless otherwise indicated.

HCSC paid sales and use tax on some of these expenses and applied for a refund under the sale-for-resale exemption.[2] The Comptroller denied the refund. HCSC brought two separate tax-refund suits, the first covering December 1, 1988 through December 31, 1998, and the second covering January 1, 1999 through December 31, 2003. The two cases were nearly identical except for minor variations in the specific property and services for which HCSC sought a sales-tax refund.[3] However, in both cases, HCSC claimed the sale-for-resale exemption for three general categories of property and services it used to perform the contracts: (1) tangible personal property (such as chairs, printers, and office supplies); (2) taxable services (such as printer repair services, landscape maintenance, and copier maintenance); and (3) leases of certain tangible personal property (such as leases of computers, audio equipment, and printers).

In both cases, the court of appeals affirmed trial-court decisions that HCSC was entitled to the claimed refunds.[4] We consolidated the cases and issue this joint decision.

II. Discussion

The Comptroller argues the sale-for-resale exemption is inapplicable and also that HCSC should have to prove the federal government did not already reimburse it for the sales tax for which it requests refunds.

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[2] For clarity, we will abbreviate "sales and use tax" to just "sales tax."

[3] In the first trial, the specific property or services were: "Utilities," "Taxable Services on Tangible Personal Property," "Allowable," "Capitalized Assets," "Leases," "Maintenance on Tangible Personal Property," and "Software/Software Maintenance." In the second trial, the specific property or services were: "Utilities," "Taxable Services on Tangible Personal Property," "Taxable Services on Real Property," "Allowable," "Leases," "Maintenance on Tangible Personal Property," "Maintenance on Real Property," and "Software/Software Maintenance."

[4] ___ S.W.3d ___; ___ S.W.3d ___.

We affirm in part, reversing solely on the leases of tangible personal property. HCSC is entitled to a sales-tax refund for the tangible personal property and taxable services but not for the leases of tangible personal property. Also, HCSC need not show whether the federal government reimbursed it for the taxes.

A. Tangible Personal Property

At all relevant times, the Tax Code defined sale for resale as a sale of:

> tangible personal property or a taxable service to a purchaser who acquires the property or service for the purpose of reselling it [in certain geographical locations] in the normal course of business in the form or condition in which it is acquired or as an attachment to or integral part of other tangible personal property or taxable service.[5]

The statute applies to the tangible personal property here. HCSC purchased the "tangible personal property" for the purpose of "reselling it . . . in the normal course of business in the form or condition in which it [was] acquired." The trial court found that HCSC's normal course of business was performing federal government contracts, and the resale furthered those contracts. Further, the tangible personal property was automatically resold to the federal government as soon as it was acquired due to the title-transfer provisions.[6] Title transfer for consideration is one type of "sale."[7]

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[5] Act of May 27, 2007, 80th Leg., R.S., ch. 1266, § 2, 2007 Tex. Gen. Laws 4234, 4234 (amended 2011) (current version at TEX. TAX CODE § 151.006(a)(1)).

[6] We note that the trial court concluded that the title-transfer provisions apply to all the tangible personal property transfers. The Comptroller does not contest this conclusion or argue that the title-transfer provisions were limited to certain types of transactions. Therefore, we treat all the tangible personal property purchases identically without independently analyzing whether the title-transfer provisions were applicable to all the transactions. We note, however, that the different contracts incorporated different title-transfer provisions. The earlier Federal Employees Health Benefits Program contracts incorporated the title-transfer provision found in Federal Acquisition Regulation 52.245-2, while later, amended Federal Employees Health Benefits Program contracts incorporated the title-transfer provision found in Federal Employees Health Benefits Acquisition Regulation 1652.245-70. The Medicare contracts all incorporated the title-transfer provision found in Federal Acquisition Regulation 52.245-5. As the parties have not

Therefore, the property was resold (through title transfer) in the "form or condition in which it [was] acquired": the resale was automatic upon acquisition, so, naturally, the property was resold before HCSC had any chance to alter it.

The Comptroller asserts that Section 151.006(a)(1) requires the application of an "essence of the transaction" test. The Comptroller's argument is essentially that the exemption should only apply if the *primary* purpose of the original sale is to resell "in the form or condition in which it is acquired or as an attachment to or integral part of other tangible personal property or taxable service." Here, the primary purpose of the original sale was to acquire property that would be consumed in performing a nontaxable service, so the exemption should not apply. This restrictive interpretation collides with the statutory text.

The exemption does not say (or even intimate) that the *primary* purpose of the sale must be for a particular kind of resale.[8] The statute merely says the sale must have "the purpose" of reselling in one of the specified ways; not "the primary purpose," "the main purpose," or "the important purpose." Here, HCSC bought tangible personal property for *the purpose* of transferring its title to

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raised the issue, we express no opinion on whether these different title-transfer provisions properly apply to all of the tangible personal property transfers at issue here. *See* TEX. R. APP. P. 55.2(i).

[7] TEX. TAX CODE § 151.005(1).

[8] We recently noted that "in the area of tax law, like other areas of economic regulation, a plain-meaning determination should not disregard the economic realities underlying the transactions in issue," and cited federal and Texas tax cases referencing "economic realities" or the "essence of the transaction." *Combs v. Roark Amusement & Vending, L.P.*, ___ S.W.3d ___, ___ & n.14 (Tex. 2013). However, we also made clear that if the statute does "not impose, either explicitly or implicitly," the "extra-statutory requirement" urged by the Comptroller, "we decline to engraft one—revising the statute under the guise of interpreting it." *Id.* at ___. We did not suggest that, in the guise of considering the economic realities or essence of the transaction, courts were authorized to impose an entirely new requirement for a tax exemption that simply is not found in the language of the statutory exemption.

the federal government; we know this was the purpose because it was an unavoidable result given the automatic title-transfer provision. It is irrelevant that a second purpose of the sale was to acquire property that would be consumed in performing the nontaxable services. Taking the Legislature at its word and giving the statute its plain meaning, the definition and exemption apply.

This plain-text analysis reaffirms our holding in *Day & Zimmerman, Inc. v. Calvert*.[9] That case involved a taxpayer, Day & Zimmerman, that contracted with the federal government "for the loading, assembling and packaging of ammunition and related components as well as the handling of the mechanics of procurement of all necessary materials, supplies, equipment and services."[10] The contract between Day & Zimmerman and the government contained an automatic title-transfer provision similar to the one here.[11] The Comptroller made a deficiency determination against Day & Zimmerman for the sales tax paid for "the tangible personal property, not including any of the component parts that went into the finished product, purchased and consumed by the operating contractor in the performance of its contract with the Federal Government."[12] We held that the sales tax for this property had to be refunded to Day & Zimmerman because the transaction fell within the sale-for-resale exemption. The sale happened when the tangible personal property was physically transferred from the vendor to Day & Zimmerman.[13] Then, because the definition of "sale" included

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[9] 519 S.W.2d 106 (Tex. 1975)

[10] *Id.* at 108.

[11] *Id.* at 110.

[12] *Id.* at 108.

[13] *Id.* at 109–11.

title transfer for consideration, the resale happened when title to the property transferred from Day & Zimmerman to the federal government.[14] *Day & Zimmerman* is thus completely consistent with our decision today, both in its holding and its reasoning.

We find unpersuasive the Comptroller's attempt to distinguish *Day & Zimmerman*. The Comptroller argues that *Day & Zimmerman* involved a contract where the "essence of the transaction" was selling goods, whereas the essence of the transaction here is selling nontaxable services to which Section 151.006(a)(1) does not apply. So, the Comptroller says *Day & Zimmerman* is consistent with her proposed essence of the transaction test. The difficulty with this reasoning is simply stated: *Day & Zimmerman* never mentions or alludes to any such test. Moreover, it's anything but clear whether the essence of the transaction was reselling tangible personal property (ammunition) or reselling services (assembly and packaging of ammunition).[15] If the essence of the transaction really mattered, we would expect a more detailed description of the contract's "essence." *Day & Zimmerman* did not contemplate an "essence of the transaction" test because no such discussion exists. Instead, *Day & Zimmerman* stands for the proposition that automatic title transfer upon purchase qualifies for the sale-for-resale exemption. *Day & Zimmerman* cuts squarely in HCSC's favor due to the analogous title-transfer provisions.

The Comptroller next urges that *Day & Zimmerman* was abrogated by amendments to the sale-for-resale statute. While conceding that "sale" is still defined to include bare transfer of title

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[14] *Id.* at 110.

[15] *See id.* at 108.

of tangible personal property for consideration,[16] she asserts that two amendments have changed the legal landscape and rendered *Day & Zimmerman* irrelevant: (1) a change to the definition of "sale for resale," and (2) a new provision dealing with certain transactions that mix the resale of tangible personal property with the resale of taxable services. Upon careful examination of the amendments, the Comptroller's argument fails.

1. The Slight Definitional Change to "Sale for Resale" Does Not Abrogate Day & Zimmerman *and Defeat the Exemption*

In *Day & Zimmerman*, the statutory definition of sale for resale was:

> A sale of tangible personal property to any purchaser who is purchasing said tangible property for the purpose of reselling it [in certain geographical locations] in the normal course of business either in the form or condition in which it is purchased, or as an attachment to, or integral part of, other tangible personal property.[17]

The statutory definition relevant to this case reads:

> [A sale of] tangible personal property or a taxable service to a purchaser who acquires the property or service for the purpose of reselling it [in certain geographical locations] in the normal course of business in the form or condition in which it is acquired or as an attachment to or integral part of other tangible personal property or taxable service.[18]

Studying these similar statutes, it is difficult to understand the Comptroller's argument that the statutory definition has changed so much as to revoke *Day & Zimmerman*. The new version

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[16] *See* TEX. TAX CODE § 151.005(1).

[17] *Day & Zimmerman*, 519 S.W.2d at 109.

[18] Act of May 27, 2007, 80th Leg., R.S., ch. 1266, § 2, 2007 Tex. Gen. Laws 4234, 4234 (amended 2011) (current version at TEX. TAX CODE § 151.006(a)(1)).

merely seems to recognize the fact that some services are now taxable in Texas, whereas they were not when *Day & Zimmerman* was decided almost forty years ago.

The Comptroller's main argument appears to be that adding the words "taxable service" throughout the definition makes it clear that tangible personal property cannot be considered "resold" if the property is merely used to provide a nontaxable service. After all, says the Comptroller, the definition doesn't mention *nontaxable* services. But the *Day & Zimmerman*-era statute similarly made it clear that tangible personal property could not be considered "resold" if it was merely used to provide a service because the definition did not mention *any* services.

The Comptroller also argues that the statutory change unambiguously requires (or, in the alternative, ambiguously allows) application of the "essence of the transaction" test. The trouble with this argument, again, is that the changes since *Day & Zimmerman* say nothing about the "essence of the transaction" test. We do not see how the revisions have introduced any ambiguity into the statute that would allow application of the "essence of the transaction" test when it did not apply in *Day & Zimmerman*. In sum, the definitional changes to "sale for resale" do not statutorily abrogate *Day & Zimmerman*.

2. New Tax Code Section 151.302(b) Similarly Does Not Abrogate Day & Zimmerman *and Defeat the Exemption*

The Comptroller next argues that *Day & Zimmerman* was abrogated by Section 151.302(b), which provides:

> Tangible personal property used to perform a taxable service is not considered resold unless the care, custody, and control of the tangible personal property is transferred to the purchaser of the service.[19]

But it is uncontested in this case that HCSC is asking for a refund for tax paid on tangible personal property used to perform a *nontaxable* service because administrative services are not listed as a taxable service in Section 151.0101(a). Tangible personal property used to perform a nontaxable service is outside the exception to the exemption created by Section 151.302(b); by its own terms, that section only applies to tangible personal property used to perform a *taxable* service.

Perhaps it seems strange to distinguish between taxable and nontaxable services in Section 151.302(b). After all, if HCSC had transferred bare title to the tangible personal property and then consumed it in performing a *taxable* service, HCSC would not be entitled to a reimbursement. However, we read unambiguous statutes as they are written, not as they make the most policy sense. If a statute is worded clearly, we must honor its plain language, unless that interpretation would lead to absurd results. The Comptroller urges deference to its interpretation, but we recently canvassed our articulations of the agency-deference doctrine and formulated this test:

> We have long held that an agency's interpretation of a statute it is charged with enforcing is entitled to "serious consideration," so long as the construction is reasonable and does not conflict with the statute's language. . . . In our "serious consideration" inquiry, we will generally uphold an agency's interpretation of a statute it is charged by the Legislature with enforcing, so long as the construction is reasonable and does not contradict the plain language of the statute. . . . [T]his deference is tempered by several considerations: [the statute must be ambiguous, the

[19] TEX. TAX CODE § 151.302(b).

agency interpretation must be the result of formal procedures, and the interpretation must be reasonable].[20]

It is true that courts grant deference to an agency's reasonable interpretation of a statute, but a precondition to agency deference is ambiguity; "an agency's opinion cannot change plain language."[21] There is no ambiguity about the ambiguity requirement, nor with the unassailable rule that agency interpretations cannot contradict statutory text. Here, the Comptroller's interpretation is contrary to the Tax Code. The statute unambiguously applies only to tangible personal property used to perform a taxable service. Further, it is not absurd for the Tax Code to treat nontaxable services more favorably than taxable services; indeed, the Tax Code already treats nontaxable services more favorably by not taxing them. Summing up: As Section 151.302(b) explicitly applies only to tangible personal property used to perform taxable services, we decline the Comptroller's invitation to rewrite the statute to reach nontaxable services, too.

3. Given the Statute's Clarity, the Comptroller's Unintended Consequences Arguments Are Unavailing

The Comptroller contends the Legislature could not have intended to exempt HCSC from sales tax for items it consumed itself. Arguing that a plain-language interpretation of the exemption would produce unintended consequences, she asserts the "tie-pin" example: that HCSC should not be refunded sales tax on tie pins it bought to reward its employees for good work.

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[20] *R.R. Comm'n of Tex. v. Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 624–25 (Tex. 2011) (internal quotation and citation omitted).

[21] *Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 747 (Tex. 2006).

We recognize that statutes, framed in general terms, can often work peculiar outcomes, including over- or under-inclusiveness, but such minor deviations do not detract from the statute's clear import. If an as-written statute leads to patently nonsensical results, the "absurdity doctrine" comes into play, but the bar for reworking the words our Legislature passed into law is high, and should be. The absurdity safety valve is reserved for truly exceptional cases, and mere oddity does not equal absurdity. A sales-tax exemption for tie pins, even if unintended, even if improvident, even if inequitable, falls short of being unthinkable or unfathomable. The absurdity backstop requires more than a curious loophole. Indeed, given the complexity of modern tax laws (and the haste with which many are enacted), whimsical examples of over- or under-inclusiveness, likely wholly unintended, doubtless abound.[22] But pointing out a quirky application is quite different from proving it was quite impossible that a rational Legislature could have intended it.

Since at least *Day & Zimmerman*, items consumed while performing a contract with a title-transfer provision have clearly been covered by the sale-for-resale exemption. If the Legislature considered this a loophole worth closing, it could have done so. In fact, lawmakers in 2011 narrowed it via Section 151.006(c), which reserves this sale-for-resale exemption to contractors that are partnering with federal national security-related agencies.[23]

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[22] Partly because of the title-transfer provision, the federal government likely could have demanded at any time that HCSC turn over all tangible personal property that wasn't consumed yet (even the tie pins). Indeed, the trial court found that when certain HCSC contracts expired, the federal government required HCSC physically to transfer any remaining tangible personal property to the new contractor. Title transfer was not a mere sham here; it had a real-world impact on HCSC. The federal government owned the tangible personal property, even if it lacked physical control over it. It thus makes some sense to shield HCSC from the tax burden for all property purchased to carry out the contracts.

[23] *See* TEX. TAX CODE § 151.006(c) which provides:

A sale for resale does not include the sale of tangible personal property or a taxable service to a

B. Taxable Services

The Comptroller argues that the taxable services that HCSC bought on the government's behalf fall outside the sale-for-resale exemption because the title-transfer clauses did not transfer title of the taxable services to the federal government. However, title transfer clearly is not the only way to bring about a resale. Instead, "sale" also includes "performance of a taxable service" for consideration.[24] Here, HCSC bought these taxable services (the sale). HCSC then resold the services to the government by directing that they be performed on the government's behalf with the purpose of receiving reimbursement and compensation (consideration) from the government (the resale). The sale-for-resale exemption explicitly includes the sale-for-resale of a service when it is

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> purchaser who acquires the property or service for the purpose of performing a service that is not taxed under this chapter, regardless of whether title transfers to the service provider's customer, unless the tangible personal property or taxable service is purchased for the purpose of reselling it to the United States in a contract, or a subcontract of a contract, with any branch of the Department of Defense, Department of Homeland Security, Department of Energy, National Aeronautics and Space Administration, Central Intelligence Agency, National Security Agency, National Oceanic and Atmospheric Administration, or National Reconnaissance Office to the extent allocated and billed to the contract with the federal government.

See also id. § 151.006(a)(5) which provides that a "sale for resale" means:

> except as provided by Subsection (c), tangible personal property to a purchaser who acquires the property for the purpose of transferring it as an integral part of performing a contract, or a subcontract of a contract, with the federal government only if the purchaser:
>
> (A) allocates and bills to the contract the cost of the property as a direct or indirect cost; and
>
> (B) transfers title to the property to the federal government under the contract and applicable federal acquisition regulations.

Both of these subsections were added in 2011. Act of June 28, 2011, 82d Leg., 1st C.S., ch. 4, § 12.01, 2011 Tex. Gen. Laws 5263, 5263 (current version at TEX. TAX CODE § 151.006).

[24] TEX. TAX CODE § 151.005(3).

resold "in the form or condition in which it is acquired."[25] Here, HCSC bought the services and then immediately resold them to the federal government, so the services were resold in the same form as they were acquired, thus qualifying for the sale-for-resale exemption.

The Comptroller attempts to recharacterize HCSC's sale-for-resale of services as sale-for-resale of service *contracts*. However, the trial court's findings of fact include findings that the services at issue were performed on behalf of the federal government and that HCSC was compensated for them. Therefore, because the Comptroller has not challenged the evidentiary sufficiency of these factual findings, we accept them as a true characterization of the transfer. That is, the resale to the government was the performance of the services for consideration, not merely a resale of service contracts.

C. Leases of Tangible Personal Property

The Comptroller further argues that the leases of tangible personal property fall outside the sale-for-resale exemption. After all, the Comptroller says, leases themselves are not tangible personal property, so sale-for-resale of a lease is not the sale-for-resale of tangible personal property. But "lease" is statutorily included in the definition of "sale."[26] Therefore, lease-for-(re)lease of tangible personal property falls within the definition of sale-for-resale of tangible personal property.

That said, there is no evidence here that HCSC leased the property for the purpose of *re-leasing* it. That is, using the property for the federal government contract is not the same as formally

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[25] Act of May 27, 2007, 80th Leg., R.S., ch. 1266, § 2, 2007 Tex. Gen. Laws 4234, 4234 (amended 2011) (current version at TEX. TAX CODE § 151.006(a)(1)).

[26] TEX. TAX CODE § 151.005(2).

re-leasing the property to the federal government. The trial court pointed out that some leased property was transferred to the new contractor after HCSC's contract ended. But there is no finding or even allegation that HCSC's *purpose* in leasing the property in the first place was to re-lease it to the federal government or another contractor. Instead, the transfer of the leased property apparently only happened because the federal contract ended, not because the original purpose of leasing the property was to re-lease it. Thus, HCSC is not due a refund on sales tax paid on the leases.

D. Documentation of Reimbursements

HCSC is not required to produce documentation proving it did not receive federal government reimbursement for the sales tax it paid. Section 111.104(f) provides:

> No taxes, penalties, or interest may be refunded to a person who has *collected* the taxes from another person unless the person has refunded all the taxes and interest to the person from whom the taxes were *collected*.[27]

The Comptroller argues that this section imposes a burden on HCSC to show it was never reimbursed for the taxes it is seeking to have refunded. The Comptroller claims that HCSC can't prove that here.[28] But the statute precludes a refund only if HCSC *collected* a tax, not just if it was reimbursed some amount that may or may not include a tax. The Comptroller claims that being reimbursed for a tax is equivalent to collecting a tax. That is simply not the case. At all times relevant to this dispute, the Tax Code provided that a person who collects a tax holds that money in

[27] *Id.* § 111.104(f) (emphasis added).

[28] In contrast, the trial court seemed to find some circumstantial evidence that the federal government had not reimbursed HCSC for the taxes because HCSC was operating at a loss.

trust for the State.[29] Such a trust relationship clearly did not exist here; the federal government did not pay HCSC tax for it to hold in trust and then remit to the State. Further, in the sales tax context, tax is collected by a seller adding the sales tax to an initial sales price and then charging that amount to the buyer as part of the new sales price.[30] Such a collection process did not occur here.

That is, contrary to the Comptroller's argument, collecting a tax is not the same as reimbursing a tax. Hypothetically, a contractor and the federal government could agree for the government to pay ten percent of sales tax as part of the consideration for the contract; this would not mean that the contractor would "collect" ten percent of sales tax from the federal government. Instead, the sale price itself would go up by ten percent of the sales tax rate. Such a contract might actually be sensible if a federal contractor foresaw having to fight with the Comptroller to get a refund for the tax. A very similar (although less transparent) contractual arrangement may have occurred here; the federal government may have paid part of the sales tax price as part of the consideration for the contract.

However, if the federal government's contractual arrangement did not intend to pay HCSC for sales tax that was ultimately refunded, the federal government can likely recover the portion of

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[29] TEX. TAX CODE § 111.016 ("Any person who receives or collects a tax or any money represented to be a tax from another person holds the amount so collected in trust for the benefit of the state and is liable to the state for the full amount collected plus any accrued penalties and interest on the amount collected.").

[30] *Id.* § 151.052(a) ("COLLECTION BY RETAILER. . . . [A] seller who makes a sale subject to the sales tax imposed by this chapter shall add the amount of the tax to the sales price.").

the sales tax that it paid.[31] Therefore, the risk of HCSC receiving an unintended windfall at the federal government's expense is slight.

Regardless, though, as explained above, the statute designed to prevent double recovery (Section 111.104(f)) is inapplicable in light of the fact that HCSC never "collected" tax from the federal government, which is a prerequisite for the statute's application.[32] Our statutory interpretation is reinforced by the fact that it makes sense from a policy perspective to prevent refund of tax only when it is explicitly collected from (i.e., charged as tax to) the buyer. After all, when such a tax is charged to a buyer, the buyer's understanding is that the portion of the sale attributed to tax will be paid to the government. The buyer also knows that any profit the seller makes in the transaction is through the sales price alone. On the other hand, with a lump sum charge to a customer that does not clearly delineate sales tax, the customer has no such expectation that a certain portion will be remitted to the State. It would also make very little sense to make federal government contractors write up transaction-by-transaction receipts with line items saying "Tax Collected = 0" for each transaction. Money is plainly and inarguably fungible, so even if the tax collected is listed as zero, federal contractors could just increase the amount they are paid under the contract to cover any money spent on sales tax. There is no reason to force contractors to engage in such creative accounting when the statute itself does not dictate that result.

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[31] *See Hercules Inc. v. United States*, 292 F.3d 1378, 1382–83 (Fed. Cir. 2002) (when federal government contract incorporates certain Federal Acquisition Regulations, any state tax refund must be remitted to the United States in the same proportion that the federal government paid the original tax).

[32] The Legislature *could* impose a record-keeping requirement when a tax is reimbursed rather than collected, but Section 111.104(f) does not do so.

III. Conclusion

We affirm in part and reverse in part, holding that HCSC is entitled to a sales- and use- tax refund for all the transactions except the leases of tangible personal property. We remand to the trial court for further proceedings consistent with this opinion.

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Don R. Willett
Justice

OPINION DELIVERED: June 7, 2013

IN THE SUPREME COURT OF TEXAS

NO. 11-0311

NELDA GONZALES, PETITIONER,

v.

SOUTHWEST OLSHAN FOUNDATION REPAIR COMPANY, LLC, D/B/A/ OLSHAN FOUNDATION REPAIR COMPANY, RESPONDENT

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

Argued October 15, 2012

JUSTICE GUZMAN delivered the opinion of the Court.

We decide whether the implied warranty for good and workmanlike repair of tangible goods or property in *Melody Home Manufacturing Co. v. Barnes* can be disclaimed or superseded.[1] The *Melody Home* warranty is a "gap-filler" warranty similar to the one we addressed in *Centex Homes v. Buecher* for good and workmanlike construction of a new home.[2] As in *Buecher*, we hold that parties cannot disclaim but can supersede the implied warranty for good and workmanlike repair of tangible goods or property if the parties' agreement specifically describes the manner, performance,

[1] 741 S.W.2d 349, 354–55 (Tex. 1987).

[2] 95 S.W.3d 266, 269, 273 (Tex. 2002).

or quality of the services. Because the parties' agreement here specifies that the service provider would perform foundation repair in a good and workmanlike manner and adjust the foundation for the life of the home due to settling, the express warranty sufficiently describes the manner, performance, or quality of the services so as to supersede the *Melody Home* implied warranty. We further hold that the plaintiff's remaining Deceptive Trade Practices Act claims are time barred because they were filed more than two-and-one-half years after one of the defendant's employees informed the plaintiff of the allegedly defective nature of the defendant's work. Thus, we affirm the court of appeals' judgment that the plaintiff take nothing.[3]

I. Background

Gonzales hired a plumber to repair water leaks under her foundation and hired Southwest Olshan Foundation Repair Co., LLC, d/b/a Olshan Foundation Repair Co. (Olshan) to repair the foundation problems the water leaks had caused. The foundation repair contract included a lifetime, transferrable warranty on the work requiring Olshan to adjust the foundation due to settling. The contract further provided that Olshan "perform all the necessary work in connection with this job . . . in a good and workmanlike manner."[4] The work included cosmetic repairs to the interior of the house, such as taping, floating, texturing, and painting walls and ceilings. In April 2002, Gonzales noticed doors not locking, windows not opening, and new cracks appearing in previously repaired

[3] We do not address Gonzales's ability to make a future claim under her express, lifetime warranty. *See PPG Indus., Inc. v. JMB/Houston Ctrs. Partners Ltd. P'Ship*, 146 S.W.3d 79, 96 (Tex. 2004) ("[A] warranty for repair services [is] not breached until further repairs [are] refused.").

[4] The lifetime warranty was contained in a separate warranty certificate that was attached to the contract and incorporated by reference.

walls. Gonzales informed Olshan and her property insurer, who both informed Gonzales that there were additional plumbing leaks. Olshan excavated tunnels under the home to allow a plumbing company to repair those leaks in May 2003. Olshan leveled the foundation in August 2003.

Olshan again leveled the foundation in October 2003. Gonzales testified that, during this work, an Olshan employee informed her that Olshan was "not doing a good job under the home. . . . In fact, it's the worst job I have ever seen." According to Gonzales, the employee cautioned her not to allow Olshan to fill in the tunnels because the foundation had not been repaired properly and advised her to contact an attorney. Gonzales refused to allow Olshan to fill in the tunnels after asking for proof of the nature of the defective components Olshan removed from the foundation support. Gonzales alleges the foreman informed her they had spent too much time on her home and, in light of their other work, would place her on a wait list for four to six months. Olshan left the property, and Gonzales believed Olshan would return in four to six months to correct the work.

On November 12, 2003, Olshan sent an engineer to take elevations and a plumber to check for plumbing leaks. The engineer told Gonzales the foundation was functioning properly, and Gonzales believed she was still on a wait list for further work. In early 2004, Olshan returned to fill in the tunnels under Gonzales's home in response to a call by Gonzales's husband.[5] Gonzales again refused to allow Olshan to fill in the tunnels because it had not repaired the foundation.

Gonzales subsequently called Olshan, who sent BEC Engineering, LP (BEC) to inspect the home in July 2005. BEC reported that the foundation was functioning properly. On July 11, 2005,

[5] Gonzales's husband had filed for divorce in August 2003.

Olshan's general counsel notified Gonzales that, "[b]ased on th[e] [BEC] report, no adjustments to the . . . underpinning system are required at this time," and Olshan needed to fill in the tunnels if no further plumbing leaks were detected.

In May 2006, Gonzales noticed more cracking. She hired engineer Jim Linehan to inspect her home, and he determined Olshan improperly repaired the foundation by: (1) not epoxying the cable holding the string of piles together, and (2) failing to drive the piles more than 15 feet deep. In June 2006, Gonzales sued Olshan for, among other things, breach of an express warranty, breach of the common-law warranty of good and workmanlike repairs, and DTPA violations.[6] The jury failed to find that Olshan breached its express warranty, but it found that Olshan did breach the implied warranty of good and workmanlike repairs and engaged in unconscionable actions under the DTPA, causing $101,000 in damages to Gonzales's home.[7] The trial court entered judgment in favor of Gonzales for $101,000, as well as $10,127 in engineering fees and $80,000 in attorney's fees under the DTPA.

The court of appeals reversed, concluding that the implied warranty of good and workmanlike repairs is actionable only under the DTPA, not under the common law, and is therefore governed by the DTPA's two-year statute of limitations. 345 S.W.3d 431, 437. The court further found that Gonzales should have discovered Olshan's acts at the latest in October 2003, when she alleged an Olshan employee told her the work was "the worst job [he had] ever seen." *Id*. at 439

[6] Gonzales also filed breach of contract claims but abandoned them at trial.

[7] The jury also found that Olshan committed fraud and awarded exemplary damages of $2,500. The court of appeals held that there was legally insufficient evidence to support Gonzales's fraud claim, which Gonzales does not contest in this Court. 345 S.W.3d 431, 441.

(alteration in original). Accordingly, the court held that Gonzales's implied warranty and DTPA claims were barred by limitations and did not reach Olshan's remaining arguments, one of which was that the express warranty superseded the implied warranty.[8] We granted Gonzales's petition for review. 55 Tex. Sup. Ct. J. 571, 572 (Tex. Apr. 20, 2012).

II. Discussion

Olshan asserts that its express warranty superseded the implied warranty of good and workmanlike repair, and the jury's finding that Olshan did not breach the express warranty precludes liability on Gonzales's warranty claims.[9] We agree.

Initially, we determine whether Olshan waived its argument that the express warranty supersedes the implied warranty. Gonzales contends that Olshan waived the issue by failing to raise it in the trial court. We disagree. In *Rocky Mountain Helicopters, Inc. v. Lubbock County Hospital District*, Rocky Mountain asserted in a motion to disregard jury findings that no evidence supported the jury's finding of a DTPA violation, which included a ground for failing to perform services in

[8] Olshan's remaining arguments in the court of appeals were: (1) there was no evidence of the reasonable cost of repairs; (2) Gonzales failed to prove a construction defect caused damage; (3) there was no evidence of a misrepresentation, reliance on a misrepresentation, or damages caused by a misrepresentation; and (4) the trial court erred by not submitting a jury question on whether Gonzales wrongfully prevented Olshan from performing warranty work.

[9] Gonzales argues that a breach of the implied warranty of good and workmanlike repairs is actionable under the common law and not only under the DTPA, an issue over which courts have differed. One court of appeals and the Fifth Circuit have held that the implied warranty of good and workmanlike repairs is actionable under the common law and not only under the DTPA. *See Basic Energy Serv., Inc. v. D-S-B Props., Inc.*, 367 S.W.3d 254, 269 n.9 (Tex. App.—Tyler 2011, no pet.); *Walker v. Sears, Roebuck & Co.*, 853 F.2d 355, 363 n.5 (5th Cir. 1988). Four courts of appeals have held that this implied warranty is only actionable under the DTPA. *See* 345 S.W.3d at 437; *Koehler v. Sears, Roebuck & Co.*, No. 05-98-01325-CV, 2001 WL 611453, at *5 (Tex. App.—Dallas June 6, 2001, no pet.); *Foreman v. Pettit Unlimited, Inc.*, 886 S. W.2d 409, 412 (Tex. App.—Houston [1st Dist.] 1994, no pet.); *Darr Equip. Co. v. Allen*, 824 S.W.2d 710, 712 (Tex. App.—Amarillo 1992, writ denied). Because we need not consider the basis for the implied warranty if, as Olshan argues, it was superseded by the express warranty, we address Olshan's argument first.

a good and workmanlike manner. 987 S.W.2d 50, 52 (Tex. 1998). On appeal, Rocky Mountain asserted that no implied warranty arose from the circumstances of the case. *Id*. We held that Rocky Mountain's no-evidence challenge in the post-verdict motion was sufficient to preserve the argument that there was no implied warranty for appeal. *Id*. Here, Olshan objected at the charge conference that there was no evidence to submit the implied warranty question to the jury. We conclude the objection preserved Olshan's argument that no implied warranty exists under the facts of this case. *Id*.

We recognized the existence of "an implied warranty to repair or modify existing tangible goods or property in a good and workmanlike manner" in *Melody Home Manufacturing Co. v. Barnes*, 741 S.W.2d 349, 354 (Tex. 1987). We defined good and workmanlike as "that quality of work performed by one who has the knowledge, training, or experience necessary for the successful practice of a trade or occupation and performed in a manner generally considered proficient by those capable of judging such work." *Id*. at 354.[10] We further held that the implied warranty "may not be waived or disclaimed." *Id*. at 355.

In *Centex Homes v. Buecher*, we addressed the implied warranty of good workmanship in new home construction.[11] 95 S.W.3d 266, 273–74 (Tex. 2002). We noted that the "implied warranty

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[10] *See* COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES: BUSINESS, CONSUMER, INSURANCE & EMPLOYMENT PJC 102.12 (2012) ("Implied Warranty of Good and Workmanlike Performance—Services (DTPA § 17.50(a)(2))[:] Failing to perform services in a good and workmanlike manner. A good and workmanlike manner is that quality of work performed by one who has the knowledge, training, or experience necessary for the successful practice of a trade or occupation and performed in a manner generally considered proficient by those capable of judging such work.").

[11] We recognized the implied warranties of habitability and good and workmanlike construction for new home sales in *Humber v. Morton*, 426 S.W.2d 554, 555 (Tex. 1968).

of good workmanship serves as a 'gap-filler' or 'default warranty'; it applies unless and until the parties express a contrary intention." *Id*. at 273. We held that the implied warranty of good workmanship "attaches to a new home sale if the parties' agreement does not provide how the builder or the structure is to perform." *Id*. Specifically, we stated that, when "the parties' agreement sufficiently describes the manner, performance or quality of construction, the express agreement may supersede the implied warranty of good workmanship." *Id*. at 268.

The *Melody Home* implied warranty of good and workmanlike repair of tangible goods or property—like the implied warranty of good workmanship for a new home in *Buecher*—is a "gap-filler" warranty. *See id*. at 273 (citing to *Melody Home* for the definition of good workmanship). As in *Buecher*, this gap-filler warranty may not be disclaimed but may be superseded if "the parties' agreement sufficiently describes the manner, performance or quality" of the services. *Id*. at 268. In other words, the implied warranty of good and workmanlike repair of tangible goods or property attaches to a contract if the parties' agreement does not provide for the quality of the services to be rendered or how such services are to be performed. *See id*. at 273 ("Thus, the implied warranty of good workmanship attaches to a new home sale if the parties' agreement does not provide how the builder or the structure is to perform.").

Here, the parties' agreement includes two warranty provisions. First, the warranty certificate provides that Olshan would use the Cable Lock system of foundation repair and would adjust the foundation for the life of the home due to settling. Second, the contract provides that Olshan "will perform all the necessary work in connection with this job . . . in a good and workmanlike manner." Gonzales argues that because she did not sign the contract containing the good-and-workmanlike

requirement and the trial court admitted the contract for a limited purpose, we cannot consider the requirement when determining whether the express warranty superseded the implied warranty. We disagree. The trial court stated that it admitted the contract containing the good-and-workmanlike requirement for evidence of "what in [Olshan's] opinion the company was supposed to do on [Gonzales's] behalf." The good-and-workmanlike requirement is fairly characterized as an obligation of Olshan to Gonzales. Thus, we may consider the good-and-workmanlike requirement to determine whether Olshan's obligations under the express warranty superseded the implied warranty.

In total, the warranty provisions required Olshan to repair the foundation with the Cable Lock system, to perform the work in a good and workmanlike manner, and to adjust the foundation due to settling for the life of the home. This warranty language specified the work Olshan was to provide (foundation repair with the Cable Lock system), the manner in which it was to provide it (a good and workmanlike manner), and how the service would perform (that it would not need adjustments for life due to settling, or, if it did, would be adjusted without cost to the owner). Thus, this warranty language "sufficiently describes the manner, performance or quality" of how Olshan and the foundation are to perform so as to supersede the implied warranty of good and workmanlike repair or modification to tangible goods or property.[12] *Buecher*, 95 S.W.3d at 268.

The jury found that Olshan did not breach the express warranty. Instead, the jury found that Olshan breached the implied warranty of good and workmanlike repairs and engaged in

[12] In light of our determination that the express warranty superseded the implied warranty here and bars Gonzales's implied warranty claim, we need not reach Gonzales's argument that the implied warranty is actionable at the common law in addition to the DTPA.

misrepresentations that violated the DTPA. The trial court entered judgment for Gonzales, awarding $101,000 in damages for the implied warranty and DTPA claims, and attorney's fees and engineering fees under the DTPA. Because we have concluded this express warranty superseded the implied warranty of good and workmanlike repairs, the implied warranty cannot serve as a basis for the judgment.

Concerning Gonzales's DTPA claim, the court of appeals held the claim was time-barred because it accrued at the latest in October 2003, when an Olshan employee informed her Olshan was "not doing a good job under the house [and it was] the worst job [he had] ever seen [and she should] find an attorney because [her] house is messed up." 345 S.W.3d at 438–39 (alterations in original). We agree.

The DTPA provides that suits under the chapter "must be commenced within two years after the date on which the false, misleading, or deceptive act or practice occurred or within two years after the consumer discovered or in the exercise of reasonable diligence should have discovered the occurrence of the false, misleading, or deceptive act or practice." TEX. BUS. & COM. CODE § 17.565. In essence, the Legislature codified the discovery rule for DTPA claims. *See KPMG Peat Marwick v. Harrison Cnty. Hous. Fin. Corp.*, 988 S.W.2d 746, 749 (Tex. 1999). We have explained that, "[o]nce a claimant learns of a wrongful injury, the statute of limitations begins to run even if the claimant does not yet know 'the specific cause of the injury; the party responsible for it; the full extent of it; or the chances of avoiding it.'" *Exxon Corp. v. Emerald Oil & Gas Co.*, 348 S.W.3d 194, 207 (Tex. 2011) (quoting *PPG Indus., Inc. v. JMB/Houston Ctrs. Partners Ltd. P'ship*, 146 S.W.3d 79, 93 (Tex. 2004)); *see also KPMG*, 988 S.W.2d at 749 (holding that "accrual occurs when

the plaintiff knew or should have known of the wrongfully caused injury," not when the plaintiff knows "the specific nature of each wrongful act that may have caused the injury").

Here, Olshan repaired the foundation in July 2001. In April 2002, Gonzales noticed cracks in walls and sticking windows and doors. She testified that she knew something was wrong and that the foundation was shifting. Gonzales further testified that when Olshan was re-leveling the foundation in October 2003, an Olshan employee informed her that "[t]hey are not doing a good job under the home. . . . In fact, it's the worst job I have ever seen" and that "[i]f I were you, I would find an attorney because your house is messed up." Gonzales purchased a camera for the employee to document the defective work, but the same day, "the camera was missing." Gonzales testified that she heard the foreman instruct the crew not to speak to her and that "[a]nybody taking pictures is going to be fired on the spot." Gonzales's exchange with the Olshan employee conclusively established that she knew of the injury in October 2003, without regard to whether she knew the specific nature of each of Olshan's wrongful acts that caused her injury. *See KPMG*, 988 S.W.2d at 750. Gonzales filed suit on July 6, 2006, over two years and eight months later.[13] Absent the application of an equitable tolling doctrine, the evidence conclusively established that Gonzales's DTPA claims are time barred because she brought them more than two years after discovering her injury. *See KPMG*, 988 S.W.2d at 750; TEX. BUS. & COM. CODE § 17.565.

Gonzales contends that Olshan engaged in fraudulent concealment, making her claim timely. We disagree. The doctrine of fraudulent concealment tolls limitations "because a person cannot be

[13] The record is not clear on what specific date in October 2003 the exchange between Gonzales and the Olshan employee occurred. Even assuming it occurred on the last day of October 2003, it was more than two years and eight months before Gonzales filed suit.

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). The DTPA establishes a 180-day limit on tolling for fraudulent concealment. TEX. BUS. & COM. CODE § 17.565 (providing that limitations "may be extended for a period of 180 days if the plaintiff proves that failure timely to commence the action was caused by the defendant's knowingly engaging in conduct solely calculated to induce the plaintiff to refrain from or postpone the commencement of the action"). Even if limitations were tolled for 180 days on Gonzales's DTPA claims, they would still have been filed at least two months late.

Gonzales also argues that the common-law doctrine of fraudulent concealment tolls limitations for DTPA claims and is not limited to 180 days as required by the DTPA limitations statute. We have previously rejected a similar argument. In *Underkofler v. Vanasek*, the plaintiff brought common-law and DTPA claims for legal malpractice against his law firm. 53 S.W.3d 343, 345 (Tex. 2001). We held that the common-law rule tolling limitations for legal malpractice claims until the underlying litigation concluded does not apply to DTPA claims. *Id*. at 346. We pronounced that the Legislature crafted only two exceptions to the rule that DTPA limitations begin to run when the injury occurs: the discovery rule and the fraudulent concealment rule (both specified in section 17.565 of the Business and Commerce Code). *Id*. at 346. Just as section 17.565 forecloses the application of the common-law tolling rule to legal malpractice claims under the DTPA, it forecloses the application of the common-law doctrine of fraudulent concealment to DTPA claims. The Legislature could have incorporated the common-law doctrine of fraudulent concealment into the DTPA's limitations provision. Instead, it only incorporated the discovery rule and a version of the

fraudulent concealment doctrine limited to 180 days, and "we will not rewrite the statute to add . . . a third" exception. *Id*. The common-law doctrine of fraudulent concealment does not apply to Gonzales's DTPA claim, and it is time barred.

III. Conclusion

The implied warranty of good and workmanlike repair or modification to tangible goods or property is a "gap filler" warranty that implies terms into a contract that fails to describe how the party or service is to perform. Although the parties cannot disclaim this warranty outright, an express warranty in their contract can fill the gaps covered by the implied warranty and supersede it if the express warranty specifically describes the manner, performance, or quality of the services. Here, the parties agreed that Olshan would perform the work in a good and workmanlike manner, would use the Cable Lock foundation repair system, and would adjust the foundation for the life of the home if the foundation settled. This express warranty sufficiently describes the manner, performance, and quality of the services so as to supersede the implied warranty. Because the jury found that Olshan did not breach the express warranty, Gonzales cannot prevail on her warranty claims. Gonzales's only remaining claim is under the DTPA. Because Gonzales learned of her injury directly from Olshan more than two-and-one-half years before she filed suit, her DTPA claim is barred by limitations, even assuming the application of the DTPA's 180-day tolling provision for fraudulent concealment. We affirm the judgment of the court of appeals.

Eva M. Guzman
Justice

OPINION DELIVERED: March 29, 2013

IN THE SUPREME COURT OF TEXAS

NO. 11-0312

THE STATE OF TEXAS AND THE TEXAS DEPARTMENT OF TRANSPORTATION, PETITIONERS,

v.

NICO-WF1, L.L.C., RESPONDENT

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

Argued October 16, 2012

JUSTICE MEDINA delivered the opinion of the Court.

JUSTICE JOHNSON did not participate in the decision.

This appeal questions the validity of certain conditions a grantor placed on a dedicated public-street easement. The easement in question provides for a 100-foot-wide public right of way, but the instrument dedicating the land also provides that the street's curb lines are to be fifteen feet inside the street's boundary lines. The issue is whether this curb-line condition limits the dedication such that only the seventy-foot area between the curb lines can be used for vehicular traffic.

The court of appeals concluded that the curb-line condition effectively limited the public easement in this way. ___ S.W.3d ___ (Tex. App.–Corpus Christi-Edinburg 2010) (mem. op.). The court further suggested that the State would have to use its eminent domain powers, if the public

roadway needed to be improved or widened beyond the existing curb lines. We do not agree, however, that the State must condemn property already dedicated for a public street before widening the existing roadway. Because we conclude that the State has the right to improve the existing roadway to the boundary of the dedicated street line notwithstanding the curb-line condition, we reverse the court of appeals' judgment and remand the case to the trial court.

I

NICO-WF1, L.L.C., owns a building that fronts Arroyo Boulevard in Los Fresnos, Texas. The building has been there since the 1930s. Part of the building—primarily its attached concrete awning, columns, raised porch, and steps—extends several feet into Arroyo Boulevard's 100-foot public right of way. No part of the building, however, intrudes beyond the boulevard's curb line, which is fifteen feet inside the outer edge of the dedicated street line.

Since 1951, Arroyo Boulevard has been a part of the state highway system, designated as FM 1847. While considering proposed improvements to FM 1847, the Texas Department of Transportation (TxDOT) discovered that NICO's building encroached about ten feet onto the public right of way. In 2007, TxDOT officially asked NICO to abate the encroachment. When NICO failed to remedy the situation, the State and TxDOT filed suit. NICO answered and filed a counterclaim for declaratory judgment, asserting that its building did not encroach on Arroyo Boulevard because the public dedication limited the road's width to the existing curb line. NICO also sought award of its attorney's fees and costs, as did the State.

The streets of Los Fresnos were dedicated to public use in 1928. The dedication incorporated a recorded subdivision plat, titled "Map of Unit A of the Townsite of Fresnos," which showed

Arroyo Boulevard and the town's other streets. The plat specified the width of the various streets and indicated where the curb lines should be placed in relation to those streets' outer boundary lines. Regarding Arroyo Boulevard, the dedication provided that its boundary lines were to be 100 feet apart with curb lines fifteen feet inside the outer boundaries, leaving seventy feet between the curb lines.

NICO interprets the dedication to include a seventy-foot public roadway easement bounded on either side by a fifteen-foot public right-of-way easement. The State, however, contends that Arroyo Boulevard has been dedicated as a 100-foot-wide public street.

Both the State and NICO filed motions for partial summary judgment, urging their respective interpretations. The trial court denied the State's motion and granted NICO's, concluding that "the right-of-way easement for public roadway purposes . . . of Arroyo Boulevard (now FM 1847)" was subject to a curb line condition that limited "the width of the roadway to a maximum of seventy feet" and that NICO's building was therefore "not an encroachment into the right-of-way easement [the State] was entitled to use and possess for public roadway purposes[.]" The issue of NICO's attorney's fees was tried to the court. The court's final judgment incorporated its rulings on the two summary judgment motions and its award of attorney's fees to NICO.

The court of appeals affirmed the trial court's judgment. ___ S.W.3d ___. The court of appeals also held that the State's public easement for the roadway was limited to the seventy feet between the curb lines. *Id*. at ___. The court of appeals further concluded that NICO's building did not encroach on the public right of way because the fifteen feet between the curb and outer street

lines "was not dedicated for any public use whatsoever." *Id*. The State filed a petition for review challenging those holdings.

II

While the court of appeals concludes that the public easement ends at Arroyo Boulevard's curb line, NICO concedes here that it does not. The State similarly argues that the dedication creating Arroyo Boulevard includes the fifteen feet beyond the curb lines notwithstanding the court of appeals' conclusion to the contrary. We agree with the parties that the dedication here established a 100-foot street easement for Arroyo Boulevard, not the seventy-foot easement the court of appeals found.

A street dedication is setting land apart for public use as a passageway. *See City of Uvalde v. Stovall*, 279 S.W. 889, 890 (Tex. Civ. App.–San Antonio 1925, writ ref'd). When a street is dedicated to the public, the governmental entity taking control of the street ordinarily acquires only an easement that it holds in trust for public benefit. *Humble Oil & Ref. Co. v. Blankenburg*, 235 S.W.2d 891, 893 (Tex. 1951). The easement, however, carries with it the right to use and control as much of the surface and subsurface of the street as may be reasonably needed for street purposes. *Hill Farm, Inc. v. Hill Cnty.*, 436 S.W.2d 320, 321 (Tex. 1969). These purposes, of course, include transporting people and property, but a public street may also be used as a passageway for utilities and other public purposes. *Harris Cnty. Flood Control Dist. v. Shell Pipe Line Corp.*, 591 S.W.2d 798, 799 (Tex. 1979).

In short, a street includes the whole width of the public right of way. *Joseph v. City of Austin*, 101 S.W.2d 381, 385 (Tex. Civ. App.–Austin 1936, writ ref'd). It includes sidewalks and

parkways, which "are a part of the street itself." *Jones v. City of Mineola*, 203 S.W.2d 1020, 1022 (Tex. Civ. App.–Texarkana 1947, writ ref'd); *see also City of San Antonio v. Wildenstein*, 109 S.W. 231, 233 (Tex. Civ. App.–San Antonio 1908, writ ref'd) ("Sidewalks are uniformly regarded as part of the street."). And it includes "the pavement, shoulders, gutters, curbs, and other areas within the street lines." BLACK'S LAW DICTIONARY 1434 (7th ed. 1999). The Transportation Code similarly defines a street as more than a mere roadway for vehicular traffic.[1]

The Los Fresnos townsite plat clearly set Arroyo Boulevard's boundary lines 100 feet apart. The curb-line condition did not purport to alter the street's outer boundaries, nor did it serve to reduce the area dedicated for the public street. The court of appeals accordingly erred in concluding that the public-street easement was defined by a curb-line condition rather than the street's boundary line as dedicated.

III

Although NICO concedes that the public right of way here is 100 feet, it nevertheless contends that the grantor did not intend to dedicate the public easement entirely for vehicular traffic. It submits that the grantor limited the State's use of the entire easement for this purpose through the curb-line condition. NICO thus concludes that the State holds a 100-foot-wide right-of-way easement subject to a condition, which limits the easement's use as a roadway to seventy feet.

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[1] TEX. TRANSP. CODE § 316.001(1) ("'Municipal street' means the entire width of way held by a municipality in fee or by easement or dedication that has a part open for public use for vehicular travel."); *Id*. § 316.001(3) ("'Sidewalk' means the portion of a municipal street between the curb lines or lateral lines of a roadway and the adjacent property lines that is improved and designed for or is ordinarily used for pedestrian travel."); *Id*. § 541.302(5) ("'Highway or street' means the width between the boundary lines of a publicly maintained way any part of which is open to the public for vehicular travel."); *Id*. § 541.302(16) ("'Sidewalk' means the portion of a street that is: (A) between a curb or lateral line of a roadway and the adjacent property line; and (B) intended for pedestrian use.").

The State, of course, disagrees about the condition's effect, although it does not dispute that the grantor probably intended limiting vehicular traffic to only a part of the easement. But even assuming that to be the grantor's intent, the fact remains that he dedicated the entire 100-foot area to public use as a street. The State argues that reading the curb-line condition to limit its authority over the entire public street easement contravenes well-established public policy to the contrary.

The establishment, design, construction, and control of public streets are primarily governmental functions over which the government has full authority. *See Tex. Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 645 (Tex. 2004) (quoting *Robbins v. Limestone Cnty.*, 268 S.W. 915, 918 (Tex. 1925) ("Public roads are state property over which the state has full control and authority.")); *see also Mission v. Popplewell*, 294 S.W.2d 712, 715 (Tex. 1956) ("[T]he legal title to city streets belongs to the state, which has full control and authority over them[.]"). As mentioned, Arroyo Boulevard is now a part of the state highway system. By statute, the Texas Department of Transportation has "exclusive and direct control of all improvement of the state highway system." TEX. TRANSP. CODE § 224.031(a).

Texas courts have long recognized, however, that dedicating land for public use may include reasonable restrictions and limitations. *Griffith v. Allison*, 96 S.W.2d 74, 77 (Tex. 1936). But limitations imposed by the dedicator cannot be "repugnant to the dedication or against public policy." *Roaring Springs Town-Site Co. v. Paducah Tel. Co.*, 212 S.W. 147, 148-49 (Tex. 1919) (holding void a restriction reserving to the dedicator the exclusive right to construct telephone lines in the public right of way); *see also Scott v. Cannon*, 959 S.W.2d 712, 718 (Tex. App.–Austin 1998, pet. denied) (noting that owner of dedicated land "reserves no rights that are incompatible with the

full enjoyment of the public"). When a dedication includes a condition that is inconsistent with the grant or contravenes public policy, the dedication is nevertheless effective even though the condition is not. *See City of Fort Worth v. Ryan Props., Inc.*, 284 S.W.2d 211, 214 (Tex. Civ. App.–Fort Worth 1955, no writ).

The 1928 dedication here purported to reserve a number of rights to the grantor, such as:

> [T]he right to occupy and use said streets, boulevards and alleys for purposes of constructing, maintaining and operating ditches, gutters, pipe-lines and culverts, and other appurtenances for drainage purposes, pipelines and conduits with necessary appurtenances for the distribution and sale of water, gas or oil for railroads or other lines of transportation for the carriage of freight or passengers, for lines of poles and wires, or conduits, or the purposes of the distribution and sale of light or power, and for telephone or telegraph purposes.

The grantor further reserved the right "to excavate and grade and otherwise improve all streets, boulevards and alleys and to temporarily interfere with the use of same while so doing." Most if not all of these reservations are inconsistent with the dedication to the public. *See, e.g.*, *City of Beaumont v. Calder Place Corp.*, 183 S.W.2d 713, 716 (Tex. 1944) (holding grantor's reservation of ownership and control of water and sewer mains void after annexation by city); *Roaring Springs Town-Site Co.*, 212 S.W. at 148-49 (rejecting dedicator's reservation to use streets to construct telephone, telegraph, and electric poles and wires as void and repugnant to the public dedication); *Harlingen Irrigation Dist. Cameron Cnty. No. 1 v. Caprock Comm. Corp.*, 49 S.W.3d 520, 532 (Tex. App.—Corpus Christi 2001, pet. denied) (holding invalid a condition requiring that any improvements to the public roadway be approved by the dedicator); *accord W. Tex. Utils. Co. v. City of Spur*, 38 F.2d 466 (5th Cir. 1930) (denying control of public streets and right of ways to private electric utility for installation of poles and lines).

The substantive principle from these cases is that a grantor cannot dedicate land for a public purpose and yet retain control over such land in derogation of the public right conveyed. The question in this case is whether the curb-line condition violates this principle. Under NICO's application of the condition, we conclude that it does.

NICO interprets the curb-line condition as freezing the public's use of the street to when it was dedicated. But the public's future use of a street easement is not dependent on the usage prevailing when the street opened. *See City Comm'rs of Port Arthur v. Fant*, 193 S.W. 334, 345 (Tex. Civ. App.–Beaumont 1916, no writ). Moreover, the public right extends to the entire width of the dedicated street, *Joseph*, 101 S.W.2d at 385, and includes portions not previously used or used for other street purposes. *See Ryan Props.*, 284 S.W.2d at 213. Whenever public convenience or necessity dictates, a public right of way may be put to its dedicated purpose. *Joseph*, 101 S.W.2d at 384. Clearly, an eighty-four-year-old condition purporting to fix the curb lines permanently in Los Fresnos, Texas, is a restriction that impairs state control and public use of the dedicated street. *See McCraw v. City of Dallas*, 420 S.W.2d 793, 796 (Tex. Civ. App.–Dallas 1967, writ ref'd n.r.e.) ("Land dedicated for the use of the public as a street may continue to be used by the public as a street, not only in the manner in which streets are ordinarily used at the time of dedication, but also to accommodate the most recently invented vehicles and to conform to modern plans for traffic acceleration and control.").

The circumstances here are not unlike those in another case decided by this same court of appeals. *See Harlingen Irrigation Dist.*, 49 S.W.3d 520. In that case, the deed conveying the public easement contained a restriction that required the grantor's approval of any construction on the

easement. *Id*. at 532. The court of appeals held the condition void because it "interfer[ed] with the state's freedom to devote the roadways to the wants and convenience of the public" and "impermissibly limit[ed] the state from exercising its jurisdiction as to construction on the roadway." *Id*. at 532, 534. The curb-line condition in this case presents a similar impediment to the State's control and authority over Arroyo Boulevard. And when a condition in the street's dedication is inconsistent with the grant or void as against public policy, the dedication prevails over the invalid condition. *Town of Palm Valley v. Johnson*, 17 S.W.3d 281, 287 (Tex. App.–Corpus Christi 2000), pet. denied, 87 S.W.3d 110 (Tex. 2001) (per curiam); *Ryan Props.*, 284 S.W.2d at 214.

Because the curb-line condition purports to control the construction and use of Arroyo Boulevard, it is repugnant to the State's control and authority over the public street and is void. The court of appeals accordingly erred in affirming NICO's favorable judgment premised on the condition's assumed validity.

IV

Finally, the matter of the State's motion for summary judgment remains. The State asserted in its motion that a part of NICO's building interfered with the public's use of FM 1847, constituting an obstruction and nuisance the State was entitled to remove. Indeed, any structure that interferes with the public's present or future use of a dedicated street is a nuisance per se and subject to removal. *Joseph*, 101 S.W.2d at 384; *Ryan Props.*, 284 S.W.2d at 215.

A few years before Arroyo Boulevard's dedication, a Texas appellate court aptly discussed the law's intolerance of encroachments upon the public right of way:

> [A]ny permanent structure or purpresture which materially encroaches upon a public street and impedes travel is a nuisance per se, and may be abated, notwithstanding space is left for the passage of the public. This is the only safe rule, for, if one person can permanently use a highway for his own private purposes, so may all, and if it were left to the jury to determine in every case how far such an obstruction might encroach upon the way without being a nuisance, there would be no certainty in the law and what was at first a matter of a small consequence would soon become a burden, not only to adjoining owners, but to all the taxpayers and the traveling public as well. Thus expediency forbids any other rule.

Dozier v. City of Austin, 253 S.W. 554, 556 (Tex. Civ. App.–San Antonio 1923, writ dism'd w.o.j.). That NICO's building encroaches several feet upon Arroyo Boulevard's 100-foot-wide public easement is not in dispute. The court of appeals accordingly erred in affirming the denial of the State's summary judgment motion that sought the removal of the purpresture.[2]

* * * * *

The court of appeals' judgment is reversed. Because the State's summary judgment motion does not dispose of all issues raised by its pleadings, the cause is remanded to the trial court for further proceedings consistent with this opinion.

David M. Medina
Justice

Opinion delivered: November 2, 2012

[2] A purpresture is "an encroachment upon public rights and easements, the appropriation to private use of that which belongs to the public." *Hill Farm*, 436 S.W.2d at 321.

IN THE SUPREME COURT OF TEXAS

NO. 11-0332

ROBERT MASTERSON, MARK BROWN, GEORGE BUTLER, CHARLES WESTBROOK, RICHEY OLIVER, CRAIG PORTER, SHARON WEBER, JUNE SMITH, RITA BAKER, STEPHANIE PEDDY, BILLIE RUTH HODGES, DALLAS CHRISTIAN, AND THE EPISCOPAL CHURCH OF THE GOOD SHEPHERD, PETITIONERS,

v.

THE DIOCESE OF NORTHWEST TEXAS, THE REV. CELIA ELLERY, DON GRIFFIS, AND MICHAEL RYAN, RESPONDENTS

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

Argued October 16, 2012

JUSTICE JOHNSON delivered the opinion of the Court, in which JUSTICE HECHT, JUSTICE GREEN, JUSTICE GUZMAN, and JUSTICE DEVINE joined, and in parts I, II, III-A, and V of which JUSTICE WILLETT and JUSTICE BOYD joined.

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

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

The question before us is what happens to the property when a majority of the membership of a local church votes to withdraw from the larger religious body of which it has been a part. In this case, title to property of the local church is held by a Texas non-profit corporation originally named The Episcopal Church of the Good Shepherd (corporation or Good Shepherd). The corporation was

formed as a condition of Good Shepherd's congregation being accepted into union with the Episcopal Diocese of Northwest Texas (Diocese). When members of the congregation became divided over doctrinal positions adopted by The Episcopal Church of the United States (TEC), a majority of the parishioners voted to amend Good Shepherd's articles of incorporation and bylaws to withdraw Good Shepherd from communion with TEC and the Diocese and revoke any trusts on the corporation's property in favor of those entities. The corporation and the withdrawing faction of parishioners maintained possession of the property.

The Diocese and leaders of the faction of parishioners loyal to the Diocese and TEC filed suit seeking title to and possession of the property. The trial court eventually granted summary judgment in favor of the loyal faction. The court of appeals affirmed.

The first issue we confront is the legal methodology to be applied. At least two are permissible under the First Amendment to the United States Constitution: "deference" and "neutral principles of law" (neutral principles). The court of appeals held that Texas courts may use either. We conclude that greater predictability in this area of the law will result if Texas courts apply only one methodology. We also conclude that the neutral principles methodology should be applied because it better conforms to Texas courts' constitutional duty to decide disputes within their jurisdiction while still respecting limitations the First Amendment places on that jurisdiction. Under the neutral principles methodology, courts decide non-ecclesiastical issues such as property ownership based on the same neutral principles of law applicable to other entities, *Jones v. Wolf*, 443 U.S. 595, 603-04 (1979), while deferring to religious entities' decisions on ecclesiastical and church polity questions. *See Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708 (1976).

Applying neutral principles of law to the record before us, we conclude that the trial court erred by granting summary judgment and the court of appeals erred by affirming. We reverse the judgment of the court of appeals and remand the case to the trial court for further proceedings.

I. Background

A. Episcopal Good Shepherd

In 1961 individuals purchased a tract of land in San Angelo (1961 tract) and donated it to the Northwest Texas Episcopal Board of Trustees (Trustees). The donation was for the purpose of establishing a mission church. In 1965 a group of worshipers filed an application with the Diocese to organize a mission to be named "The Episcopal Church of the Good Shepherd" (the Church). The Diocese eventually approved the application and TEC made loans and grants to the Church to assist its growth. The bishop of the Diocese ultimately approved plans for a building, presided over the groundbreaking ceremony, then formally dedicated the building. In 1969 individuals purchased another tract of land (1969 tract) that was adjacent to the 1961 tract and donated it to the Trustees.

In March 1974 the Church applied to the Diocese for parish status. It was formally accepted into union with the Diocese at the Diocese's annual convention in April 1974. That same year, in conformance with canons of the Diocese which required parishes to be corporations, the Church incorporated under the Texas Non-Profit Corporations Act. *See* TEX. REV. CIV. STAT. art. 1396. The corporation's bylaws provided that the corporation would be managed by a Vestry elected by

members of the parish.[1] The bylaws prescribed qualifications for voting at parish meetings[2] and specified that amendments to the bylaws would be by majority vote.[3]

In 1982 the Trustees conveyed the 1961 and 1969 tracts to the corporation by warranty deed. In 2005 two individuals sold a tract of land (the 2005 tract) to Good Shepherd. The tract was conveyed to the corporation by warranty deed with a vendors lien to secure a purchase-money note executed by the corporation. Neither the 1982 deed from the Trustees nor the 2005 deed provided for or referenced a trust in favor of TEC or the Diocese.

B. Schism

Due to doctrinal differences with TEC, some members of the parish proposed disassociating from TEC and organizing as an independent church under the name "Anglican Church of the Good Shepherd" (withdrawing faction). The parish held a called meeting on November 12, 2006, during

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[1] Article VI of the Articles of Incorporation addressed election of the Vestry:

> Article VI
>
> The number of vestrymen constituting the initial vestry of the corporation is nine . . . .
> The vestrymen named in these Articles of Incorporation as the first vestry of the Episcopal Church of the Good Shepherd shall hold office in accordance with the Church Canons until the expiration of their duly elected terms of office. At the expiration of the term of office of each member of the vestry, successors will be elected at the annual meeting of the members of the parish with the duly elected vestry-men serving in staggered terms of three years each.

[2] Those qualified to vote at Parish meetings were "communicants of the Parish, as shown on the Parish register, who are at least sixteen (16) years of age and are baptized members of the congregation who are regular contributors as shown by the Treasurer's records."

[3] Provisions for amending the bylaws were as follows:

> These By-Laws may be amended at an Annual Parish Meeting or at a special meeting called for that purpose by a majority vote of the duly qualified voters of the Parish. Notice of the proposed amendments shall be given to all qualified voters in writing at least thirty (30) days before such meeting. A majority vote of the duly qualified voters of the Parish will be necessary to approve an amendment to these By-Laws.

which four resolutions were presented. The resolutions were to (1) amend the corporate bylaws to, among other changes, remove all references to TEC and the Diocese; (2) withdraw the local congregation's membership in and dissolve its union with TEC and the Diocese; (3) revoke any trusts that may have been imposed on any of its property by TEC, the Diocese, or the Trustees; and (4) form a new church named Anglican Church of the Good Shepherd and change the name of the corporation to that name. The resolutions passed by a vote of 53 to 30. The stated effective date of the vote was January 5, 2007. Amended articles of incorporation changing the corporate name to Anglican Church of the Good Shepherd were then filed. *See* TEX. BUS. ORGS. CODE §§ 3.052–.053, 22.106 (providing procedures for amending certificate of formation of a non-profit corporation).

After the parish vote, but before the effective date, the Diocese's Bishop, Rev. Wallis Ohl, took the position that Good Shepherd could not unilaterally disassociate from the Diocese and that the vote did not have any effect on Good Shepherd's relationship with the Diocese or TEC. He held a meeting with the faction of the parish loyal to TEC and the Diocese and appointed Rev. Celia Ellery as Priest-in-Charge of the Parish. Under the leadership of Rev. Ellery, the loyal faction elected a vestry and was recognized by Bishop Ohl as the "continuing Episcopal Parish operating Good Shepherd."

The withdrawing faction continued to use the parish property, so two vestry members of the loyal faction together with Rev. Ellery and the Diocese (collectively, Episcopal Leaders) filed suit against leaders of the withdrawing faction and the Good Shepherd corporation (collectively, Anglican Leaders). The Episcopal Leaders sought a declaratory judgment that (1) Good Shepherd's

property could not be alienated or used by the Anglican Leaders for any purpose other than the mission of TEC; (2) the continuing Parish of the Good Shepherd was represented by those persons recognized by the Bishop as the loyal faction; (3) the actions of the Anglican Leaders in seeking to sever ties between Good Shepherd, the Diocese, and TEC were void; and (4) all the parish property was held in trust for TEC and the Diocese and the Episcopal Leaders were entitled to possess and control it.[4] In their pleadings the Episcopal Leaders based their claim to the property on the allegation that: "According deference to the Bishop, Plaintiffs assert that they are entitled to title, possession and use of all real and personal property belonging to the GOOD SHEPHERD, including the CHURCH PREMISES."

The Anglican Leaders answered and filed a counterclaim seeking judgment quieting title to the property in the Anglican Church of the Good Shepherd, a Texas non-profit corporation, and removing any cloud to the title created by the Episcopal Leaders' claims. The Anglican Leaders asserted that under Texas law the non-profit corporation held unencumbered title to the property; the individual Anglican Leaders had been elected as the corporation's vestry in accordance with the corporate Articles of Incorporation and bylaws; the Episcopal Leaders had no right or authority to act on behalf of the corporation; and the Episcopal Leaders' claims were barred by statutes of frauds. *See* TEX. BUS. & COM. CODE § 26.01; TEX. PROP. CODE §112.004.

The Episcopal Leaders moved for summary judgment. They asserted that TEC is a hierarchical church; its Canons and rules provide that all property of a Parish is held in trust for use

[4] The Episcopal Leaders also sought an accounting for funds and personal property of the Parish being held by defendants and damages for conversion of Parish personal property and funds. Those claims were non-suited before summary judgment was granted.

of TEC and the respective Diocese; when congregations of hierarchical churches split, Texas courts defer to the decisions of the church's superior hierarchical authority as to which faction comprises the true church; the members loyal to TEC have been recognized by the Diocese's Bishop as the true church; and the parish property is held in trust for TEC and the Diocese. In both their motion and reply to the Anglican Leaders' response, the Episcopal Leaders maintained that "[t]he sole legal issue is whether or not the Episcopal Church is hierarchical." They did not plead or assert as grounds for summary judgment that they were entitled to the property on the grounds that application of neutral principles of law mandated summary judgment in their favor, although in reply to the Anglican Leaders' response to their motion for summary judgment, the Episcopal Leaders argued that they were entitled to the property under both deference and neutral principles analyses.

The trial court granted the Episcopal Leaders' motion. It made several findings in its order, including a finding that TEC is a hierarchical church. The court declared and ordered that (1) "the continuing Parish of the Good Shepherd is identified as and represented by those persons recognized by the Bishop of the [Diocese]"; (2) the actions of the Anglican Leaders in seeking to withdraw Good Shepherd as a Parish of the Diocese and from TEC were void; (3) the Anglican Leaders could not "divert, alienate, or use" Parish property except for the mission of TEC; and (4) all the property of Good Shepherd is held in trust for TEC and the Diocese. The court ordered the Anglican Leaders to relinquish control of the property to the Vestry of the faction recognized by Bishop Ohl as The Episcopal Church of the Good Shepherd.

The Anglican Leaders appealed and the court of appeals affirmed. 335 S.W.3d 880. It held that Texas courts may analyze disputes such as these under either the deference or neutral principles

methodologies. It analyzed the case under both and reached the same conclusion: the summary judgment should be affirmed. *Id.* at 892. The appeals court concluded that when the withdrawing faction voted to disaffiliate from TEC, the vote was only effective as to those parishioners who withdrew and who were free to join the Anglican community; the vote did not withdraw Good Shepherd itself from TEC, and therefore, the church property remained under the authority and control of TEC. *Id.* at 892-93.

In this Court the Anglican Leaders primarily argue that the proper approach to dealing with church property disputes in Texas is the neutral principles methodology because that methodology, at bottom, simply allocates decisions to the proper forum: ecclesiastical decisions are made by the church and secular decisions are made by courts. They urge that the court of appeals' classification of this dispute as an inherently ecclesiastical question of identity—*i.e.*, which parishioners comprise the continuing Episcopal parish—ignores the fact that there is a Good Shepherd non-profit corporation controlled by its members; the Bishop of the Diocese has no authority to determine affairs of the corporation, including who its members are and who comprises its Vestry; a majority of those qualified to vote in corporate matters voted to amend the corporate governing documents and disassociate the corporation from the Diocese and TEC; and under Texas law and the corporate bylaws the majority vote prevails. Not wanting to put all their eggs in the neutral principles basket, the Anglican Leaders also argue that even if the case is analyzed under the deference approach, the judgment of the court of appeals must be reversed. They assert that the deference approach is predicated on a church organization having superior ecclesiastical tribunals with control over the specific dispute, and because neither TEC nor the Diocese have such tribunals, there is no basis to

afford deference to decisions of either of those entities. Finally, the Anglican Leaders contend that the effect of the court of appeals' decision is to deny the right of a non-profit corporation to withdraw from an association with another entity when the corporate documents do not preclude its doing so, a majority of its voting members desire to do so, and its elected leadership desires to do so. That, they argue, violates its rights under the First Amendment to the United States Constitution.

The Episcopal Leaders respond that Good Shepherd is bound by the Canons and Constitution of TEC because Episcopal Good Shepherd is and always has been part of TEC's hierarchical structure. They argue that the only question to be decided by civil courts is the identity of the body of believers comprising the true faction continuing Episcopal Good Shepherd, and that question must be answered by deferring to the decision of TEC and the Diocese because it is a matter of church polity and administration. They urge that in the past Texas has embraced the "identity" approach to church property disputes involving hierarchical churches and should continue to do so. As do the Anglican Leaders, the Episcopal Leaders offer an alternative argument. They say that even under a neutral principles analysis, the judgment of the court of appeals should be affirmed because the Constitution, Canons, and other rules of TEC and the Diocese provide that the property is held in trust for TEC and the Diocese.

Because arguments of the parties reference the organizational structure of TEC, we briefly review it.

C. Organizational Structure

TEC is a religious denomination founded in 1789. It has three tiers. The first and highest is the General Convention. The General Convention consists of representatives from each diocese and

most of TEC's bishops. It adopts and amends TEC's Constitution and Canons, which establish the structure of the denomination and rules for how it operates. Each subordinate Episcopal affiliate must accede to and agree to be subject to the TEC Constitution and Canons.

The second tier is comprised of regional, geographically defined dioceses. Dioceses have bishops and are governed by their own conventions. Diocesan conventions adopt and amend a constitution and canons for each particular diocese.

The third tier is comprised of local congregations. Local congregations are classified as parishes, missions, or congregations. To be accepted into union with TEC they must accede to and agree to be subject to the constitutions and canons of both TEC and the diocese in which the congregation is located.

This case involves a parish. A parish is governed by a rector or priest-in-charge and a vestry comprised of lay persons elected by the parish members. Members of the vestry must meet certain qualifications, including committing to "conform to the doctrine, discipline and worship of The Episcopal Church."

II. Who Decides What

Good Shepherd corporation's bylaws prescribe who can vote when vestry members are elected, how the corporation's vestry is elected, who can vote on proposed amendments to the bylaws, and how the bylaws and articles of incorporation are amended. The essential issue presented is whether either (1) the decision by Bishop Ohl to recognize the Episcopal Leaders and the loyal faction as the vestry and members of the continuing Good Shepherd Parish served to establish those vestry members as the vestry of the corporation and the loyal faction as the voters entitled to vote on

corporate matters when neither the articles of incorporation nor the bylaws afforded him that authority; or (2) his decision determined who was entitled to the corporation's property regardless of the decisions of elected leaders of the corporation and persons specified by the corporate bylaws as qualified to vote on corporate affairs. In addressing the issue we are guided by two principles. The first is that a court has no authority to decide a dispute unless it has jurisdiction to do so. *See, e.g.*, *In re United Servs. Auto. Ass'n*, 307 S.W.3d 299, 309 (Tex. 2010). The second is that Texas courts are bound by the Texas Constitution to decide disputes over which they have jurisdiction, and absent a lawful directive otherwise they cannot delegate or cede their judicial prerogative to another entity. *See Morrow v. Corbin*, 62 S.W.2d 641, 645 (1933) ("We are equally clear that the power thus confided to our trial courts [by the Constitution] must be exercised by them as a matter of nondelegable duty, that they can neither with nor without the consent of parties litigant delegate the decision of any question within their jurisdiction, once that jurisdiction has been lawfully invoked, to another agency or tribunal.") (citations omitted).

A. Jurisdiction In Church Property Disputes

The Free Exercise clause of the First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I. The clause "severely circumscribes the role that civil courts may play in resolving church property disputes," *Presbyterian Church v. Hull Church*, 393 U.S. 440, 449 (1969), by prohibiting civil courts from inquiring into matters concerning "'theological controversy, church discipline, ecclesiastical government, or the conformity of the members of a church to the standard of morals required of them.'" *Milivojevich*, 426 U.S. at 713-14 (quoting

Watson v. Jones, 80 U.S. 679, 733 (1872)). The First Amendment is applicable to the states through the Fourteenth Amendment. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

Attempts by courts to resolve church property disputes while balancing the competing interests of property rights and the First Amendment's Free Exercise provision have resulted in two general approaches to the issue. They are typically referred to as the "neutral principles of law" approach and the "deference" or "identity" approach. *See, e.g.*, *Jones v. Wolf*, 443 U.S. 595, 602-10 (1979) (discussing both approaches to church property disputes). The First Amendment does not require states to follow a particular method of resolving church property disputes; rather, "a State may adopt *any* one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith." *Id.* at 602 (citing *Md. & Va. Eldership of Churches of God v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367, 368 (1970) (Brennan, J., concurring)) (emphasis in original).

1. Deference

The Supreme Court recently elaborated on its decision in *Watson*, which is often cited as the seminal case regarding the "deference" or "identity" approach in church property dispute cases:

> In [*Watson*], the Court considered a dispute between antislavery and proslavery factions over who controlled the property of the Walnut Street Presbyterian Church in Louisville, Kentucky. The General Assembly of the Presbyterian Church had recognized the antislavery faction, and this Court—applying not the Constitution but a "broad and sound view of the relations of church and state under our system of laws"—declined to question that determination. *Id.* at 727. [The Court] explained that "*whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of [the] church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them.*" *Ibid*. As [the Court] would put it later, [the] opinion in *Watson* "radiates . . . a spirit of freedom for religious organizations, an independence from

> secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94 (1952).

Hosana-Tabor Evangelical Lutheran Church and School v. Equal Emp't Opportunity Comm'n, ___ U.S. ___, 132 S.Ct. 694, 704 (2012) (emphasis added); *see also Jones*, 443 U.S. at 602. The deference approach embodies this general principle. A court applying the deference approach defers to and enforces the decision of the highest authority of the ecclesiastical body to which the matter has been carried. *See Jones*, 443 U.S. at 604-05.

While the deference approach is based on principles set forth in *Watson*, *Watson* itself clarified that the First Amendment does not require a court to forego application of secular legal principles when resolving church property disputes:

> Religious organizations come before us in the same attitude as other voluntary associations for benevolent or charitable purposes, and their rights of property, or of contract, are equally under the protection of the law, and the actions of their members subject to its restraints. Conscious as we may be of the excited feeling engendered by this controversy, . . . we enter upon its consideration with the satisfaction of knowing that the principles on which we are to decide so much of it as is proper for our decision, are those applicable alike to all of its class, and that our duty is the simple one of applying those principles to the facts before us.

80 U.S. at 714. As the Court elaborated in *Presbyterian Church v. Blue Hull Memorial Church*, 393 U.S. 440, 449 (1969) and in *Jones*, "deference" is not a choice where ecclesiastical questions are at issue; as to such questions, deference is compulsory because courts lack jurisdiction to decide ecclesiastical questions. 443 U.S. at 602-03, 605. But when the question to be decided is not ecclesiastical, courts are not deprived of jurisdiction by the First Amendment and they may apply another Constitutionally acceptable approach. *Id.*

2. Neutral Principles

In *Jones v. Wolf* the Supreme Court approved the neutral principles methodology as constitutionally permissible. 443 U.S. at 604. *Jones* concerned the Vineville Presbyterian Church, which was incorporated under Georgia law and was a member church of the Augusta-Macon Presbytery of the Presbyterian Church in the United States (PCUS). The PCUS maintained a hierarchical form of government. *Id.* at 597-98. Under the PCUS polity, the actions of local churches were subject to review and control by higher church courts. *Id.* at 598. The powers and duties of each level of the church hierarchy were set out in the PCUS constitution, the Book of Church Order. *Id.*

At a 1973 meeting, the Vineville Church's pastor and a majority of its members voted to separate from the PCUS and unite with the Presbyterian Church in America. *Id.* The Augusta-Macon Presbytery of the PCUS concluded that the minority faction remaining loyal to the PCUS constituted "the true congregation of Vineville Presbyterian Church." *Id.* The Presbytery then withdrew "all authority to exercise office derived from the PCUS" from the majority faction and the minority sued in state court to establish their right to exclusive possession of the church property. *Id.* at 598-99. The trial court granted judgment for the majority. The Georgia Supreme Court affirmed, rejecting the minority faction's First Amendment challenge and holding that the trial court had correctly applied neutral principles of law. *Id.* at 599.

The United States Supreme Court affirmed. It held that the methodology employed by the Georgia courts was not constitutionally infirm. *Id.* at 600 (*citing Carnes v. Smith*, 222 S.E.2d 322 (Ga. 1976), *cert. denied*, 429 U.S. 868; *Presbyterian Church v. E. Heights*, 167 S.E.2d 658, 658-60 (Ga. 1969) (*Presbyterian II*), *cert. denied*, 429 U.S. 868). Under the neutral principles methodology,

ownership of disputed property is determined by applying generally applicable law and legal principles. That application will usually include considering evidence such as deeds to the properties, terms of the local church charter (including articles of incorporation and by laws, if any), and relevant provisions of governing documents of the general church. *E.g.*, *Jones*, 443 U.S. at 602-03; *see Presbyterian II*, 167 S.E.2d at 659-60. The Court held that the First Amendment precluded neither application of neutral principles of law nor a state's adopting a presumptive rule of majority rule. *Jones*, 443 U.S. at 604, 607. It noted that "any rule of majority representation can always be overcome, under the neutral-principles approach, either by providing in the corporate charter or the constitution of the general church, that the identity of the local church is to be established in some other way . . . [such as] by providing that the church property is held in trust for the general church and those who remain loyal to it[,]" or any other method that "does not impair free-exercise rights or entangle the civil courts in matters of religious controversy." *Id.* at 607-08.

Since the identity of the local Vineville congregation was a matter of state law, the Supreme Court remanded the case to the Georgia Supreme Court. On remand the Georgia Supreme Court held that Georgia applies the presumptive majority rule to church identity and nothing in Georgia's statutes or the relevant corporate charters, deeds, and organizational constitutions of the denomination rebutted that presumption "as to the right to control the actions of the titleholder." *Jones v. Wolf*, 260 S.E.2d 84, 85 (Ga. 1979).

B. Texas

In *Brown v. Clark*, this Court addressed a dispute similar to both the one the Supreme Court addressed in *Jones* and the one now before us. 116 S.W. 360 (Tex. 1909). In that case, property had

been conveyed by general warranty deed to "trustees named for the Cumberland Presbyterian Church [of Jefferson, Texas]." *Id.* at 361. The dispute in the local church arose following a vote by the majority of the presbyteries of the General Assembly of the Cumberland Presbyterian Church and the General Assembly of the Presbyterian Church of the United States of America to reunite as one church. *Id.* at 362. This Court described the schism in the Jefferson church and resulting lawsuit as follows:

> There was at all times a strong minority which opposed the reunion, and, when the General Assembly of the Cumberland Presbyterian Church adopted the report and declared the union completed, the dissenting commissioners in attendance upon that General Assembly held a meeting, and organized another General Assembly of the Cumberland Presbyterian Church. Much dissatisfaction prevailed in the churches of the Cumberland Presbyterian, and in the church at the city of Jefferson, Tex., there was a difference of opinion upon the subject of reunion among its members. Those who opposed the reunion instituted this action, claiming that they constituted the session of the Cumberland Presbyterian Church at Jefferson. The defendants in the action claimed to be the session of the Presbyterian Church of the United States of America, and were in possession of the property, and claimed that by the union the property had been transferred to the Presbyterian Church of the United States of America. The case was tried before the judge without a jury, and a judgment was rendered in favor of the defendants-those who claimed under the Presbyterian Church of the United States of America. The Court of Civil Appeals of the Sixth Supreme Judicial District reversed that judgment, and rendered judgment in favor of the plaintiffs below.

Id.

The principal issues presented were whether the General Assembly of the Cumberland Church had authority to reunite the Cumberland Church with the Presbyterian Church, and if so, how did the reunion affect the church property in Jefferson? *Id.* at 363-64. The Court held that the first issue was within the exclusive jurisdiction of the General Assembly because it was the highest court of the church, it had decided the question, and thus "there is no ground for action by this court." *Id.* at 364.

As to the second issue, the Court noted that the question of how the reunion affected the property was "perhaps the only question in the case" over which it had jurisdiction. *Id.* As opposed to the first issue, which presented no basis on which the Court could consider the merits or take action, the Court addressed the merits of the second:

> The deed for the property was made to the trustees of the Cumberland Presbyterian Church at Jefferson, Tex. It expressed no trust nor limitation upon the title. The property was purchased by the church and paid for in the ordinary way of business, and there is not attached to that property any trust either express or implied. *It follows, we think, as a natural and proper conclusion, that the church to which the deed was made still owns the property, and that whatever body is identified as being the church to which the deed was made must still hold the title.* The Cumberland Presbyterian Church at Jefferson was but a member of and under the control of the larger and more important Christian organization, known as the Cumberland Presbyterian Church, and the local church was bound by the orders and judgments of the courts of the church. *Watson v. Jones*, 13 Wall. 727, 20 L. Ed. 666. The Jefferson church was not disorganized by the act of union. It remained intact as a church, losing nothing but the word 'Cumberland' from its name. Being a part of the Cumberland Presbyterian Church, the church at Jefferson was by the union incorporated into the Presbyterian Church of the United States of America. The plaintiffs in error and those members who recognize the authority of the Presbyterian Church of the United States of America are entitled to the possession and use of the property sued for.

Id. at 364-65 (emphasis added). *See Rusk State Hosp. v. Black*, 392 S.W.3d 88, 95 (Tex. 2012) (noting that the opinion of a court without jurisdiction is advisory to the extent it addresses issues other than the jurisdictional issue because the Texas Constitution does not authorize courts 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."); *Tex. Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 517 n.15 (Tex. 1995).

Courts of appeals have read *Brown* as applying a deference approach, and generally have applied deference principles to hierarchical church property dispute cases.[5] It is true that in *Brown* the Court determined it lacked jurisdiction over the ecclesiastical questions of whether the doctrines of the two general churches were dissimilar and whether their merger was proper. But it did not simply defer to the ecclesiastical authorities with regard to the property dispute. Instead, the Court addressed the merits of the title question by examining the deed using principles of Texas law. It concluded that the deed transferred the property to trustees of the local church that was a subordinate part of the merged Presbyterian Church of the United States of America, thus the believers recognizing the authority of that body were entitled to possession and use of the property. *Brown*, 116 S.W. at 365.

The method by which this Court addressed the issues in *Brown* remains the appropriate method for Texas courts to address such issues. Courts do not have jurisdiction to decide questions of an ecclesiastical or inherently religious nature, so as to those questions they must defer to decisions of appropriate ecclesiastical decision makers. But Texas courts are bound to exercise jurisdiction

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[5] *See Green v. Westgate Apostolic Church*, 808 S.W.2d 547, 552 (Tex. App.—Austin 1991, writ denied) ("Where a congregation of a hierarchical church has split, those members who renounce their allegiance to the church lose any rights in the property involved and the property belongs to the members who remain loyal to the church. It is a simple question of identity."); *Templo Ebenezer, Inc. v. Evangelical Assemblies, Inc.*, 752 S.W.2d 197, 198 (Tex. App.—Amarillo 1988, no writ); *Schismatic & Purported Casa Linda Presbyterian Church in Am. v. Grace Union Presbytery, Inc.*, 710 S.W.2d 700, 706-07 (Tex. App.—Dallas 1986, writ ref'd n.r.e.) (applying the deference rule); *Presbytery of the Covenant v. First Presbyterian Church*, 552 S.W.2d 865, 871-72 (Tex. Civ. App.—Texarkana 1977, no writ) (determining that the question of which faction of a congregation that is part of a hierarchical religious body is entitled to church property is a question of identity answered by which faction is recognized by the higher, more important religious body); *Browning v. Burton*, 273 S.W.2d 131, 135 (Tex. Civ. App.—Austin 1954, writ ref'd n.r.e) ("[T]he right to sell the property must come from the members of the religious organization in whom the beneficial title is vested or as the laws of that group may direct."); *see also Church of God in Christ, Inc. v. Cawthon*, 507 F.2d 599, 602 (5th Cir. 1975) (discussing Texas law) ("Here the national church is a party and, as a church of the hierarchical polity, has established its right to possession and control.").

vested in them by the Texas Constitution and cannot delegate their judicial prerogative where jurisdiction exists. Properly exercising jurisdiction requires courts to apply neutral principles of law to non-ecclesiastical issues involving religious entities in the same manner as they apply those principles to other entities and issues. Thus, courts are to apply neutral principles of law to issues such as land titles, trusts, and corporate formation, governance, and dissolution, even when religious entities are involved.

We recognize that differences between ecclesiastical and non-ecclesiastical issues will not always be distinct, and that many disputes of the type before us will require courts to analyze church documents and organizational structures to some degree. Further, deferring to decisions of ecclesiastical bodies in matters reserved to them by the First Amendment may, in some instances, effectively determine the property rights in question. *See Milivojevich*, 426 U.S. at 709-10; *Brown*, 116 S.W. at 364-65. Nevertheless, in our view the neutral principles methodology simply requires courts to conform to fundamental principles: they fulfill their constitutional obligation to exercise jurisdiction where it exists, yet refrain from exercising jurisdiction where it does not exist. The neutral principles methodology also respects and enforces the manner in which religious entities and their adherents choose to structure their organizations and their property rights in the same manner as those structures and rights are respected and enforced for other persons and entities.

We join the majority of states[6] that have considered the matter. We hold that Texas courts should use the neutral principles methodology to determine property interests when religious organizations are involved. Further, to reduce confusion and increase predictability in this area of the law where the issues are difficult to begin with, Texas courts must use only the neutral principles construct.

III. Discussion

A. Summary Judgment

The Episcopal Leaders filed a traditional motion for summary judgment on the basis that (1) TEC is a hierarchical church; (2) when hierarchical churches split, Texas courts defer to the decisions of the superior organization in the church hierarchy as to which faction comprises the true church; (3) the members loyal to TEC have been recognized by the Diocese's Bishop as the "true and

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[6] The parties differ on exactly which states have adopted neutral principles, and which have not. We interpret the decisions of the following state supreme courts to have adopted the basic concepts of neutral principles: *African Meth. Epis. Zion Church v. Zion Hill Meth. Church, Inc.*, 534 So.2d 224, 225 (Ala. 1988); *St. Paul Church, Inc. v. Bd. of Trs.*, 145 P.3d 541, 553 (Alaska 2006); *Ark. Presbytery v. Hudson*, 40 S.W.3d 301, 306 (Ark. 2001); *In re Episcopal Church Cases*, 198 P.3d 66, 70 (Cal. 2009); *Bishop & Diocese of Colo. v. Mote*, 716 P.2d 85, 96 (Colo. 1986); *Episcopal Church in the Diocese of Conn. v. Gauss*, 28 A.3d 302, 316 (Conn. 2011); *E. Lake Meth. Epis. Church, Inc. v. Trs.*, 731 A.2d 798, 810 (Del. 1999); *Meshel v. Ohev Sholom Talmud Torah*, 869 A.2d 343, 354 (D.C. 2005); *Rector, Wardens, Vestrymen of Christ Church in Savannah v. Bishop of Epis. Diocese*, 718 S.E.2d 237, 241 (Ga. 2011); *Gospel Tabernacle Body of Christ Church v. Peace Publishers & Co.*, 506 P.2d 1135, 1138 (Kan. 1973); *Fluker Cmty. Church v. Hitchens*, 419 So.2d 445, 447 (La. 1982); *Attorney Gen. v. First United Bapt. Church of Lee*, 601 A.2d 96, 99 (Me. 1992); *From the Heart Church Ministries, Inc. v. African Meth. Epis. Zion Church*, 803 A.2d 548, 565 (Md. 2002); *Maffei v. Roman Catholic Archbishop*, 867 N.E.2d 300, 310 (Mass. 2007); *Piletich v. Deretich*, 328 N.W.2d 696, 701 (Minn. 1982); *Schmidt v. Catholic Diocese*, 18 So.3d 814, 824 (Miss. 2009); *Presbytery of Elijah Parish Lovejoy v. Jaeggi*, 682 S.W.2d 465, 467 (Mo. 1984); *Hofer v. Mont. Dep't of Pub. Health*, 124 P.3d 1098, 1103 (Mont. 2005); *Medlock v. Medlock*, 642 N.W.2d 113, 128-29 (Neb. 2002); *Berthiaume v. McCormack*, 891 A.2d 539, 547 (N.H. 2006); *Blaudziunas v. Egan*, 961 N.E.2d 1107, 1110 (N.Y. 2011); *Harris v. Matthews*, 643 S.E.2d 566, 570 (N.C. 2007); *Serbian Orthodox Church Congregation v. Kelemen*, 256 N.E.2d 212, 216 (Ohio 1970); *In re Church of St. James the Less*, 888 A.2d 795, 805-06 (Pa. 2005); *All Saints Parish Waccamaw v. Protestant Epis. Church in Diocese of S.C.*, 685 S.E.2d 163, 171 (S.C. 2009); *Foss v. Dykstra*, 342 N.W.2d 220, 222 (S.D. 1983); *Jeffs v. Stubbs*, 970 P.2d 1234, 1250-51 (Utah 1998); *Reid v. Gholson*, 327 S.E.2d 107, 112 (Va. 1985); *Wis. Conf. Bd. of Trs. v. Culver*, 627 N.W.2d 469, 475-76 (Wis. 2001).

proper representatives of the Episcopal Church of the Good Shepherd"; and (4) the Canons and rules of TEC and the Diocese provide that property of a parish is to be held in trust for use of TEC and the respective Diocese, thus the parish property is held in trust for TEC, the Diocese, and through them, the loyal faction. In both their motion and reply to the defendant's response, the Episcopal Leaders maintained that the Episcopal Church is hierarchical as a matter of law and the Anglican Leaders did not have authority to dissolve the relationship between Good Shepherd and TEC and the Diocese.

We review the trial court's grant of summary judgment de novo. *Exxon Corp. v. Emerald Oil & Gas Co.*, 331 S.W.3d 419, 422 (Tex. 2010). To prevail on their motion, the Episcopal Leaders must have proved that, as a matter of law, they were entitled to judgment on the issues they pleaded and set out in their motion for summary judgment. *See* TEX. R. CIV. P. 166a(c).

Civil courts are constitutionally required to accept as binding the decision of the highest authority of a hierarchical religious organization to which a dispute regarding internal government has been submitted. *See Hosanna-Tabor*, ___ U.S. ___, 132 S. Ct. at 705 (*citing Milivojevich*, 426 U.S. at 708). So what happens to the relationship between a local congregation that is part of a hierarchical religious organization and the higher organization when members of the local congregation vote to disassociate is an ecclesiastical matter over which civil courts generally do not have jurisdiction. *Milivojevich*, 426 U.S. at 713-14. But what happens to the property is not, unless the congregation's affairs have been ordered so that ecclesiastical decisions effectively determine the property issue.

The Anglican Church Leaders contend that even if TEC is hierarchical, not all decisions by hierarchical religious organizations are entitled to deference regarding ecclesiastical governmental

matters. They argue that in order to determine whether to defer to a church tribunal's decision, civil courts should examine the church's organizational documents and evaluate whether those documents expressly vest a church tribunal with authority to decide the specific issue in question. Citing *Milivojevich*, the Anglican Church Leaders urge that the Episcopal Church has not created hierarchical tribunals with authority to remove the vestry, exclude people from membership in the local church, or to adjudicate this property dispute. But nothing in *Milivojevich* requires a hierarchical religious entity to expressly establish which powers its religious tribunals may properly exercise. To the contrary, *Milivojevich* suggests that the First Amendment limits the jurisdiction of secular courts regarding the extent to which they may inquire into the form or type of decision-making authority a religious entity chooses to utilize, the specific powers of that authority, or whether the entity has followed its own procedures regarding controversies within the exclusive jurisdiction of the ecclesiastical authorities. *See Milivojevich*, 426 U.S. at 720. Further, courts are precluded from exercising jurisdiction over matters the First Amendment commits exclusively to the church, even where a hierarchical religious organization fails to establish tribunals or specify how its own rules and regulations will be enforced. *See Hosanna-Tabor*, ___ U.S. at ___, 132 S.Ct. at 704 (*citing Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952)); *Watson*, 80 U.S. at 728-30.

We agree with the court of appeals that the record conclusively shows TEC is a hierarchical organization. The Anglican Leaders do not dispute that Bishop Ohl is the highest ecclesiastical authority in the Diocese nor that he has recognized the new vestry aligned with the Episcopal Church Leaders as "the true and proper representatives of the Episcopal Church of the Good Shepherd."

Whether Bishop Ohl was authorized to form a parish and recognize its membership, whether he could or did authorize that parish to establish a vestry, and whether he could or did properly recognize members of the vestry are ecclesiastical matters of church governance. The trial court lacked jurisdiction over and properly deferred to Bishop Ohl's exercise of ecclesiastical authority on those questions. *See Hosanna-Tabor*, ___ U.S. at ___, 132 S.Ct. at 704; *Brown*, 116 S.W. at 363.

But although we agree with the court of appeals as to these conclusions, we disagree with its determination that the question of who owns the property is inextricably linked to or determined by them. There is a difference between (1) the Bishop's determining which worshipers are loyal to the Diocese and TEC, whether those worshipers constituted a parish, and whether a parish properly established a vestry, and (2) whether the corporation's bylaws were complied with when the vote occurred to disassociate the corporation from the Diocese and TEC. After all, the Diocese required the Church to incorporate, and the corporation has a secular existence derived from applicable Texas law and the corporation's articles of incorporation and bylaws. The Diocese did not urge as grounds for summary judgment that amendment of the bylaws and articles of incorporation was ceded to the Diocese so that whether to amend them was an ecclesiastical decision and not a secular one. Rather, the Episcopal Leaders alleged that they are entitled to the property because Bishop Ohl—after the vote to change the corporation's status took place in 2006—decided the loyal faction was the true membership of Good Shepherd, and "[a]ccording deference to the Bishop, [the Episcopal Leaders] assert that they are entitled to title, possession and use of [the property]."

The Episcopal Leaders neither pleaded nor urged as grounds for summary judgment that they are entitled to the property on the basis of neutral principles. Because the deference methodology is

not to be used to determine this type dispute, the Episcopal Leaders' pleadings and motion will not support summary judgment.

The same result is mandated as to Good Shepherd's personal property for the reasons expressed as to the real property.

The judgment of the court of appeals must be reversed and the case remanded to the trial court.[7]

B. Remand

The parties advance arguments that may be presented to the trial court upon remand. To assist the trial court in the event they are, we address some of them. *See MCI Sales & Serv. v. Hinton*, 329 S.W.3d 475, 495 n.19 (Tex. 2010) (addressing an issue that would "feature prominently on retrial" in order to "provide guidance to the trial court" even though the issue was not necessary to the ultimate resolution of the case); *Edinburg Hosp. Auth. v. Trevino*, 941 S.W.2d 76, 81 (Tex. 1997) ("Although resolution of this issue is not essential to our disposition of this case, we address it to provide the trial court with guidance in the retrial . . . .").

[7] Several amici supporting the deference approach contend that if the neutral principles of law approach is adopted, fairness precludes its retroactive application and that retroactive application of that approach will violate the First Amendment's Free-Exercise clause. These amici cite a footnote in *Jones* wherein the Supreme Court noted that "a claim that retroactive application of a neutral-principles approach infringes free-exercise rights" was not involved in that case since the Georgia Supreme Court "clearly enunciated its intent to follow the neutral-principles analysis" in two prior cases. *Jones*, 443 U.S. at 606 n.4. The parties do not raise the issue except for the Anglican Leaders including it in their reply brief and asking that it be considered if we decide the case on the Episcopal Leaders' proposed legal theory that churches are public charitable trusts or that under the "identity" approach, those who remain part of the hierarchical church of which the congregation was a part before the dispute arose are entitled to possess and control the property. Based on our disposition of the appeal, we need not and do not address it. However, we note that our analysis in *Brown* substantively reflected the neutral principles methodology.

1. Control of the Corporation

We first address the Episcopal Leaders' argument that Good Shepherd's corporate powers were restricted by its affiliation with TEC. The Episcopal Leaders assert that TEC's structure, constitution, canons, and rules required parish corporations to remain part of and subject to TEC's authority. They point to the Good Shepherd corporate bylaws confirming that Good Shepherd "is a constituent part of the Diocese of Northwest Texas and of the Protestant Episcopal Church . . . [and Good Shepherd] accedes to, recognizes, and adopts the General Constitution and Canons of that Church." But the vote at the called meeting was in favor of amending the bylaws to delete or change provisions referring to and adopting the canons and constitutions of TEC and the Diocese, and revoking any trusts in the corporate property in favor of them.[8] Absent specific, lawful provisions in a corporation's articles of incorporation or bylaws otherwise, whether and how a corporation's directors or those entitled to control its affairs can change its articles of incorporation and bylaws are secular, not ecclesiastical, matters.

The Episcopal Leaders cite Texas Business Organizations Code § 3.009 and argue that Good Shepherd's articles of incorporation were required to expressly state that the corporation is a member-managed corporation in order for the corporation to be governed by its local members. This argument is unpersuasive to the extent it relates to whether an outside entity has authority to control the corporation. First, even if the corporation were not member managed, that would not mean that its

[8] The Episcopal Leaders argued in their reply to the Anglican Leaders' response to the motion for summary judgment that the votes on the resolutions to amend the corporation's bylaws and articles of incorporation failed because the resolutions passed by only a majority and not a two-thirds vote. Because neither party addresses the argument in this Court and the court of appeals did not address it, we do not.

management could be appointed by or was under the control of TEC, the Diocese, or Bishop Ohl, absent corporate documents and law so providing. Second, when Good Shepherd incorporated in 1974 the Non-Profit Corporations Act provided that "[t]he power to alter, amend, or repeal the by-laws or to adopt new by-laws shall be vested in the members, if any, but such power may be delegated by the members to the board of directors." *See* TEX. REV. CIV. STAT. art. 1396-2.09. The current statutory scheme changes the default rule on who is authorized to amend the bylaws, but under neither the former nor the current statute is an external entity empowered to amend them absent specific, lawful provision in the corporate documents. *See* TEX. BUS. ORGS. CODE § 3.009; TEX. REV. CIV. STAT. art. 1396-2.09 (current version at TEX. BUS. ORGS. CODE § 22.102) ("The power to alter, amend, or repeal the by-laws or to adopt new by-laws shall be vested in the members . . . .").

2. Control of the Property

It is undisputed that title to the real property is in the name of the corporation. It is further undisputed that the language of the deeds does not provide for an express trust in favor of TEC or the Diocese. Three reasons are suggested for the proposition that TEC should have possession of the property. The first is that under deference principles Bishop Ohl's decision identifying the loyal faction as the continuing Parish of Good Shepherd settled the question of who was entitled to the property and the corporation had no rights in the property other than holding title as trustee for the loyal faction, the Diocese, and TEC. The second is that under neutral principles of law the initial adoption of the constitutions and canons of TEC and the Diocese by the corporation in its bylaws was irrevocable, so any action to revoke that part of the bylaws was void. The third is that because the corporation accepted donations of property and money based on its having subscribed and acceded

to the Constitutions and canons of the Diocese and TEC, it cannot obtain the right to own and possess the property by unilaterally changing its articles of incorporation and bylaws.

In regard to the first question, we have held that Texas courts cannot simply use the deference or identity methodology principles to resolve this type of issue. Under neutral principles of law, the deeds conveying the property to Good Shepherd corporation "expressed no trust nor limitation upon the title," and therefore the corporation owns the property. *See Brown*, 116 S.W. at 364. Bishop Ohl could, as an ecclesiastical matter, determine which faction of believers was recognized by and was the "true" church loyal to the Diocese and TEC. Courts must defer to such ecclesiastical decisions. But under neutral principles, any decisions he made about the secular legal questions of whether the vote by the parish members to amend the bylaws and articles of incorporation was valid under Texas law and whether the bylaws and articles of incorporation were validly amended, are not entitled to deference. Nor does his decision identifying the loyal faction as the continuing Episcopal Parish operating Good Shepherd church determine the property ownership issue under this record, as it might under the deference or identity methodology.

As to the second and third reasons, the Episcopal Leaders and several *amici* argue that Good Shepherd's articles of incorporation and bylaws evidence the fact that the corporation is subordinate to TEC and the Diocese. They do not argue, however, that the articles of incorporation, bylaws, or statutory law precluded amendments revoking any relationship with TEC and the Diocese. A religious organization may choose to organize as a domestic non-profit organization and acquire, own, hold, mortgage, and dispose of or invest its funds in property for the use and benefit of and in trust for a higher or other organization. *See, e.g.*, TEX. BUS. ORGS. CODE § 2.102. But whether a religious

organization *can* acquire and hold property in trust for another person or entity is a different question from whether it *has done* so, and is also a different question from whether such a choice is irrevocable.

The Episcopal Leaders argue that the Supreme Court's pronouncement in *Jones* that a superior heirarchical church organization's amendment to its constitution to include a trust provision is sufficient to establish a trust in property held by its subordinate churches. The gravamen of this argument is that in *Jones* the Supreme Court established substantive property and trust law to be applied in church property disputes, and under such law a subordinate organization cannot revoke a trust on its property once the superior body imposes it. In support of their argument the Episcopal Church leaders point to the following passage in *Jones*:

> At any time before the dispute erupts, the parties can ensure, if they so desire, that the faction loyal to the hierarchical church will retain the church property. They can modify the deeds or the corporate charter to include a right of reversion or trust in favor of the general church. *Alternatively, the constitution of the general church can be made to recite an express trust in favor of the denominational church*. The burden involved in taking such steps will be minimal. And the civil courts will be bound to give effect to the result indicated by the parties, provided it is embodied in some legally cognizable form.

Jones, 443 U.S. at 606 (emphasis added) (footnote omitted). The Episcopal Leaders argue that TEC adopted canon I.7.4 in 1979[9] in accordance with the *Jones* decision and thereby established a trust as to the property. Canon I.7.4 provides:

> All real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church and the Diocese thereof in which such Parish, Mission, or Congregation is located. The existence of this trust, however,

[9] The Diocese incorporated this provision into its canons in 1982.

> shall in no way limit the power and authority of the Parish, Mission, or Congregation otherwise existing over such property so long as the particular Parish, Mission, or Congregation remains a part of, and subject to, this Church and its Constitution and Canons.

The Episcopal Leaders cite other state courts for the proposition that an express trust canon like canon I.7.4 precludes the disassociating majority of a local congregation from retaining local parish property after voting to disaffiliate from the Church. *See The Episcopal Church in the Diocese of Conn. v. Gauss*, 28 A.3d 302 (Conn. 2011); *Episcopal Church Cases*, 198 P.3d 66 (Cal. 2009); *Episcopal Diocese of Rochester v. Harnish*, 899 N.E.2d 920 (N.Y. 2008); *In re Church of St. James the Less*, 888 A.2d 795 (Penn. 2005); *Bishop & Diocese of Colo. v. Mote*, 716 P.2d 85 (Colo. 1986) (en banc).

The Missouri Court of Appeals recently addressed this issue in *Heartland Presbytery v. Gashland Presbyterian Church*, 364 S.W.3d 575 (Mo. Ct. App. 2012). There the court explained that:

> The intent of the . . . passage [in *Jones*] was to explain that, contrary to the dissent's characterization, a "neutral-principles" approach would not impose a particular property-rights regime on the parties, or infringe upon the rights of a denomination's adherents to order their affairs as they saw fit. Instead, like the discussion earlier in the Court's opinion, the quoted passage simply makes clear that, like "private-law systems in general," the application of neutral principles of state property and trust law would afford "flexibility in ordering private rights and obligations to reflect the intentions of the parties." [*Jones*, 443 U.S.] at 604, 99 S.Ct. 3020 (emphasis added). The recitation of the particular documents which might be employed to accomplish the parties' intentions can only be read as illustrative. We will not read the quoted passage as itself establishing the substantive property and trust law to be applied to church-property disputes, particularly where the very same passage contemplates (in its reference to "other neutral principles of state law") that the applicable law—like American property and trust law in general—would be state, rather than federal, law. Further, the statement that "the civil courts will be bound to give effect to" the parties' expressed intentions was explicitly conditioned on those intentions being "embodied in some legally cognizable form"—precisely the issue we address in this opinion.

Id. at 589.

Our view coincides with that of the Missouri court. We do not read *Jones* as purporting to establish substantive property and trust law that state courts must apply to church property disputes. *See Am. Elec. Power Co. v. Conn.*, ___ U.S. ___, ___,131 S. Ct. 2527, 2535 (2011) ("*Erie* 'le[ft] to the states what ought to be left to them,' and thus required 'federal courts [to] follow state decisions on matters of substantive law appropriately cognizable by the states.'" (citations omitted)); *Jones*, 443 U.S. at 609 ("This Court, of course, does not declare what the law of Georgia is."). The Episcopal Leaders do not cite Texas law to support their argument that under the record before us Good Shepherd corporation was precluded from revoking any trusts actually or allegedly placed on its property.

IV. Response to the Dissent

The dissent agrees that neutral principles is the proper methodology to apply in this type of case, but argues that summary judgment was properly granted for the Episcopal Leaders because (1) whether Good Shepherd can amend its articles of incorporation and bylaws to delete references to TEC and the Diocese and to revoke any trusts on the property, is at bottom an ecclesiastical matter that courts do not have jurisdiction to address; (2) Good Shepherd's bylaws agreeing to be bound by the Canons of TEC and the Diocese imposed a trust on the property that became irrevocable when Good Shepherd withdrew from TEC; and (3) Good Shepherd is estopped from revoking the trust in favor of TEC and the Diocese. The arguments do not persuade us.

As we have previously noted, the Episcopal Leaders' pleadings do not support summary judgment on the basis of neutral principles because they allege only that they are entitled to the

property based on application of the deference methodology. Further, their only ground for summary judgment was that deference principles apply and the property goes to those members of the congregation recognized by Bishop Ohl as the true membership of Good Shepherd. But the deference methodology is inapplicable under our holding in this case. Moreover, going beyond the procedural issue, the dissent's arguments are not supported by the record.

The dissent's first argument, that Good Shepherd corporation could not amend its articles of incorporation and bylaws to omit references to TEC and the Diocese because doing so would circumvent "an ecclesiastical decision made by a higher authority within a hierarchical church structure," is in substance application of the deference methodology. That position, if applied in this case, would subject the corporation's decision makers and the parish members who were qualified to vote under the bylaws to the dictates of persons not identified in corporate governing documents as having the right to make, control, or override corporate decisions. Despite agreeing that the neutral principles methodology applies, the dissent's argument ignores the fact that Good Shepherd was incorporated pursuant to secular Texas corporation law and Texas law dictates how the corporation can be operated, including how and when corporate articles and bylaws can be amended and the effect of the amendments. The dissent points to neither a requirement in the corporate documents that amendments are subject to approval by the Diocese or TEC, nor to any Texas law precluding the corporation from amending its articles and bylaws to exclude references to the Diocese and TEC. To the contrary, the articles of incorporation and bylaws specified that qualified parish members were entitled to elect the vestry and amend the bylaws.

Second, the dissent concludes that despite there being no trust language in either the deeds transferring property to Good Shepherd or in Good Shepherd's articles of incorporation or bylaws, the Dennis Canon, which provides in part that "all real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for TEC," and Good Shepherd's actions before the split conclusively establish Good Shepherd's intent to hold its property in trust for the benefit of TEC and the Diocese. The dissent then concludes that the trust is irrevocable because the Dennis Canon limits Good Shepherd's authority over its property to the period of time for which it remains a part of and subject to TEC. But the Episcopal Leaders did not move for summary judgment on this basis. *See* TEX. R. CIV. P. 166a(c); *G & H Towing Co. v. Magee*, 347 S.W.3d 293, 297 (Tex. 2011) ("Summary judgments, however, may only be granted upon grounds expressly asserted in the summary judgment motion."). Further, even assuming a trust was created by the Dennis Canon and Good Shepherd's bylaws and actions, we disagree that the Canon's terms make the trust expressly irrevocable as Texas law requires. The dissent interprets the Dennis Canon as limiting Good Shepherd's authority over the property to the time Good Shepherd remained affiliated with TEC and the Diocese. Assuming the Dennis Canon imposed a trust on Good Shepherd's property and limited Good Shepherd's authority over the property as the dissent argues, and we expressly do not decide whether it did, the Canon simply does not contain language making the trust *expressly* irrevocable. *See* TEX. PROP. CODE § 112.051 ("A settlor may revoke the trust unless it is irrevocable by the express terms of the instrument creating it or of an instrument modifying it."). Even if the Canon could be read to *imply* the trust was irrevocable, that is not good enough under Texas law. The Texas statute requires *express* terms making it irrevocable. *See Vela v. GRC Land Holdings, Ltd.*, 383

S.W.3d 248, 252-53 (Tex. App.—San Antonio 2012, no pet.) ("Because section 112.051(a) requires express language of irrevocability, we conclude that the use of the term 'forever' in the special warranty deed did not cause the Trust to become irrevocable.").

Under its third argument, the dissent would hold that the doctrine of estoppel applies and requires that the judgment of the court of appeals be affirmed. But summary judgment may only be granted based on grounds pleaded and expressly presented in a motion for summary judgment. TEX. R. CIV. P. 166a(c); *G & H Towing Co.*, 347 S.W.3d at 297. The Episcopal Leaders neither pleaded estoppel nor urged it as a ground for summary judgment.

V. Conclusion

The judgment of the court of appeals is reversed. The case is remanded to the trial court for further proceedings consistent with this opinion.

_____

Phil Johnson
Justice

OPINION DELIVERED: August 30, 2013

IN THE SUPREME COURT OF TEXAS

NO. 11-0332

ROBERT MASTERSON, MARK BROWN, GEORGE BUTLER, CHARLES WESTBROOK, RICHEY OLIVER, CRAIG PORTER, SHARON WEBER, JUNE SMITH, RITA BAKER, STEPHANIE PEDDY, BILLIE RUTH HODGES, DALLAS CHRISTIAN AND THE EPISCOPAL CHURCH OF THE GOOD SHEPHERD, PETITIONERS,

v.

THE DIOCESE OF NORTHWEST TEXAS, THE REV. CELIA ELLERY, DON GRIFFIS AND MICHAEL RYAN, RESPONDENTS

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

JUSTICE BOYD, joined by JUSTICE WILLETT, concurring.

I join in the Court's adoption of the neutral-principles approach to deciding non-ecclesiastical issues, and in its disposition reversing and remanding this case for the trial court to decide under that approach. I do not, however, join in Part III.B. ("Remand") or Part IV ("Response to the Dissent") of the Court's opinion, addressing issues that I believe the Court decides prematurely.

As the Court explains, "[t]he Episcopal Leaders neither pleaded nor urged as grounds for summary judgment that they are entitled to the property on the basis of neutral-principles," *ante* at ___, which we hold today is the only basis on which they could be entitled to the property. Moreover, as the Court acknowledges, even under the neutral-principles approach, courts must still defer "to religious entities' decisions on ecclesiastical and church polity questions," *ante* at ___, and

"[t]he Diocese did not urge as grounds for summary judgment that amendment of the bylaws and articles of incorporation was ceded to the Diocese so that whether to do so was an ecclesiastical decision and not a secular one." *Ante* at ___.

Despite the lack of pleadings and evidence addressing the standards we adopt today, the Court decides that the amendment of the bylaws and articles did not involve ecclesiastical decisions entitled to deference and that the local parish either did not place the property in a trust or, if it did, did not make that trust irrevocable. The Dissent disagrees, concluding that the Episcopal Church and the Diocese should prevail under the neutral-principles approach, either because the amendment of the bylaws and articles remains an ecclesiastical decision to which the courts must defer, or because, under neutral-principles, the parish placed the property in an irrevocable trust.

Both the Court and the Dissent make good arguments, but they are premature. Before we decide these fact-intensive issues, we should afford the parties an opportunity to fully develop their pleadings and the record under the neutral-principles approach that we have adopted today; and we would benefit by affording the courts below an opportunity to consider and decide these matters first. *See Lopez v. Munoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 862 (Tex. 2000) ("On an appeal from summary judgment, we cannot consider issues that the movant did not present to the trial court.") (citing *Cincinnati Life Ins. Co. v. Cates*, 927 S.W.2d 623, 625 (Tex.1996) and *Travis v. City of Mesquite,* 830 S.W.2d 94, 100 (Tex.1992)).

For these reasons, I join in the Court's disposition, reversing and remanding the case for further proceedings in the trial court, but not in its discussion and resolution of issues that the parties have not yet fully litigated.

_____

Jeffrey S. Boyd
Justice

OPINION DELIVERED: August 30, 2013

IN THE SUPREME COURT OF TEXAS

NO. 11-0332

ROBERT MASTERSON, MARK BROWN, GEORGE BUTLER, CHARLES WESTBROOK, RICHEY OLIVER, CRAIG PORTER, SHARON WEBER, JUNE SMITH, RITA BAKER, STEPHANIE PEDDY, BILLIE RUTH HODGES, DALLAS CHRISTIAN AND THE EPISCOPAL CHURCH OF THE GOOD SHEPHERD, PETITIONERS,

v.

THE DIOCESE OF NORTHWEST TEXAS, THE REV. CELIA ELLERY, DON GRIFFIS AND MICHAEL RYAN, RESPONDENTS

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

JUSTICE LEHRMANN, joined by CHIEF JUSTICE JEFFERSON, dissenting.

Today the Court applies state law governing corporations to bar summary judgment for TEC[1] on an ecclesiastical matter over which the Court has no jurisdiction. While I wholeheartedly agree with the Court that church property disputes should be resolved under the neutral-principles approach approved by the Supreme Court in *Jones v. Wolf*, 443 U.S. 595 (1979), in my view, the Court has misapplied those principles in this case. In deciding that the secular law governing corporations controls the outcome of this matter, the Court places undue emphasis on the local church's incorporated status. Although a corporation is a separate entity with authority to amend its

[1] Unless otherwise noted, abbreviated terms shall have the meaning specified in the Court's opinion.

bylaws and articles of incorporation, it cannot do so when such an action results in the circumvention of an ecclesiastical decision made by a higher authority within a hierarchical church structure. In this case, the Court determines that Good Shepherd's incorporation allows it to disregard TEC's governing documents by withdrawing from TEC and taking church property with it—actions that go beyond the parish's authority. All the while, Good Shepherd has sought, agreed to, and received the benefits of association with TEC. Because the decision about whether a subordinate church entity can withdraw involves a matter of church polity, which is clearly an ecclesiastical issue, we have no jurisdiction over the subject under the First Amendment of the U.S. Constitution.

Moreover, even if this dispute could be resolved by conducting a purely secular analysis, summary judgment in favor of the Episcopal Leaders remains appropriate. Considering all the relevant statutes and documents, I would hold that a trust on the church property was created in favor of TEC and the Diocese, which became irrevocable upon Good Shepherd's vote to withdraw. Alternatively, I would hold that Good Shepherd was estopped from revoking the trust. Good Shepherd freely and eagerly chose to accept the use and benefit of the property at issue, paying nothing for the privilege. It cannot now unilaterally escape its part of the arrangement. Accordingly, I respectfully dissent.

I. Background

A. Good Shepherd Sought the Benefit of TEC Structure

As the Court notes, TEC is structured in three tiers, from the General Convention (at the highest level) to the regional dioceses (at the intermediate level) to the local congregations, divided into parishes, missions, and congregations (at the lower level). *See* ___ S.W.3d at ___. In turn, each

subordinate Episcopal affiliate must accede and be subject to the Constitution and Canons of the higher entity or entities. *See id.* Good Shepherd expressed this agreement to be bound by the higher entities repeatedly and consistently until its vote to withdraw in 2006.

When the original members of Good Shepherd first applied to TEC to organize a mission in 1965, the applicants stated that they were "desirous of obtaining the services of the Church, and ready, according to our several abilities, to sustain the same." In accordance with diocesan Canon, the applicants further "promise[d] conformity to [TEC's] Doctrine, Discipline, and Worship" and "to the Constitution and Canons of the General Convention and the Diocese of Northwest Texas." In the 1972 Instrument of Donation declaring the church building and grounds free from debt or lien, Good Shepherd's Vicar and Bishop's Committee further stated "that the building and grounds are secured from the danger of alienation, either in whole or in part, from those who profess and practice the Doctrine, Discipline, and Worship of this Church." Good Shepherd applied for and was granted parish status in 1974, reaffirming in its petition that the signatories thereto were "conscientiously attached to the Doctrine, Discipline and Worship of the Protestant Episcopal Church in the United States of America."

Upon being granted parish status, Good Shepherd incorporated in accordance with diocesan Canon. The Articles of Incorporation provided that "[t]he corporation is organized for religious purposes in order to provide a location for religious worship, education, and the furtherance of the Christian religion." The initial Bylaws, adopted in January 1975, state in Article I:

> The Church of the Good Shepherd is situated in San Angelo, Tom Green County, Texas. It is a constituent part of the Diocese of Northwest Texas and of the Protestant Episcopal Church in the United States of America. The Parish accedes to,

> recognizes, and adopts the General Constitution and Canons of that Church, and the Constitution and Canons of the Diocese of Northwest Texas and acknowledges the authority of the same.

Before the underlying dispute arose, Good Shepherd amended its Bylaws twice (once in 1994 and once in 1998), with no material changes made to Article I.

B. Church Property Placed in Trust

As discussed by the Court, in 1979 TEC amended its Canons, adding Canon I.7.4 (often referred to as the "Dennis Canon") and I.7.5 for the purpose of placing church property in trust:

> **Sec. 4.** All real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church and the Diocese thereof in which such Parish, Mission or Congregation is located. The existence of this trust, however, shall in no way limit the power and authority of the Parish, Mission or Congregation otherwise existing over such property *so long as the particular Parish, Mission or Congregation remains a part of, and subject to, this Church and its Constitutions and Canons*.
>
> **Sec. 5.** The several Dioceses may, at their election, further confirm the trust declared under the foregoing Section 4 by appropriate action, *but no such action shall be necessary for the existence and validity of the trust*.

(Emphasis added).

In 1982, after TEC enacted the Dennis Canon, the Diocese conveyed the relevant property to Good Shepherd. As the Court notes, the deed itself contained no trust language or other limitation on the conveyance. Finally, in 2006, Good Shepherd's members passed several resolutions by majority vote, with full knowledge of the Dennis Canon to which Good Shepherd had agreed to be bound. Pursuant to these resolutions, Good Shepherd voted to "withdraw[] from, end its membership in, and dissolve[] its union with" TEC and the Diocese. It further voted to amend its

Bylaws to remove any reference to TEC, as well as to revoke any trust placed on church property for the benefit of TEC or the Diocese.

II. Analysis of Neutral-Principles Approach

In *Jones v. Wolf*, the United States Supreme Court recognized as constitutional the neutral-principles approach to resolving church property disputes. 443 U.S. at 602. While courts remain prohibited under this approach "from resolving [such] disputes on the basis of religious doctrine or practice," they may apply "objective, well-established concepts of trust and property law" so long as it involves "no consideration of doctrinal matters." *Id.* at 602–03. This approach, the Supreme Court concluded, "promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice." *Id.* at 603. Further,

> the neutral-principles analysis shares the peculiar genius of private-law systems in general—flexibility in ordering private rights and obligations to reflect the intentions of the parties. Through appropriate reversionary clauses and trust provisions, religious societies can specify what is to happen to church property in the event of a particular contingency, or what religious body will determine the ownership in the event of a schism or doctrinal controversy.

Id. The Supreme Court cautioned, however, that in examining any religious documents to discern the intent of the parties, "a civil court must take care to [do so] in purely secular terms." *Id.* at 604. Thus, if the interpretation of such documents "would require the civil court to resolve a religious controversy, then the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body." *Id.* The Supreme Court stressed that "the outcome of a church property dispute is not foreordained" under a neutral-principles approach. *Id.* at 606. Instead,

> [a]t any time before the dispute erupts, the parties can ensure, if they so desire, that the faction loyal to the hierarchical church will retain the church property. They can

> modify the deeds or the corporate charter to include a right of reversion or trust in favor of the general church. *Alternatively, the constitution of the general church can be made to recite an express trust in favor of the denominational church.* The burden involved in taking such steps will be minimal. And the civil courts will be bound to give effect to the result indicated by the parties, provided it is embodied in some legally cognizable form.

Id. (emphasis added).

Today, this Court adopts the neutral-principles approach for resolution of disputes involving religious organizations. *See* ___ S.W.3d at ___. I fully support this adoption and agree that this approach is the preferable method of resolving such controversies. However, the neutral-principles approach only allows courts to become involved in non-ecclesiastical decisions; it does not confer jurisdiction upon courts to decide matters over which they have no constitutional authority. In my view, the Court oversteps this boundary and ignores its constitutional mandate.

A. Improper Resolution of Ecclesiastical Issues

In adopting the neutral-principles approach, the Court recognizes that "differences between ecclesiastical and non-ecclesiastical issues will not always be distinct" and that "deferring to decisions of ecclesiastical bodies in matters reserved to them by the First Amendment may, in some instances, effectively determine the property rights in question." *Id.* at ___. Unlike the Court, however, I believe proper deference with respect to such matters determines the property rights at issue in this case. When deciding whether a matter invokes constitutional protection, I believe that we should err on the side of caution, upholding constitutional mandates when in doubt.

The Court divides the questions of Good Shepherd *parish's* authority to withdraw from TEC and Good Shepherd *corporation's* authority to withdraw by amending its bylaws and articles of

incorporation. *Id.* at ___. In my view, however, the two inquiries are inextricably linked. The Court goes on to conclude that, because the parish at issue was incorporated and because there was no specific TEC or diocesan restriction on the corporation's authority to amend its bylaws and articles of incorporation, the validity of Good Shepherd's withdrawal by amendment of those documents was *not* an ecclesiastical question. *See id.* I am unconvinced that the incorporated status of the parish removes the issue from the realm of church polity. If Bishop Ohl's determination that the parish could not withdraw from TEC is a binding ecclesiastical decision,[2] it does not cease to be so because of the corporate form taken by the parish. Such a determination permits civil courts to conduct an end-run around the First Amendment's prohibition against inquiry into and resolution of religious issues by effectively allowing the lower church entity's unilateral decision to trump the higher entity's authority over matters of church polity.

Notably, the Court recognizes that "what happens to the relationship between a local congregation that is part of a hierarchical religious organization and the higher organization when members of the local congregation vote to disassociate is an ecclesiastical matter over which civil courts generally do not have jurisdiction." *Id.* at ___ (citing *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 713–14 (1976)). "But what happens to the property is not," the Court continues, "unless the congregation's affairs have been ordered so that ecclesiastical decisions effectively determine the property issue." *Id.* It follows that Bishop Ohl's determination regarding the parish's authority (or, more accurately, lack of authority) to withdraw from TEC is a binding

[2] This determination is unrelated to the undisputed right of the individual members of any religious organization to withdraw their affiliation should they choose to do so.

ecclesiastical decision, irrespective of the corporate form taken by the parish. In turn, since Good Shepherd did not validly withdraw from TEC, Good Shepherd remained a constituent thereof and consequently remained subject to TEC's and the Diocese's Constitutions and Canons.

There appears to be no dispute that, as a TEC parish, Good Shepherd could not pick and choose those portions of the governing documents by which it wished to be bound. And the Dennis Cannon and its diocesan counterpart expressly state that the church property is held in trust for TEC and the Diocese. Thus, if Good Shepherd had no authority to withdraw, it had no authority to revoke its adherence to the Canons or to revoke the trust placed on the property by virtue thereof. Moreover, the Canons condition Good Shepherd's authority over the church property on its "remain[ing] a part of, and subject to, this Church and its Constitutions and Canons." By purporting to withdraw from TEC, then, Good Shepherd took the very action that would strip it of its rights in the property. Good Shepherd may not avoid the consequences of its actions—consequences to which it had freely agreed—simply by voting to no longer be subject to those consequences.

B. Application of Secular Law

1. Intent of Parties to Create Trust

Even if this dispute could be resolved in a purely secular manner and without interference with TEC's ecclesiastical determinations, I would still hold that the Episcopal Leaders met their summary judgment burden. The Anglican Leaders argue that no valid trust exists on the property and that, to the extent one did exist, it was revoked upon Good Shepherd's 2006 amendment of its Bylaws. I disagree.

Under the Texas Trust Code, "[a] trust is created only if the settlor manifests an intention to create a trust." TEX. PROP. CODE § 112.002. Further, the intent to create a trust must be expressed in writing. *Id.* § 112.004. As discussed above, neither the deed conveying the property at issue to Good Shepherd nor Good Shepherd's Articles of Incorporation and Bylaws reference the creation of a trust. Courts in other states with similar trust statutes have struggled to determine the issue of whether the Dennis Canon, or similarly worded provisions in the governing documents of other hierarchical churches, creates a trust under such circumstances. *See Jones*, 443 U.S. at 606 (endorsing the means utilized by TEC to create a trust by noting that, as an alternative means of ensuring retention of the property by the higher entity, "the constitution of the general church can be made to recite an express trust in favor of the denominational church").

In *Presbytery of Greater Atlanta, Inc. v. Timberridge Presbyterian Church, Inc.* (*Timberridge*), the Georgia Supreme Court held that a local church (Timberridge) affiliated with the hierarchical Presbyterian Church (U.S.A.) (PCUSA) held property in trust for the national church based in part on an explicit trust provision in PCUSA's governing Book of Order, as well as on language in the local church's charter documents. 719 S.E.2d 446 (Ga. 2011). Following a 1982 amendment to the Book of Order by PCUSA's predecessor to add the property trust provision,[3] Timberridge "functioned as a regular member of the national church" until a property dispute arose in 2007, leading to Timberridge's withdrawal from PCUSA. *Id.* at 449–50. In applying the neutral principles doctrine to the dispute, the court aptly noted:

[3] The northern and southern branches of the Presbyterian Church formally reunited as PCUSA in 1983, with the Book of Order retaining the trust provision. 719 S.E.2d at 448.

> We review all of these materials [deeds, state statutes, and governing documents of the local and national churches], keeping in mind that the outcome of these church property disputes usually turns on the specific facts presented in the record, that the neutral principle factors are interrelated, and that our ultimate goal is to determine "the intentions of the parties" at the local and national level regarding beneficial ownership of the property at issue as expressed "before the dispute erupt[ed]" in a "legally cognizable form."

Id. at 450 (quoting *Jones*, 443 U.S. at 603). The court found persuasive that Timberridge's Articles of Incorporation "proclaimed [its] allegiance to the PCUSA Book of Order" containing the trust provision and noted that "at no time during the more than two decades before this dispute erupted and the eight years after it was deeded the property at issue did [Timberridge] even *seek* to amend its Articles to demonstrate any different intent." *Id.* at 455.

By contrast, in *From the Heart Church Ministries, Inc. v. African Methodist Episcopal Zionist Church*, the Maryland Court of Appeals held the evidence established that the local incorporated church "did not, in fact, consent to the trust provisions" in the national church's Book of Discipline. 803 A.2d 548, 569 (Md. 2002). Key to the court's holding was the local church's deletion, many years before the property dispute arose, of a requirement in its charter documents to act in accordance with the Book of Discipline. The court also noted the church's addition of a provision in those documents addressing the disposition of church property upon dissolution of the corporation, as well as the absence of trust language in the deed. This omission was significant, the court noted, because the Book of Discipline required such language, but the national church had nevertheless acquiesced in the "deeding irregularity." *Id.*

Like the local church in *Timberridge*, Good Shepherd's corporate documents "proclaimed allegiance" to TEC's and the Diocese's Constitutions and Canons. 719 S.E.2d at 455. The property

trust provision was added to the TEC Canons in 1979, before the church property was conveyed to Good Shepherd. Further, like the church in *Timberridge*, and notably in contrast to the church in *From the Heart Church Ministries*, "at no time during the more than two decades before this dispute erupted and the [twenty-four] years after it was deeded the property at issue did [Good Shepherd] even *seek* to amend its [corporate documents] to demonstrate any different intent." *Id.* In fact, Good Shepherd amended its Bylaws twice before the underlying dispute arose, leaving untouched the provision agreeing to be bound by the TEC and Diocesan Canons.[4] Moreover, the absence of trust language from the deed to the property at issue is not a departure from the requirements in the Canons and thus does not, in and of itself, raise suspicion about Good Shepherd's intent to hold the property in trust. *See From the Heart Church Ministries, Inc.*, 803 A.2d at 569.

The Court cites with approval the Missouri Court of Appeals' opinion in *Heartland Presbytery v. Gashland Presbyterian Church*, 364 S.W.3d 575 (Mo. Ct. App. 2012), which further supports the conclusion that a trust was imposed on the church property in this case. In *Heartland Presbytery*, the court held that a local church corporation's Articles of Agreement, which stated that the local church was "connected with and ecclesiastically subject to" PCUSA's predecessor, "[did] not establish its agreement to be bound by the property provisions of the PCUSA's Constitution; instead, it suggests the opposite." *Id.* at 585, 587. Noting that "[t]he 'connected with' language . . . cannot alone establish PCUSA's trust interest," the court went on to examine the statement that the local church "would be '*ecclesiastically* subject to' the denomination." *Id.* at 586. The latter

[4] Bishop Ohl also testified by affidavit that Good Shepherd participated in the annual Diocese Conventions each year from 1966 through 2006. This includes 1984, the year the Diocese added the property trust provision to its Canons.

statement, the court concluded, implied that the local church "would *not* be subject to the denomination's authority in *non*-ecclesiastical matters." *Id.* The Articles also provided that title to any property acquired "vests, without qualification, in [the local church] itself, in its corporate capacity," and that such property "can only be conveyed to others pursuant to specific authorization of its members . . . and of its Board of Trustees." *Id.* at 587. These provisions, the court held, lent further credence to the conclusion that the local church did not consent to the PCUSA trust provision. *Id.*

In this case, Good Shepherd's corporate documents contained the kind of language that was conspicuously absent from the Articles of Agreement at issue in *Heartland Presbytery*. Prior to the split with TEC and the Diocese, Good Shepherd's Bylaws stated not only that the church "is a constituent part of the Diocese of Northwest Texas and of the Protestant Episcopal Church in the United States of America," but also that it "accedes to, recognizes, and adopts the General Constitution and Canons of that Church, and the Constitution and Canons of the Diocese of Northwest Texas and acknowledges the authority of the same."[5] This is consistent with Good Shepherd's promise of "conformity to" TEC Doctrine when it originally applied for mission status and the declaration in its parish application that it was "conscientiously attached" to that Doctrine. Thus, unlike in *Heartland Presbytery*, Good Shepherd's corporate documents constitute an "effective

[5] The local church's Bylaws in *Heartland Presbytery* did state that PCUSA's Constitution was "obligatory upon it and its members" and that the Bylaws "shall be construed only in conformity" with the Constitution. 364 S.W.3d at 587. However, the court held that these provisions conflicted with the local church's Articles of Agreement and that, under state law, the Articles controlled. *Id.* Here, there is no conflict between Good Shepherd's Articles of Incorporation and its Bylaws; that is, nothing in the Articles of Incorporation is negated, or even affected, by the statement in the Bylaws that Good Shepherd acceded to TEC's and the Diocese's Constitutions and Canons.

expression of [Good Shepherd's] intent to be bound by [TEC's and the Diocese's Canons]," which have included the property trust provisions since 1979 and 1984, respectively.[6] *Id.* at 591.

In sum, under a neutral analysis of the relevant documents, I would hold that the Episcopal Leaders met their summary judgment burden with respect to the creation of a trust. In light of the property trust provisions in TEC's and the Diocese's Canons, Good Shepherd's corporate documents agreeing to be bound by those Canons, Good Shepherd's periodic amendment of its corporate documents without altering its allegiance to the Canons, and Good Shepherd's continued participation in Diocesan Conventions prior to the dispute, the Episcopal Leaders conclusively established an expression of intent by Good Shepherd to hold its property in trust for the benefit of TEC and the Diocese.

2. The Trust Is Expressly Irrevocable

The Court holds that, regardless of whether Good Shepherd agreed to hold the church property in trust, the trust was revocable under Texas law. ___ S.W.3d at ___. I disagree.

The Court correctly notes that, under Texas law, a trust is revocable unless expressly made irrevocable. TEX. PROP. CODE § 112.051. However, "[n]o specific words of art are required to create an irrevocable trust" so long as the instrument "reflect[s] the trustor's intent to make the trust irrevocable." *Vela v. GRC Land Holdings, Ltd.*, 383 S.W.3d 248, 250–51 (Tex. App.—San Antonio 2012, no pet.) (mem. op.) (citing *McCauley v. Simmer*, 336 S.W.2d 872, 881 (Tex. Civ. App.—Houston 1960, writ dism'd), and *Austin Lake Estates Recreation Club, Inc. v. Gilliam*, 493

[6] This is consistent with the Texas Trust Code, which provides for creation of a trust by "a property owner's declaration that the owner holds the property as trustee for another person." TEX. PROP. CODE § 112.001(1).

S.W.2d 343, 347 (Tex. Civ. App.—Austin 1973, writ ref'd n.r.e.)). I would hold that the terms of the property trust provision in the Dennis Canon, to which Good Shepherd agreed to be bound, expressly rendered the trust irrevocable upon Good Shepherd's withdrawal from TEC.

As noted above, the property trust provision in TEC's Canons (with a substantially similar provision in the diocesan Canons) states:

> All real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church and the Diocese thereof in which such Parish, Mission or Congregation is located. The existence of this trust, however, shall in no way limit the power and authority of the Parish, Mission or Congregation otherwise existing over such property *so long as the particular Parish, Mission or Congregation remains a part of, and subject to, this Church and its Constitutions and Canons*.

(Emphasis added). This provision clearly limits a parish's authority over church property by requiring that the parish be "a part of, and subject to," TEC. Thus, if a parish withdraws from TEC, it necessarily loses such authority to the extent it is inconsistent with holding the property in trust for TEC and the Diocese. While the Dennis Canon does not use the term "irrevocable," it nevertheless reflects Good Shepherd's intent to make the trust irrevocable upon its withdrawal from TEC and was thus sufficient to create an irrevocable trust under Texas law.

The Dennis Canon's language distinguishes the property trust provision here from the national church's trust provision at issue in *From the Heart Church Ministries*, which did not address the situation in which "a local church disaffiliates from the denomination." 803 A.2d at 571. Without such language, the Maryland Court of Appeals declined to find that the trust was irrevocable, concluding that "[c]onsent to holding property in trust during the course of affiliation does not automatically constitute consent to relinquishing that property once the affiliation

terminates." *Id.* Here, Good Shepherd did more than consent to holding the property in trust during the course of its affiliation with TEC; it also consented to its authority over the property being contingent on that affiliation. As a result, even if Good Shepherd had the authority to disaffiliate from TEC and the Diocese by proper vote under its Articles and Bylaws, I cannot agree with the Court that Good Shepherd could revoke the trust and maintain control of the property upon its withdrawal. *See Bishop & Diocese of Colo. v. Mote*, 716 P.2d 85, 108 (Colo. 1986) (holding that a local church's articles of incorporation and bylaws that were similar to Good Shepherd's, along with the relevant provisions of TEC's Canons, "foreclose the possibility of the withdrawal of property from the parish simply because a majority of the members of the parish decide to end their association with [TEC]").

The Supreme Court confirmed in *Jones v. Wolf* that "before the dispute erupts, the parties can ensure, if they so desire, that the faction loyal to the hierarchical church will retain the church property." 443 U.S. at 606. That is exactly what the parties did in this case. Good Shepherd agreed to hold the church property in trust for TEC and the Diocese, and any authority it otherwise had over the property terminated when it withdrew from TEC.

3. Good Shepherd Is Estopped from Revoking the Trust

Alternatively, I believe the Episcopal Leaders prevail under the doctrine of quasi-estoppel. The Episcopal Leaders did not formally plead quasi-estoppel as an affirmative defense, though they did allege facts to support it.[7] The summary judgment evidence establishes the applicability of the

[7] The Anglican Leaders counterclaimed for a declaratory judgment regarding ownership and possession of the church property. In their First Amended Petition, the Episcopal Leaders argued that they "relied on the promises and statements" of Good Shepherd in "provid[ing] financial support" thereto.

doctrine and precludes Good Shepherd from claiming that it may revoke the trust in conjunction with its withdrawal from TEC. "Quasi-estoppel precludes a party from asserting, to another's disadvantage, a right inconsistent with a position previously taken. The doctrine applies when it would be unconscionable to allow a person to maintain a position inconsistent with one to which he acquiesced, or from which he accepted a benefit." *Lopez v. Muñoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 864 (Tex. 2000) (citation omitted).

Prior to the 2006 dispute, Good Shepherd: had promised conformity to TEC Doctrine and to TEC's and the Diocese's Constitutions and Canons; had accepted grants as well as no-interest and low-interest loans from TEC and the Diocese to assist in building the church; had declared that the church property was "secured from the danger of alienation . . . from those who profess and practice the Doctrine, Discipline, and Worship of this [Episcopal] Church"; and had accepted the conveyance of the property from the Diocese after the property trust provisions were added to TEC's Canons. Having made these promises and accepted these benefits, Good Shepherd may not now contend it is free to disregard these positions because a majority of its members have voted to do so.

III. Conclusion

In denying summary judgment, the Court oversteps its constitutional bounds to resolve ecclesiastical matters over which it has no authority. Further, the Court ignores language in the relevant documents clarifying that Good Shepherd's authority over the church property is contingent upon its affiliation with TEC and the Diocese. Finally, Good Shepherd is barred from revoking the trust on the property in conjunction with its withdrawal from TEC. For these reasons, I am compelled to respectfully express my dissent.

_____

Debra H. Lehrmann
Justice

OPINION DELIVERED: August 30, 2013

IN THE SUPREME COURT OF TEXAS

NO. 11-0362

WEST HARDIN COUNTY CONSOLIDATED INDEPENDENT SCHOOL DISTRICT, PETITIONER,

v.

WALLACE MAURY POOLE D/B/A L&B PRODUCTION, RESPONDENT

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

PER CURIAM

The West Hardin County Consolidated Independent School District obtained an *in rem* delinquent property tax judgment against an oil and gas lease that Wallace Maury Poole owned and operated. Poole did not appeal, and the District foreclosed its judgment lien on the leasehold, taking ownership. The Railroad Commission then directed Poole to plug a well on the lease, *see* TEX. NAT. RES. CODE § 89.022(d), which Poole failed to do. Poole asserted that the responsibility lay with the District, the new owner, or alternatively, that the District had prevented him from re-entering the premises with threats of criminal prosecution. Ultimately, the Commission, after a hearing, ordered Poole to plug the well, *see id*. § 89.042, and assessed a penalty against him, *see id.* § 89.046. Poole did not seek judicial review of the order, *see id*. § 89.087, and when he failed to comply, the

Commission plugged the well and brought an enforcement action in court to recover the costs of the operation and the penalty, *see id.* § 89.121. Poole and the Commission settled.

Poole then sued the District, alleging in part that the District's actions had resulted in a taking of his property requiring compensation under article 1, section 17 of the Texas Constitution. The trial court dismissed Poole's action for want of jurisdiction, but the court of appeals reversed and remanded with respect to the takings claim. ___ S.W.3d ___ (Tex. App.–Beaumont 2011).

Poole tells us that he seeks "damages that resulted after [the District] foreclosed on [his] property, including the amounts that he had to pay . . . for plugging the wells on the lease and . . . related attorneys' fees and expenses". Respondent's Brief on the Merits 4. The "essence" of his complaint, he says, is that the District "refused to resolve this situation and/or replace Poole as Lease operator—thereby playing Poole against the Commission and causing Poole to pay excessive well plugging costs and Lease clean-up costs, all (or a substantial portion of which) were the liability of [the District]." *Id.* at 4-5. Poole thus contends only that the District has injured him, not that it has taken his property without compensation. "The text of section 17 waives immunity only when one seeks adequate compensation for property lost" to a governmental entity. *City of Beaumont v. Bouillion*, 896 S.W.2d 143, 149 (Tex. 1995). Poole's allegations do not assert a taking for which immunity from suit is waived.

The District argues that Poole is making an impermissible collateral attack on the tax judgment. The court of appeals concluded that even if the District was correct, the trial court had jurisdiction to consider Poole's claim. ___ S.W.3d at ___. But Poole insists that "this lawsuit does not challenge the findings of any prior tax owed and does not seek to set aside or avoid any prior

judgment: it seeks redress for damages caused to Poole by [the District's] subsequent bad acts." Respondent's Brief on the Merits 11. Poole does not make a collateral attack for the trial court to consider.

The court of appeals held that the trial court had jurisdiction only over Poole's takings claim. Poole asserts in this Court no other ground for jurisdiction. We conclude that the trial court correctly dismissed Poole's case. Accordingly, we grant the District's petition for review, and without hearing oral argument, TEX. R. APP. P. 59.1, reverse the judgment of the court of appeals and render judgment dismissing the case.

Opinion delivered: October 26, 2012

IN THE SUPREME COURT OF TEXAS

NO. 11-0394

LENNAR CORPORATION, LENNAR HOMES OF TEXAS SALES & MARKETING LTD., AND LENNAR HOMES OF TEXAS LAND & CONSTRUCTION LTD., PETITIONERS,

v.

MARKEL AMERICAN INSURANCE COMPANY, RESPONDENT

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

Argued October 16, 2012

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

JUSTICE BOYD filed a concurring opinion.

Having determined that homes built with an exterior insulation and finish system ("EIFS") suffer serious water damage that worsens over time, a homebuilder undertook to remove the product from all the homes it had built and replace it with conventional stucco. The homebuilder's insurers refused to cooperate with this remediation program, preferring instead to wait until homeowners sued, and denied coverage of the costs. This litigation, lasting more than twelve years, ensued. Now, only one insurer remains, and the issues have been winnowed to two:

- Not having consented to the homebuilder's remediation program, is the insurer nevertheless responsible for the costs if it suffered no prejudice as a result?

- Is the insurer responsible for (i) costs incurred to determine property damage as well as to repair it, and (ii) costs to remediate damage that began before and continued after the policy period?

We resolve these issues in the homebuilder's favor, reverse the judgment of the court of appeals,[1] and reinstate the judgment of the trial court.

I

Long used in commercial construction, EIFS was marketed in the early 1990s as an attractive alternative to conventional stucco in home construction. But installed on wood-frame walls typical of single-family homes, EIFS traps water inside, causing rot and structural damage, mildew and mold, and termite infestations.[2] Damage is often undetectable from a visual inspection of the exterior of the home. Lennar Corporation and another homebuilder it bought[3] built some 800 homes using EIFS, but stopped using it in 1998. After the problems with EIFS were exposed on the NBC television show *Dateline* in 1999, homeowner complaints poured in. Lennar investigated and learned that the problems associated with EIFS were frequent and substantial. Property damage typically began six to twelve months after EIFS was installed, progressed more or less, depending

[1] 342 S.W.3d 704 [*Lennar II*], following remand in *Lennar Corp. v. Great Am. Ins. Co.*, 200 S.W.3d 651 (Tex. App.–Houston [14th Dist.] 2006, pet. denied) [*Lennar I*].

[2] The problems with using EIFS in home construction have become familiar to us. *See Fresh Coat, Inc. v. K-2, Inc.*, 318 S.W.3d 893 (Tex. 2010); *Pine Oak Builders, Inc. v. Great Am. Lloyds Ins. Co.*, 279 S.W.3d 650 (Tex. 2009); *Don's Bldg. Supply, Inc. v. OneBeacon Ins. Co.*, 267 S.W.3d 20 (Tex. 2008).

[3] Petitioners are Lennar Corporation and two subsidiaries, Lennar Homes of Texas Sales & Marketing Ltd. and Lennar Homes of Texas Land & Construction Ltd. Lennar Corporation bought Village Builders in 1996. All are collectively referred to as "Lennar".

on the proximity of water due to rain and yard irrigation, and continued until the EIFS was removed. Lennar decided not merely to address complaints as it received them but to contact all its homeowners and offer to remove the EIFS and replace it with conventional stucco. Lennar began its remediation program in 1999 and finished in 2003. Almost all the homeowners accepted Lennar's offer of remediation. A few were paid cash.[4] Only three ever sued.[5] All settled.[6]

Early in the process, Lennar notified its insurers that it would seek indemnification for the costs. The insurers refused to participate in Lennar's proactive, comprehensive efforts, preferring instead to wait and respond to homeowners' claims one by one. All the insurers denied coverage, and in 2000, Lennar sued. The trial court granted summary judgments for the insurers, and the court of appeals affirmed for all but two: American Dynasty Surplus Lines Insurance Company, which had provided Lennar a $1 million primary commercial general liability policy with an annual $1 million self-insured retention, and Markel American Insurance Company, which had provided a $25 million commercial umbrella policy, in effect from June 1, 1999 through October 19, 2000.[7] On remand, Lennar settled with American Dynasty, leaving only its claims against Markel for trial.

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[4] *See Lennar I*, 200 S.W.3d at 661 n.4 ("Lennar paid cash settlements to a few homeowners").

[5] *Id.* at 661 n.3 ("Of the approximately 400 homes involved, only two homeowners filed suit against Lennar."). The record, however, contains references to three lawsuits.

[6] *Lennar II*, 342 S.W.3d at 714 ("It is undisputed that Lennar entered into a settlement agreement with each homeowner.").

[7] *Lennar I*, 200 S.W.3d at 685, 691, 704.

Among the many disputes the court of appeals resolved was whether Lennar's costs to remove and replace EIFS as a preventative measure were incurred "because of . . . property damage" and thus covered by the policies.[8] The court held they were not:

> Lennar arguably made a good business decision to remove and replace all the EIFS to prevent further damage. Nonetheless, . . . we cannot conclude that it was necessary for Lennar to remove and replace all the EIFS in order to repair the water damage, if any, to each home. Therefore, the costs incurred by Lennar to remove and replace EIFS as a preventative measure are not [covered]. Accordingly, Lennar must apportion the EIFS-related damages between its costs to remove and replace EIFS as a preventative measure and its costs to repair water damage to the homes.[9]

Lennar and Markel also disputed whether coverage was precluded by Lennar's failure to comply with Condition E of the policy, which states in part: "it is a requirement of this policy that . . . no insured, except at their own cost, voluntarily make any payment, assume any obligation, or incur any expense . . . without [Markel's] consent". Markel had not consented to Lennar's remediation settlements.[10] Citing our decision in *Hernandez v. Gulf Group Lloyds*,[11] the court held that Markel's liability was not excused unless it could prove, as a matter of fact, that it had been prejudiced by Lennar's settlements with homeowners.[12] Both have accepted that court's holdings as governing the case.

At trial against Markel, Lennar offered evidence that the extent of water damage to a home could not be determined without removing all the EIFS, though when that was done, some homes

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[8] *Id.* at 677.

[9] *Id.* at 679–680.

[10] *Id.* at 695 n.58.

[11] 875 S.W.2d 691, 692–694 (Tex. 1994).

[12] *Lennar I*, 200 S.W.3d at 695.

turned out to have only limited damage, and some had none at all. Lennar offered evidence of its remediation costs for only 465 homes that had some water damage, but it included costs for removing and replacing all the EIFS on the homes, even if only part of a home was damaged. Lennar offered no evidence of the costs of work done on a few homes that turned out to be completely undamaged. At Lennar's request, the trial court asked the jury to find for each home the amount "incurred in payment of property damage", defined as:

- The cost to remove and replace the EIFS in order to access and repair underlying water damage *or in order to determine the areas of underlying water damage.*
- The cost to repair any water damage to the home.
- The cost to repair broken windows, cracked driveways, landscaping, and other parts of the home that were damaged in the course of repairing water damage to the home.

(Emphasis added.) The court overruled Markel's objections that the italicized phrase did not describe a cost incurred "because of . . . property damage" under its policy and that Lennar had not segregated covered and uncovered costs as directed by the court of appeals.

After hearing evidence for eight days, the jury found that Lennar's defective use of EIFS in home construction "create[d] an imminent threat to the health or safety of the inhabitants of the homes", and that Lennar took "reasonable steps to cure the construction defect as soon as practicable and within a reasonable time". Lennar argued that these findings established its legal liability to the homeowners under the Residential Construction Liability Act ("RCLA").[13] The jury failed to find

[13] TEX. PROP. CODE §§ 27.001–.007.

that Markel was prejudiced by Lennar's "failure to obtain Markel's consent (a) to enter into any compromise settlement agreement, or (b) to voluntarily make any payment, assume any obligation, or incur any expense". The trial court rendered judgment awarding Lennar $2,965,114.16, the damages found by the jury less a $425,000 credit for settlements with other insurers, $2,421,825.89, the attorney fees found by the jury, and $1,227,476.03 in prejudgment interest.

The court of appeals reversed and rendered judgment for Markel on two grounds.[14] One was that Lennar had not established its legal liability to the homeowners to trigger Markel's coverage.[15] The court concluded that the RCLA did not make Lennar legally liable to the homeowners because it does not create a cause of action,[16] and that the policy did not allow Lennar to show legal liability to the homeowners using settlements to which Markel had not agreed.[17] Markel had also argued that it was prejudiced by Lennar's violation of the consent-to-settlement provision in Condition E, but the court reasoned that it did not need to address that issue given its disposition in the case.[18]

The other ground for the court's decision was that Lennar had not offered evidence of damages covered by the policy. The court concluded that "[t]he removal and replacement of EIFS

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[14] *Lennar II*, 342 S.W.3d at 716.

[15] *Id.* at 712–16.

[16] *Id.* at 713–714; *see* TEX. PROP. CODE § 27.005 ("This chapter does not create a cause of action . . . ."). The court had not addressed this issue in the first appeal. *Lennar I*, 200 S.W.3d at 680 n.37 ("In their motions for summary judgment, several carriers argued that Lennar was not 'legally obligated to pay' the EIFS claims because it settled them voluntarily without suits being filed. According to Lennar, [RCLA] legally obligated Lennar to cure construction defects without suits being filed. On appeal, the carriers no longer argue that Lennar was not legally obligated to pay the EIFS claims." (Citation omitted.)).

[17] *Lennar II*, 342 S.W.3d at 714–716.

[18] *Id.* at 715 n.10. The court also rejected Lennar's argument that it was legally liable for using a defective product. *Id.* at 714.

'in order to determine the areas of underlying water damage' as defined in the charge includes merely removing and replacing EIFS as a preventative measure, whether there was property damage or not."[19] The court expressly did not address Markel's argument that Lennar had not offered evidence of damages occurring during its policy period as opposed to all the years during which Lennar was pursuing remediation.[20]

We granted Lennar's petition for review.[21] We consider first whether Lennar established its legal liability to the homeowners, then whether it properly proved the amount of its loss.

II

As noted above, Condition E of Markel's policy forbade Lennar, "except at [its] own cost, [from] voluntarily mak[ing] any payment, assum[ing] any obligation, or incur[ring] any expense . . . without [Markel's] consent". Though Markel did not consent to Lennar's settlements with homeowners, it concedes, as *Lennar I* held,[22] that this provision does not excuse its liability under the policy unless it was prejudiced by the settlements. *Lennar I* relied on our decision in *Hernandez v. Gulf Group Lloyds*.[23] There, the parents of a girl killed in a car accident settled with the other driver for his only asset, the limit of his auto insurance policy, which was far less than their damages,

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[19] *Id.* at 711.

[20] *Id.* at 712 n.5.

[21] 55 Tex. Sup. Ct. J. 755, 757 (June 11, 2012).

[22] 200 S.W.3d at 695.

[23] 875 S.W.2d 691 (Tex. 1994).

then claimed uninsured/underinsured motorist ("UM/UIM") coverage under their own auto policy.[24] Their insurer had not been asked to consent to the settlement and denied the claim based on a policy exclusion for "bodily injury . . . with respect to which the insured . . . shall, without written consent of the company, make any settlement with any person . . . who may be legally liable therefor".[25] The insureds argued that without a showing that their settlement had prejudiced the insurer, they had been denied the UM/UIM protection required by statute.[26] We did not reach that argument, concluding instead that prejudice is required by principles of contract law.[27] Generally, one party's breach does not excuse the other's performance unless the breach is material.[28] One factor in determining materiality is "the extent to which the nonbreaching party will be deprived of the benefit that it could have reasonably anticipated from full performance."[29] The insurer had been deprived of only one benefit, its subrogation right against the other driver, and it stipulated that it had not, as a result,

[24] *Id.* at 692.

[25] *Id.*

[26] *Id.*

[27] *Id.* at 692–694.

[28] *Id.* at 692 ("A fundamental principle of contract law is that when one party to a contract commits a material breach of that contract, the other party is discharged or excused from any obligation to perform."); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 237 (1981) (stating that with exceptions, "it is a condition of each party's remaining duties to render performances to be exchanged under an exchange of promises that there be no uncured material failure by the other party to render any such performance due at an earlier time.").

[29] *Id.* at 693 (citing RESTATEMENT (SECOND) OF CONTRACTS § 241(a) (1981)).

incurred any financial loss.[30] Thus, we concluded, the insureds' breach by settling without the insurer's consent was not material, the insurer was not prejudiced, and coverage was not excused.[31]

At trial, Markel vigorously contended that Lennar's settlements were prejudicial, largely because Lennar offered remediation to homeowners with damaged houses who would never have sought redress had Lennar left them alone. The jury did not find Markel's position convincing or conclude that Lennar's remediation program was anything other than a reasonable approach to a serious problem. The jury was entitled to credit evidence that, had Lennar not proceeded as it did, the damages would have worsened and the remediation costs increased. In this Court, Markel nevertheless asserts that it established prejudice as a matter of law. It argues in its brief:

> When an insurer is not asked to adjust a claim, provide a defense, or be involved in negotiating a settlement, but is simply told it has to pay for a voluntary payment, the insurer has suffered prejudice as a matter of law. That prejudice is even more stark in this case, in which the insured actively solicited claims which might otherwise never have been brought and made payments which were not covered under the Policy.[32]

Under *Hernandez*, an insurer establishes prejudice from a settlement to which it did not agree by showing that the insured's unilateral settlement was a material breach of the policy — that is, that it significantly impaired the insurer's position. Markel's argument boils down to this — had Lennar

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[30] *Id.* at 693–694.

[31] *Id.* Amicus curiae, the Complex Insurance Claims Litigation Association, argues that requiring prejudice before enforcing a consent-to-settlement provision simply rewrites the policy, that many jurisdictions impose no such requirement, and that *Hernandez* should be limited to UM/UIM policies. We answered the first argument in *Hernandez*: general contract law requires prejudice. *Id.* at 692. The second argument is also answered in *Hernandez*: jurisdictions differ, for various reasons, over the necessity of prejudice. *Id.* at 693 n.4 (listing cases). In response to the third, nothing in *Hernandez* suggests that its rationale is limited to the type of insurance coverage involved.

[32] Markel's Brief on the Merits 42–43.

stonewalled the homeowners, fewer repairs would have been made. On this record, that is a question of fact, not of law, which the jury resolved in Lennar's favor.

But Condition E's consent-to-settlement requirement also finds expression in the policy's Insuring Agreement, and Markel argues that it can insist on compliance with this separate provision without proving prejudice. The policy obligates Markel to pay Lennar's "ultimate net loss" — defined as "the total amount of [property] damages for which [Lennar] is legally liable"[33] — and states that such loss "may be established by adjudication, arbitration, or a compromise settlement to which we have previously agreed in writing." Markel contends that these three ways for establishing a covered loss are exclusive, and we assume, without deciding, that Markel is correct. Markel argues that this Loss Establishment Provision, unlike Condition E, is central to the policy because of its "unmistakeable language" and its purpose in preventing insureds from determining loss unilaterally, and therefore any breach is material. Lennar responds that the provision cannot operate differently than Condition E.

Assuming Markel is right, that an insurer need not show prejudice from an insured's failure to comply with a policy requirement that is "considered essential to coverage",[34] the Loss Establishment Provision does not qualify, certainly not for the reasons Markel argues. Its language is no clearer than Condition E's, and the purpose of the two provisions, precluding liability for the

[33] The obligation was, of course, subject to American Dynasty's $1 million primary coverage, Lennar's $1 million self-insured retention, and Markel's $25 million policy limits.

[34] *Prodigy Commc'ns Corp. v. Agric. Excess & Surplus Ins. Co.,* 288 S.W.3d 374, 381 (Tex. 2009) (citing as an example the requirement in a claims-made-and-reported policy that a claim be reported to the insurer during the policy period or within a specific number of days thereafter).

insured's voluntary payments without the insurer's consent, is exactly the same. The Loss Establishment Provision is no more central to the policy than Condition E, and the requirement that Markel show prejudice from Lennar's non-compliance with either operates identically. Markel failed to prove that it was prejudiced in any way by Lennar's settlements. To allow it to argue that Lennar cannot use those non-prejudicial settlements to establish the amount of its loss would plainly subvert the requirement that Markel show that Lennar's non-compliance was material. The jury's failure to find prejudice leaves but one conclusion: that Lennar's loss as shown by the settlements is the amount Markel is obligated to pay under the policy.[35]

Absent prejudice to Markel, Lennar's settlements with homeowners establish both its legal liability[36] for the property damages and the basis for determining the amount of loss.[37]

III

We come now to the question whether the amount of damages found by the jury is covered by Markel's policy. The policy obligated Markel to pay "the total amount" of Lennar's loss "because of" property damage that "occurred during the policy period", including "continuous or repeated exposure to the same general harmful condition". Focusing on "because of", the court of appeals

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[35] We do not, as the concurrence asserts, implicitly base our decision on public policy. "Generally, the State's public policy is reflected in its statutes." *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 628 (Tex. 2004) (internal quotation marks omitted). Our analysis is based on the same settled principles of contract law and textual interpretation of insurance policies on which we based our decision in *Hernandez*.

[36] Markel states in its brief that the settlement agreements did not "establish an obligation to pay anything; they commit Lennar to perform repairs." Markel's Brief on the Merits 33. The costs to perform that commitment are Lennar's legal liability.

[37] Having reached this conclusion, we need not consider Lennar's contention that its liability was also established by RCLA.

held that the policy covers only the cost of repairing home damage, not the cost of locating it, and because Lennar's evidence did not segregate the two, it was entitled to recover nothing.[38] Additionally, Markel argues that Lennar's evidence improperly included the cost of repairing home damage that occurred outside the policy period. The court of appeals did not reach this argument.[39] We examine each issue in turn.

A

As we have explained, water damage from EIFS occurs within the walls of homes to which it is applied and thus is often hidden from sight. Lennar's evidence at trial was that the extent of damage to a home cannot be determined without removing all the EIFS. Accordingly, the only cost evidence Lennar presented was for removing all the EIFS from damaged houses, repairing the damage, and recovering the houses with conventional stucco. For a few homes, removal of the EIFS revealed no damage whatever, and Lennar did not offer any evidence of its remediation costs for those homes. But for the homes that had some damage, Lennar did not segregate its cost to repair only the damage found; it included the cost of removing EIFS from the entire house to find all the damaged areas. The jury was asked to find Lennar's costs of determining the areas of water damage as well as repairing them. Markel argues, and the court of appeals held, that the cost of determining the areas of water damage is not covered by the policy.

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[38] *Lennar II*, 342 S.W.3d at 711.

[39] *Id.* at 712 n.5.

We have noted that the phrase, "because of", used in determining a covered loss under a commercial general liability policy, "is susceptible to a broad definition."[40] But it need not be read broadly to reach all of Lennar's remediation costs. Under no reasonable construction of the phrase can the cost of finding EIFS property damage in order to repair it not be considered to be "because of" the damage. We are not confronted with a situation in which the existence of damage was doubtful. Markel concedes that each of the 465 homes for which Lennar sought to recover remediation costs was actually damaged. Nor could Lennar have located all the damage, which was hidden from sight, without removing all the EIFS. The court of appeals' characterization of efforts to determine all the damaged areas of homes as preventative measures is not supported by the record.

We thus conclude that Lennar's evidence supported the jury's verdict.

B

According to the evidence at trial, water damage from EIFS begins within six to twelve months after home construction is completed and continues until it is repaired. Lennar stopped using EIFS in 1998. Markel's policy was in effect throughout 1999 and until October 2000. A fair inference from the record is that most of the damage to the homes began before or during Markel's policy period and continued afterward. Markel agrees that all the homes for which Lennar claims remediation costs sustained some damage during the policy period, but it insists that only the costs for remediating the damage in existence during the policy period are covered losses. Lennar concedes that it did not attempt to prove the specific amount of damage to each house during the

[40] *Zurich Am. Ins. Co. v. Nokia, Inc.*, 268 S.W.3d 487, 499 (Tex. 2008) (stating with respect to commercial general liability insurance policies, that "'damages because of bodily injury' is susceptible to a broad definition").

policy period but contends that it would be practically impossible to do so and that the policy does not require it.

Coverage under Markel's policy is limited to property damage that occurs during the policy period but expressly includes damage from a continuous exposure to the same harmful conditions. For damage that occurs during the policy period, coverage extends to the "total amount" of loss suffered as a result, not just the loss incurred during the policy period. No question remains that all 465 houses at issue suffered property damage during the policy period, which began before or during the policy period and continued until it was repaired, all because of water trapped in home walls by EIFS applied to wood-frame construction. Thus, the policy covered Lennar's total remediation costs.

This reading of the policy is confirmed by our decision in *American Physicians Insurance Exchange v. Garcia*.[41] In the underlying suit, plaintiffs alleged that the defendant physician's negligence in treating their decedent extended over two-and-one-half years, during which the physician was covered at various times by four non-overlapping policies, one with $100,000 limits and the other three with $500,000 limits.[42] Plaintiffs contended that the policies could be "stacked" to provide a total of $1.6 million in coverage and demanded that the insurers settle for that amount. After the insurers refused, plaintiffs obtained a judgment against the physician in excess of that amount, and, as the physician's assignees, sued the insurers under *Stowers*.[43] We rejected the plaintiffs' stacking argument, explaining instead:

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[41] 876 S.W.2d 842 (Tex. 1994).

[42] *Id.* at 843–844.

[43] *Id.* at 853.

> If a single occurrence triggers more than one policy, covering different policy periods, then different limits may have applied at different times. In such a case, the insured's indemnity limit should be whatever limit applied at the single point in time during the coverage periods of the triggered policies when the insured's limit was highest. The insured is generally in the best position to identify the policy or policies that would maximize coverage. Once the applicable limit is identified, all insurers whose policies are triggered must allocate funding of the indemnity limit among themselves according to their subrogation rights.[44]

Markel dismisses this as dicta, but having said what the policy limits were not, it was important for us to say what they were and why. Our decision provides the rule governing the situation described.

Markel argues alternatively that it should be responsible along with Lennar's other insurers only for its pro rata share of the total remediation expenses. *Garcia* rejects this approach, leaving up to insurers who share responsibility for a loss to allocate it among themselves according to their subrogation rights. Markel urges us to abandon *Garcia*, based on recent cases in other jurisdictions that take a pro rata approach.[45] While we have acknowledged that allocation issues have been treated differently in other jurisdictions,[46] the decisions of those courts do not persuade us to reconsider ours in *Garcia*.

We conclude that Markel's policy covered Lennar's entire remediation costs for damaged homes.

* * *

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[44] *Id.* at 855 (footnote omitted).

[45] *See Boston Gas Co. v. Century Indem. Co.,* 910 N.E.2d 290 (Mass. 2009); *EnergyNorth Natural Gas, Inc. v. Certain Underwriters at Lloyd's,* 934 A.2d 517 (N.H. 2007); *Crossmann Cmtys. of N.C., Inc. v. Harleysville Mut. Ins. Co.,* 717 S.E.2d 589 (S.C. 2011).

[46] *Don's Bldg. Supply, Inc. v. OneBeacon Ins. Co.*, 267 S.W.3d 20, 31 n.45 (Tex. 2008).

Lennar's responsible efforts to correct defects in its home construction did not absolve Markel of responsibility for the costs under its liability policy. We reverse the judgment of the court of appeals and affirm the judgment of the trial court.

Nathan L. Hecht
Justice

Opinion delivered: August 23, 2013

IN THE SUPREME COURT OF TEXAS

NO. 11-0394

LENNAR CORPORATION, LENNAR HOMES OF TEXAS SALES & MARKETING LTD., AND LENNAR HOMES OF TEXAS LAND & CONSTRUCTION LTD., PETITIONERS,

v.

MARKEL AMERICAN INSURANCE COMPANY, RESPONDENT

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

JUSTICE BOYD, concurring.

If we were writing on a blank slate, I would hold that Markel's insurance policy does not cover Lennar's liabilities because Lennar incurred those liabilities through settlements to which Markel had not "previously agreed in writing." But we are not writing on a blank slate, and our precedent compels us to disregard the policy's consent requirement because Lennar's failure to obtain Markel's prior agreement to the settlements did not harm or prejudice Markel. I therefore concur in the Court's judgment. But if we are going to continue imposing the prejudice requirement, as I agree our precedent compels us to do, we should admit we are doing so on public policy grounds, rather than continue our well-intended but ultimately inadequate efforts to justify our holdings on the basis of contract principles.

I.
Courts and Contracts

We have repeatedly said that we will not re-write contracts. "Courts cannot make new contracts between the parties, but must enforce the contracts as written." *Royal Indem. Co. v. Marshall*, 388 S.W.2d 176, 181 (Tex. 1965). As the Court reaffirms today, insurance agreements are simply contracts; we construe them by applying general rules of contract construction, and we assume that the parties intended what the words of the contract say. *Gilbert Tex. Constr., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 126 (Tex. 2010). "[W]e may neither rewrite the parties' contract nor add to its language." *Am. Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 162 (Tex. 2003).

Except, sometimes, we do. Judicially implied warranties provide one obvious example. In *Humber v. Morton*, we inserted into contracts between homebuilders and their purchasers an agreement that the builder warrants that the home has been constructed in a good and workmanlike manner and is suitable for human habitation. 426 S.W.2d 554, 555 (Tex. 1968). And in *Melody Home Mfg. v. Barnes*, we implied a similar warranty in contracts between those hired to repair or modify tangible property and the customers who sue them for deceptive trade practices. 741 S.W.2d 349, 354 (Tex. 1987). In doing so, we acknowledged that "[i]mplied warranties are created by operation of law and are grounded more in tort than in contract," *id.* at 352, but we judicially inserted them into the parties' contracts because "public policy so mandates." *Id.* at 353.

Similarly, as in this case, we have repeatedly inserted into insurance contracts a requirement that insurers must suffer harm or prejudice before they can deny coverage based on certain provisions, even though the policies' unambiguous language would have permitted the insurers to

deny coverage without showing prejudice. In my view, we have struggled to explain and reconcile our holdings in these cases, primarily because we (quite understandably, in my view) want to avoid judicially inserting the prejudice requirement as a matter of public policy. I am convinced that there is now no other way to reconcile them. Although I would hold differently in the absence of our prior decisions, our precedent compels us to imply the prejudice requirement in this case as well. For the sake of consistency and predictability, however, we should acknowledge that we are doing so because "public policy so mandates."

II.
Precedent

This Court has directly addressed the prejudice requirement five times over the past forty years. Although we declined to impose the requirement the first time we considered it, we then did impose it in each of the subsequent cases. Our reasons for doing so have evolved in each case, to the point that, in my opinion, they are no longer logically or legally sufficient.

A. *Cutaia*

When this Court first addressed the issue more than forty years ago, we refused to read a prejudice requirement into an insurance contract because "the matter of rewriting the insurance provisions in question is properly within the prerogative of the State Board of Insurance or the Legislature." *Members Mut. Ins. Co. v. Cutaia*, 476 S.W.2d 278, 278 (Tex. 1972). *Cutaia* involved an automobile liability policy that required the insured to "forward any suit papers immediately to the [insurance] company." *Id.* The insured failed to comply with this requirement, but "the insurance company stipulated that it had not been harmed by the failure to forward the suit papers." *Id.* at 279. Nevertheless, the Court recognized that this prompt-service requirement was a condition

precedent to coverage. The Court thus held that the insured's failure to fulfill the condition negated the insurer's liability because, "after all, this is what the contract says." *Id.*

B. *Hernandez*

Twenty-two years after *Cutaia*, the Court changed course in *Hernandez v. Gulf Group Lloyds*, 875 S.W.2d 691 (Tex. 1994). *Hernandez* involved uninsured motorist coverage under an automobile policy that—like the policy at issue in the present case—required the insured to obtain the insurer's consent prior to any settlement. Unlike the present case, the consent provision was expressed as an exclusion to the coverage that the policy otherwise provided. *Id.* at 692 n.1 (policy provided that "[t]his insurance does not apply" to liability incurred through a settlement without consent). The insured settled a claim without obtaining the insurer's prior consent, but the trial court found that this caused the insurer "no material prejudice." *Id.* at 692. Without citing or discussing *Cutaia*, we held that "an insurer may escape liability on the basis of a settlement-without-consent exclusion only when the insurer is actually prejudiced by the insured's settlement . . . ." *Id.*

Although we noted in *Hernandez* that "[m]ost other jurisdictions presented with this issue have likewise imposed a prejudice requirement, primarily on public policy grounds," *id.* at 693 n.4, we did not characterize our holding as one based on public policy considerations. Instead, we reasoned that the insured breached the agreement by failing to obtain the insurer's consent, but the breach was not material because it did not cause harm or prejudice to the insurer, and it therefore did not release the insurer from its obligation to perform. *Id.* at 693–94. Justice Enoch dissented because he did not agree that the insured's failure to obtain the insurer's consent was a breach of the agreement. Instead, the consent requirement simply defined what the policy covered, or more

specifically, what the policy excluded from coverage. In Justice Enoch's view, *Hernandez* is not a case "about a breach of contract. This case is about coverage." *Id.* at 694 (Enoch, J., dissenting).

C. *PAJ*

We have addressed the prejudice requirement three times since *Hernandez*, and in each case we have imposed the prejudice requirement. First, in *PAJ, Inc. v. Hanover Insurance Co.*, we considered a provision in a commercial general liability policy that required the insured to notify the insurer of any claim or suit "as soon as practicable." 243 S.W.3d 630, 631 (Tex. 2008). The parties stipulated that the insured failed to comply with this requirement, but they also stipulated that the insurer was not prejudiced by the untimely notice. *Id.* Although the parties disagreed on whether the provision was a condition precedent (as in *Cutaia*) or "merely a covenant," we held—in a 5–4 split decision—that, in either case, the insured's failure to provide prompt notice would negate coverage only if the insurer was prejudiced. *Id.* at 632–33. As in *Hernandez*, we did not insert the prejudice requirement as a matter of public policy, but instead reasoned that the insured's failure to give prompt notice would negate coverage only if it was "a material breach." *Id.*

The four dissenting Justices concluded that the prompt-notice requirement was a condition precedent rather than a covenant, and to them that was the controlling difference: "*Hernandez*'s materiality-of-breach analysis is inapposite here because PAJ did not breach a covenant. Rather, it failed to comply with a condition precedent, a strict requirement that precedes any obligation on the part of Hanover under the policy." *Id.* at 639 (Willett, J., dissenting).

In a discussion that is crucial to my decision in the present case, however, the dissent in *PAJ* distinguished that policy's prompt-notice requirement (which it considered to be a condition precedent) from the settlement-without-consent provision in the policy at issue in *Hernandez* (which

it considered to be a covenant). In the dissent's view, settlement-without-consent covenants differ from prompt-notice conditions because a breach of the former "might occur long after the insurer has learned of a suit and assumed its duty to defend." *Id.* Not inserting the prejudice requirement into a settlement-without-consent provision, the dissent reasoned, thus "makes little sense from a timing standpoint [and] also disserves the interests of both parties to the insurance contract." *Id.* "Considering the prejudice, if any, to the insurer of a breach of the consent requirement is therefore warranted." *Id.* (Willett, J., dissenting).

D. *Prodigy*

The following year, we addressed the issue again in *Prodigy Communications Corp. v. Agricultural Excess & Surplus Insurance Co.*, 288 S.W.3d 374 (Tex. 2009). *Prodigy* also involved a prompt-notice provision, but unlike the "occurrence-based" commercial general liability policy at issue in *PAJ*, the policy at issue in *Prodigy* was a "claims-made" directors' and officers' liability policy.[1] *Id.* at 375. More accurately, the *Prodigy* policy was a "claims-made-and-reported" policy, in that it required, "as a condition precedent" to coverage, that the insured give written notice of the claim to the insurer "as soon as practicable . . . but in no event later than ninety (90) days" after expiration of the policy's coverage period. *Id.* at 375, 379 n.7. Thus, the policy only covered claims that the insured received and reported to the insurer during the coverage period or the 90 days

[1] As we explained in *PAJ*, a "claims-made" policy "'only covers those claims first asserted against the insured during the policy period. . . . This coverage differs from "occurrence" type coverage, . . . which covers only claims arising out of occurrences happening within the policy period, regardless of when the claim is made.'" *Prodigy*, 288 S.W.3d at 378 (quoting 3 ROWLAND H. LONG, THE LAW OF LIABILITY INSURANCE § 12A.05[3] (2006)). Stated otherwise,"[a] 'claims-made' policy covers occurrences [that] may give rise to a claim that comes to the attention of the insured and is made known to the insurer during the policy period. An 'occurrence' policy covers all claims based on an event occurring during the policy period, regardless of whether the claim or occurrence itself is brought to the attention of the insured or made known to the insurer during the policy period." *Yancey v. Floyd W. & Co.*, 755 S.W.2d 914, 918 (Tex. App.—Fort Worth 1988, writ denied) (citations omitted).

thereafter, and required the insured to report the claim "as soon as practicable" within that time frame.

Prodigy received the claim and gave the required notice within the 90-day period, but did not do so as soon as practicable. The insurer conceded, however, that it suffered no prejudice from the delayed notice. In a 6–3 split decision, the Court held that the insured's failure to give notice of the claim as soon as practicable would negate coverage only if the failure prejudiced the insurer. *Id.* at 375. As in *PAJ*, the Court reasoned that the insured's failure to give notice as soon as practicable was a breach of the agreement, but the breach would excuse the insurer's performance only if it was material. *Id.* at 378. And also as in *PAJ*, the Court held that the prejudice requirement applies regardless of whether the provision is expressed as a covenant or a condition precedent. *Id.*

Notably, however, the Court in *Prodigy* recognized an important difference between the policy's requirement that the insured give notice within 90 days of the coverage period and that it do so as soon as practicable during the coverage-period-plus-90-days time frame. Specifically, the Court explained that, unlike the "as soon as practicable" requirement, the 90-day deadline actually "define[s] the scope of coverage" in a claims-made-and-reported policy, "by providing a certain date after which an insurer knows it is no longer liable under the policy." *Id.* at 380 (quoting *Resolution Trust Corp. v. Ayo*, 31 F.3d 285, 289 (5th Cir. 1994)). The Court thus reasoned that, because the 90-day notice deadline "is considered essential to coverage" under the policy, the insured's failure to report the claim by that deadline *would* negate coverage even if the insurer suffers no harm or prejudice. *Id.* at 381. But if, as actually occurred in *Prodigy*, the "insured gives notice of a claim within the policy period or other specified reporting period, the insurer must show that the insured's

noncompliance with the policy's 'as soon as practicable' notice provision prejudiced the insurer before it may deny coverage." *Id.* at 382.

The three Justices who dissented in *Prodigy* had also dissented in *PAJ*. As in *PAJ*, they concluded that, because the prompt-notice requirement was expressed in the policy as a condition precedent, the insured's failure to give prompt notice negated coverage regardless of whether the insurer was prejudiced. *Id.* at 383 (Johnson, J., dissenting). Importantly for my decision in the present case, they disagreed with the majority's distinction between the "as soon as practicable" requirement (to which the majority implied the prejudice requirement) and the 90-day deadline (to which the majority would not have implied the prejudice requirement) because, in the dissent's view, both requirements were essential to the parties' bargain as stated in the contract. *Id.* at 384 (Johnson, J., dissenting).

E. *Financial Industries*

Finally, on the same day we issued our decision in *Prodigy*, we answered a certified question in *Financial Indus. Corp. v. XL Specialty Ins. Co.*, 285 S.W.3d 877 (Tex. 2009). The policy at issue in *Financial Indus.* was a claims-made policy that required, "as a condition precedent" to coverage, that the insured give the insurer written notice of any claim "as soon as practicable," but (unlike the policy in *Prodigy*) it did not impose a specific notice deadline that limited the scope of coverage. *Id. at 877–78.* In other words, it was a claims-made policy, but not a claims-made-and-reported policy. Without any dissent, the Court held that the insurer could not deny coverage without showing that the insured's failure to provide notice as soon as practicable prejudiced the insurer. *Id.* at 879. Following *Prodigy*, the Court reasoned that, absent a showing of prejudice, the insured's

failure to provide prompt notice did not deny the insurer "the benefit of the claims-made nature of its policy," and thus the breach was not material.

III.
Application

Like the Court in *Cutaia* and the dissents in the subsequent cases, I believe we have pursued the wrong path in our dealings with this issue. "The better choice for courts, as the Court noted in *Cutaia*, is if changes to insurance policy language are to be mandated . . . the changes should be left to the Legislature and regulatory agencies." *Prodigy*, 288 S.W.3d at 388–89 (Johnson, J., dissenting). Out of respect for the parties' freedom of contract, "this Court should not overreach its boundaries and imply new standards into insurance contracts." *Hernandez*, 875 S.W.2d at 694 (Enoch, J., dissenting) (citing *Cutaia*, 476 S.W.2d at 281).

Moreover, I believe the Court's attempt to explain and reconcile these decisions based on contract principles has only muddied the waters and is no longer workable. In *Hernandez*, we acknowledged that most jurisdictions have "imposed a prejudice requirement, primarily on public policy grounds," 875 S.W.2d at 693 n.4, but we chose not to do so, and instead imposed the prejudice requirement as a logical result of the rule that a party's breach of contract excuses the other party's performance only if the initial breach is material. That analysis worked fine for *Hernandez*, but it has become unworkable as the subsequent cases have required the Court to address a variety of provisions (prompt service of suit papers, prompt notice, and settlement-without consent) that serve a variety of purposes within the policies (conditions precedent, covenants, exclusions, definitions, and descriptions of the scope of coverage).

Here, we are faced with a policy that expressly requires the insured to obtain the insurer's written agreement before settling a claim, but it does so in two different places and to serve two different purposes. In the Policy Conditions, the requirement is a condition precedent, and the majority holdings in *PAJ* and *Prodigy* clearly require that we impose the prejudice requirement on that condition. In the Insuring Agreement's Definitions, however, the settlement-without-consent provision defines the scope of the policy's coverage: the policy only covers an "ultimate net loss," which in the case of a settlement is established only by "a compromise settlement to which we have previously agreed in writing." In this provision, Lennar expressly agreed that Markel would only cover losses incurred through settlements to which Markel agreed in advance and in writing. This was the extent of the coverage Lennar purchased. Because Markel did not consent to the settlements with the homeowners in advance and in writing, the coverage that Lennar agreed to purchase from Markel simply did not extend to those losses.

The Court imposes a prejudice requirement anyway, based on the contract principle that, "[g]enerally, one party's breach does not excuse the other's performance unless the breach is material." *Ante* at ___. But no one (not even the Court[2]) asserts that Lennar "breached" the policy's Insuring Agreement by settling the claims without first obtaining Markels' written consent. The policy did not prohibit Lennar from settling claims without Markel's consent; it just didn't provide coverage for such a settlement. Lennar's failure to obtain Markel's prior written consent could not give rise to a cause of action for breach of the Insuring Agreement Definition. Instead, it simply prevented the settlements from falling within the types of liabilities that Lennar paid Markel to cover.

[2] *See ante* at __ (referring to Lennar's "failure to comply" and "non-compliance," rather than to its "breach" of the policy's Insuring Agreement).

In this sense, the Insuring Agreement provision is akin to the 90-day deadline that the *Prodigy* majority agreed would be enforceable *without* a showing of prejudice. *See Prodigy*, 288 S.W.3d at 381–82 & n.10 ("most courts have found that an insurer need not demonstrate prejudice to deny coverage when an insured does not give notice of a claim within the policy's specified time frame," and "[w]e agree with this analysis"). The Justices who dissented in *Prodigy* disagreed with the majority's distinction between the 90-day deadline and the "as soon as practicable" requirement. *Id.* at 385 ("the policy language shows [the parties] intended for the two notice provisions to have the same effect: both are conditions precedent to Prodigy's rights under the policy") (Johnson, J., dissenting). They would not have imposed the prejudice requirement on the 90-day deadline or the "as soon as practicable" requirement. And yet in *PAJ*, those same dissenting Justices agreed that the imposition of a prejudice requirement on a settlement-without-consent provision is "warranted." 243 S.W.3d 630, 639 (Willett, J., dissenting).

Logically, the majority Justices who decided to impose the prejudice requirement in *Prodigy* should decide not to do so in the present case because the settlement-without-consent provision in the Insuring Agreement (like the 90-day period in the *Prodigy* policy) "defines the limits of the insurer's obligation" and "is considered essential to coverage" under the policy. *Id.* at 380, 381. And the dissenting Justices who would not have imposed the prejudice requirement in *PAJ* or *Prodigy* should decide to impose it in the present case because this case involves a settlement-without-consent requirement. *PAJ*, 243 S.W.3d at 649.

In today's ruling, the Court does not address these variables, but instead abruptly concludes that the Insuring Agreement's consent requirement is "no clearer" than, has "exactly the same" purpose as, "is no more central to the policy than," and "operates identically" to Condition E's

consent requirement. *Ante* at ___. I disagree with these conclusions, as should those who joined the majority in *Prodigy*. In my view, at least, the Insuring Agreement "clearly" limits coverage to settlements to which Markel previously agrees in writing, does so for the "purpose" of defining the scope of coverage rather than imposing any affirmative obligation on Lennar, and is therefore "central" to the coverage that the policy provides and "operates" differently than Condition E.

The Court essentially holds that it does not matter where in the policy a settlement-without-consent provision is located, and it does not matter whether it is expressed as a condition precedent, a covenant, an exclusion to coverage, or a definition of the scope of coverage. Presumably, the Court shares Lennar's concern that the prejudice requirement would be easily circumvented if we allowed it to turn on such variables, because insurers could simply move the appropriate sentences into the definition portion of their agreements and thereby avoid the prejudice requirement. But I do not see what is wrong with that. If "parties are free to contract as they choose," *Solar Applications Eng., Inc. v. T.A. Operating Corp.*, 327 S.W.3d 104, 112 (Tex. 2010), they can define the scope of coverage however they may agree to do so, subject only to statutory, regulatory, or judicially-imposed policy limitations.

I believe the Court's effort to parse through all the variables affecting the prejudice requirement has only made Texas law more uncertain and has thereby rendered a disservice to both insureds and insurers alike. In my view, we should either imply a prejudice requirement as a matter of public policy, or not. Again, if we were writing on a clean slate, I would not. But, I "recognize the impropriety of unsettling questions [that] have been well settled by former decisions of this Court, and thereby rendering the law uncertain . . . ." *Higgins v. Bordages*, 31 S.W. 803, 804 (Tex. 1895). I agree that, with only rare exceptions, stare decisis dictates that we "adhere to our precedents

for reasons of efficiency, fairness, and legitimacy . . . ." *Sw. Bell Tel. Co., L.P. v. Mitchell*, 276 S.W.3d 443, 447 (Tex. 2008) (citations omitted). Although I believe the Court should defer to the Legislature to decide whether and when to insert policy-based requirements into private contracts, we have repeatedly inserted the prejudice requirement for more than twenty years, and it would be imprudent to suddenly stop doing so now.

IV.
Conclusion

Although our precedents may be difficult to understand and reconcile, they have undoubtedly given insurers, insureds, regulators, and even the Legislature reason to expect and rely on the implied prejudice requirement. I agree we should not now alter these reasonable expectations. But for the sake of clarity, consistency, and predictability, I would stop trying to imply the requirement based on contract principles. I would instead expressly hold that, as a matter of public policy, a prompt-notice, prompt-service, or settlement-without-consent provision will negate coverage only if the lack of prompt notice, prompt service, or consent causes harm or prejudice to the insurer. Because Lennar's failure to obtain Markel's prior written agreement to Lennar's settlements did not harm or prejudice Markel, I concur in the Court's decision to reverse the judgment of the court of appeals and affirm the judgment of the trial court.

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Jeffrey S. Boyd
Justice

OPINION DELIVERED: August 23, 2013

IN THE SUPREME COURT OF TEXAS

NO. 11-0437

TEXAS DEPARTMENT OF TRANSPORTATION, PETITIONER,

v.

JOSE LUIS PERCHES, SR. AND ALMA DELIA PERCHES, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF JOSE LUIS PERCHES, JR., DECEASED, RESPONDENTS

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

PER CURIAM

In *State Department of Highways & Public Transportation v. Payne*, 838 S.W.2d 235 (Tex. 1992), we considered whether an off-road condition can be a special defect for which the State's sovereign immunity is waived under the Texas Tort Claims Act. We noted that "[w]hether on a road or near one . . . conditions can be 'special defects . . .' only if they pose a threat to the ordinary users of a particular roadway." *Payne*, 838 S.W.2d at 238–39 n.3. In this special defect case involving a concrete guardrail, we conclude that such barriers are generally not conditions posing a threat to ordinary users of a particular roadway. Accordingly, we reverse in part and affirm in part the court of appeals' judgment, render judgment dismissing the claims brought under the Texas Tort Claims Act, and remand the case to the trial court for further proceedings.

Jose Perches was killed while navigating the "Bicentennial Underpass" in McAllen. The underpass has a ramp from the westbound lanes of U.S. Highway 83 to a bridge crossing over the highway. At the end of the ramp, a "T-intersection" directs west-bound drivers left onto Bicentennial Boulevard. Perches crashed into a concrete barrier while attempting to make the left turn. His car went over the edge and fell more than twenty feet to the roadway below.

Perches's parents sued the Texas Department of Transportation (TxDOT) and several engineering firms, alleging negligent maintenance and implementation of the roadway and traffic control devices. The Percheses also sought to permanently enjoin TxDOT from re-opening the underpass. The trial court denied TxDOT's immunity-based jurisdictional plea and severed the Percheses' causes of action against TxDOT from those asserted against the engineering firms. This interlocutory appeal ensued. *See* TEX. R. APP. PROC. 28.1; *see also* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8), 101.001(3)(B). The court of appeals affirmed, concluding that although the Percheses had not shown an immunity waiver for their negligent maintenance and implementation claims, they pleaded sufficient facts to demonstrate TxDOT's waiver of immunity with respect to their special defect claims. 339 S.W.3d 241, 259. The court also concluded that TxDOT failed to preserve its argument that the trial court lacked jurisdiction to grant the Percheses' requested permanent injunction. *Id*. TxDOT petitioned this Court for review.[1]

* * *

[1] The parties did not raise before this Court any issue related to jurisdiction over injunctive relief.

We generally lack jurisdiction over interlocutory appeals. TEX. GOV'T CODE § 22.225(b)(3). However, an exception exists when a court of appeals holds differently from another court of appeals or the Supreme Court. *Id.* § 22.225(c); § 22.001(a)(2); *City of San Antonio v. Ytuarte*, 229 S.W.3d 318, 319 (Tex. 2007) (per curiam). The Government Code provides that a court of appeals "holds differently" from another when "there is inconsistency in their respective decisions that should be clarified to remove unnecessary uncertainty in the law and unfairness to litigants." TEX. GOV'T CODE § 22.001(e); § 22.225(e).

This case creates a conflict among the courts of appeal as to whether a guardrail constitutes a special defect. In *Barron v. Texas Department of Transportation*, the plaintiff swerved to miss a stalled vehicle, causing the plaintiff's car to crash through the guardrail and fall into the creek below. 880 S.W.2d 300, 301 (Tex. App.—Waco 1994, writ denied). The court held that the bridge did not constitute a special defect. *Id.* at 303. Several other courts of appeal have rejected the guardrail-as-special-defect argument. *See State Dept. of Transp. v. Barraza*, 157 S.W.3d 922, 928 (Tex. App.—El Paso 2005, no pet.) (holding that the height of guardrails is a discretionary function for which TxDOT retains immunity); *Schafer v. Tex. Dep't of Transp.*, No. 03-01-00560-CV, 2003 WL 21467077, at *1 (Tex. App.—Austin 2003, no pet.) (mem. op.) (holding that "the placement or lack of a guardrail is not a special defect as contemplated by the Act"). Here, however, the court of appeals held that the concrete barrier was a special defect, and thus TxDOT's immunity was waived. 339 S.W.3d at 258. This conflict gives us jurisdiction over TxDOT's appeal.

* * *

Generally, the State retains sovereign immunity from suit. *Univ. of Tex. at Austin v. Hayes*, 327 S.W.3d 113, 115 (Tex. 2010) (per curiam) (citing *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 224 (Tex. 2004)). Sovereign immunity is waived only if the Legislature uses "clear and unambiguous language." TEX. GOV'T CODE § 311.034. The Texas Tort Claims Act (the Act) limits the State's liability for premise defects to dangerous conditions of which it is aware. TEX. CIV. PRAC. & REM. CODE §§ 101.002 *et seq*.; § 101.022(a); *see also Payne*, 838 S.W.2d at 237. However, this limitation does not apply to "special defects such as excavations or obstructions on highways, roads, or streets." *Id*. § 101.022(b). When a special defect exists, the government owes the same duty to users that a private landowner owes to an invitee. *Payne*, 838 S.W.2d at 237. Whether a condition is a special defect is a question of law that we review de novo. *Denton County v. Beynon*, 283 S.W.3d 329, 331 (Tex. 2009).

The Act does not define the term "special defect," but it likens it to "conditions 'such as excavations or obstructions on highways, roads, or streets.'" *Hayes*, 327 S.W.3d at 116 (quoting TEX. CIV. PRAC. & REM. CODE § 101.022(b)). A condition must therefore be in the same class as an excavation or obstruction on a roadway to constitute a special defect. *Beynon*, 283 S.W.3d at 331–32 (noting that "a court cannot 'classify as "special" a defect that is not like an excavation or obstruction on a roadway.'") (quoting *Payne*, 838 S.W.2d at 239 n.3). Further, we have observed that "the class of special defects contemplated by the statute is narrow." *Hayes*, 327 S.W.3d at 116.

We considered whether an off-road condition can be a special defect in *State Department of Highways & Public Transportation v. Payne*, 838 S.W.2d 235 (Tex. 1992). Payne was injured when he walked off the end of a culvert located about twenty-two feet from the road. *Payne*, 838 S.W.2d

at 236. Analyzing the distance of the end of the culvert from the "paved surface" and noting the anomalous circumstances in which Payne was walking "perpendicular to the paved surface into [an] adjacent field," we held that the culvert was not a threat to ordinary users of the roadway, and thus was not a special defect. *Id*. at 239. But we recognized in a footnote that, "[w]hether on a road or near one . . . conditions can be 'special defects . . .' only if they pose a threat to the ordinary users of a particular roadway." *Id*. at 238–39 n.3.

We again addressed off-road conditions in *Denton County v. Beynon*. There, the driver lost control of his car, which slid sideways on the grass and was punctured by a floodgate arm. *Beynon*, 283 S.W.3d at 330. The floodgate arm, unsecured and improperly pointed toward traffic, was located about three feet from the roadway. *Id*. at 330–31. We held that the arm did not pose a threat to an ordinary user of the road, who "would not be expected to careen uncontrollably off the paved roadway." *Id*. at 332.

Special defect jurisprudence rests on the "objective expectations of an 'ordinary user.'" *Beynon*, 283 S.W.3d at 332. In *Beynon*, the floodgate arm did not force the car from the road, nor did it cause the car to skid. *Id*. The arm was outside "the [Act's] narrow special defect class as a matter of law" because it "did not 'pose a threat to the ordinary users . . . or prevent ordinary users from traveling on the road.'" *Id*.

* * *

The court of appeals in this case held that the concrete guardrail was a special defect because it constituted an obstruction, impeding the ability of vehicles to make a safe left turn due to the narrowness of the intersection. 339 S.W.3d at 256–57. The court pointed to several facts supporting

its conclusion: (1) the Bicentennial Underpass ramp "abruptly ends"; (2) the lack of signage indicating that drivers could only turn left; and (3) the possibility that lighting was insufficient, as multiple accidents have occurred at the intersection between midnight and 4:00 A.M. *Id*. at 258. However, the "[d]esign of any public work, such as a roadway, is a discretionary function involving many policy decisions, and the governmental entity responsible may not be sued for such decisions." *State v. Rodriguez*, 985 S.W.2d 83, 85 (Tex. 1999) (per curiam), *overruled on other grounds by Beynon*, 283 S.W.3d at 331 n.11.

The statute likens special defects to "excavations or obstructions on the roadway." TEX. CIV. PRAC. & REM. CODE § 101.022(b). "Obstruction" is defined as "[s]omething that impedes or hinders." BLACK'S LAW DICTIONARY 1183 (9th ed. 2009). Here, the concrete guardrail became an impediment only when Perches missed his turn and proceeded off the road and therefore does not pose a risk to ordinary users of the road. Had Perches made the turn in accordance with the roadway's design, he would never have come into contact with the guardrail.

The normal course of travel on the portion of the Bicentennial Underpass used by Perches is to turn left and proceed south on Bicentennial Boulevard. 339 S.W.3d at 243. The concrete guardrail is located at the end of a T-intersection, and its function is to prevent cars from falling off the underpass. *Id*. The lanes are neither unfinished nor unmarked, and the concrete guardrail was part of the initial design. *Id*. at 257. An ordinary user of the roadway would not be expected to miss a turn and crash through a concrete guardrail. The guardrail here does not impede travel or otherwise "block" the road for an ordinary user in the normal course of travel, but rather, in accordance with its intended purpose, delineates the roadway's bounds. *See Beynon*, 283 S.W.3d at 332; *see also*

Hayes, 327 S.W.3d at 116–17. Guardrails, by their nature, define the roadway, they do not impede it. We therefore hold that guardrails placed in accordance to plan cannot constitute a special defect under the Act.

* * *

The Percheses also argue that if the Bicentennial Underpass is not a special defect, then it must be an ordinary premise defect for which TxDOT owes the same duty a private landowner owes a licensee. TEX. CIV. PRAC. & REM. CODE § 101.022(a). We have stated that such duty "requires that a landowner not injure a licensee by willful, wanton, or grossly negligent conduct, and that the owner use ordinary care either to warn a licensee of, or to make reasonably safe, a dangerous condition of which the owner is aware and the licensee is not." *Payne*, 838 S.W.2d at 237 (citing RESTATEMENT (SECOND) OF TORTS § 342 (1965)). We agree with the court of appeals that the Percheses have not pleaded sufficient facts demonstrating a waiver of immunity under the Act and that the trial court had jurisdiction with respect to their premise liability claims. 339 S.W.3d at 255. We affirm this portion of the court of appeals' judgment.

* * *

Accordingly, we grant the petition for review and, without hearing oral argument, we reverse in part and affirm in part the court of appeals' judgment, render judgment dismissing the Percheses' claims under the Texas Tort Claims Act, and remand the case to the trial court for further proceedings consistent with this opinion. TEX. R. APP. P. 59.1, 60.2(a), (c), (d).

OPINION DELIVERED: November 16, 2012

IN THE SUPREME COURT OF TEXAS

NO. 11-0438

JOSE L. ELIZONDO AND GUILLERMINA ELIZONDO, PETITIONERS,

v.

RONALD D. KRIST, THE KRIST LAW FIRM, P.C.,
KEVIN D. KRIST, AND WILLIAM T. WELLS, RESPONDENTS

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

Argued December 5, 2012

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

JUSTICE BOYD filed a dissenting opinion, in which JUSTICE LEHRMANN joined.

JUSTICE HECHT did not participate in the decision.

In this legal-malpractice case, the clients sued their former attorneys, complaining the attorneys had obtained an inadequate settlement. The trial court granted summary judgment for the attorneys, and the court of appeals affirmed. We affirm the court of appeals' judgment.

I. Background

In March 2005, an explosion occurred at the Texas City refinery of BP Amoco Chemical Company (BP), killing fifteen workers and injuring many others. Approximately 4000 claims were

filed against BP, and BP settled them all. A handful of cases proceeded to trial but settled before a verdict.

Jose Elizondo was working for a BP contractor at the plant on the day of the explosion. The blast threw him about twenty feet. He received medical treatment for neck and back injuries. He returned to work a few days later but claimed he continued to suffer from psychological problems. His wife, Guillermina, claimed that she too suffered, from loss of consortium. Jose met with attorney William Wells and signed a power of attorney retaining Wells to represent him on "all claims I may have against BP and others" arising from the March 2005 explosion.

Wells sent a demand letter to BP asking for a settlement of $2 million on the Elizondos' claims. The settlement demand was made on behalf of both husband and wife.[1] A few months later, an attorney for BP offered to settle "any and all claims of Jose L. Elizondo and his family members" for $50,000. In an effort to increase the settlement in this and three other cases, Wells associated Ronald Krist, Kevin Krist, and the Krist Law Firm as additional counsel. Ronald and Kevin Krist met with BP, but could not obtain a larger settlement for the Elizondos.

Wells and Kevin Krist met with Jose to discuss the settlement offer. They went through a form release prepared by BP. Jose decided to accept the settlement offer and signed the release in February 2006. The release covers Jose and Guillermina, defining the "RELEASORS" as "JOSE

[1] The letter begins "Re: Our Clients: Jose Elizondo and spouse Guillermina Elizondo." It states that "Our office represents Jose Elizondo and his wife Guillermina Elizondo" regarding the BP explosion and requests "settlement to the Elizondos" of $2 million. It describes the family life and background of both spouses. It details Jose's physical and psychological injuries. It states that "Mr. Elizondo and his wife have the privilege and responsibility of providing for, nurturing and raising four daughters. The events of March 23rd and following disrupted their family existence and security."

ELIZONDO, GUILLERMINA ELIZONDO, and any of their heirs, executors, agents, trustees, assignees, representatives, attorneys, advisors, administrators, successors and assigns." The release had signature lines for Jose and Guillermina, but only Jose signed it. Guillermina testified that she cannot speak or read English. Jose contends that when he met with his counsel, he asked whether Guillermina needed to sign the agreement and was told it was not necessary.

In August 2007, Jose brought this suit against Wells, Kevin Krist, Ronald Krist, and the Krist Law Firm (the Attorneys). Guillermina was later added as a plaintiff, but all the Attorneys deny ever representing Guillermina. The suit claimed that the Attorneys represented both Elizondos and failed to obtain an adequate settlement on their behalf. The petition asserted claims of professional negligence, breaches of fiduciary duty, and fraud, as well as other claims. It contended that Jose was "sold down the river" so that Ronald Krist could represent BP. After Jose accepted BP's settlement offer, Ronald Krist did represent BP, but he contends his representation of Jose had ended months earlier. The Elizondos also claimed that because Guillermina did not sign the release her claim was never settled, and the Attorneys should have pursued her claim before it became time-barred.

The Attorneys filed several motions for summary judgment on grounds of no evidence of damages, impermissible "claim splitting," and no attorney-client relationship with Guillermina, as well as other grounds. In response to the motions regarding damages, the Elizondos submitted the expert affidavit of attorney Arturo Gonzalez.

The trial court granted some of the summary-judgment motions, including the motions regarding damages. The court of appeals affirmed, holding that because the Elizondos had not

presented more than a scintilla of competent evidence of damages, the trial court did not err in granting summary judgment on this ground.[2]

II. Discussion

A. The Gonzalez Affidavit Did Not Raise a Genuine Issue of Material Fact on Malpractice Damages.

The parties disagree on whether the Gonzalez affidavit was sufficient to defeat summary judgment on the issue of malpractice damages.[3] Summary judgment was warranted for the Attorneys if, after adequate time for discovery, they demonstrated that the Elizondos had failed to offer competent summary judgment evidence raising a genuine issue of material fact as to damages.[4]

In his eight-page affidavit, Gonzalez recites his general qualifications and his specific involvement in the BP litigation. He worked for two firms that represented claimants in litigation arising from the plant explosion and was appointed by the 212th district court as plaintiffs' liaison counsel. He attested that these experiences familiarized him with the settlement of many claims. He stated that BP focused on ten criteria in determining the general value of a case for settlement purposes: (1) proximity to ground zero; (2) when injury was reported to a supervisor; (3) corroboration of proximity and reporting of injuries to supervisor or management; (4) age of victim; (5) wage earning capacity and wage loss (present and future); (6) injuries and bio-mechanics of

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[2] 338 S.W.3d 17, 24.

[3] The trial court struck certain portions of the affidavit after the Attorneys complained that it was conclusory. Unlike the court of appeals, we do not separately analyze this ruling but address whether the affidavit, considered in its entirety, raised a material issue of fact as to damages.

[4] *See* TEX. R. CIV. P. 166a(i).

injuries—e.g., nature, extent, and duration; (7) medical treatment received and duration thereof (physical and mental/PTSD); (8) surgical versus non-surgical interventions; (9) single or married/residual consortium claims; and (10) onsite versus offsite claims. The affidavit describes the basic facts regarding Jose's injuries, family situation, and work history. It then states:

> Based on the factual information provided and reviewed by me, my experience in the BP litigation, my knowledge of general settlement values and in the criteria and protocol relied upon to establish general settlement values in the BP litigation, it is my opinion that for a plaintiffs' attorney acting within the standard of care applicable to the same or similar circumstances, using reasonable due diligence, the Elizondo case would have had a general value, by way of settlement or verdict, in the range of between Two Million ($2,000,000.00) and Three Million ($3,000,000.00) dollars. Guillermina Elizondo's individual claim would represent some part of that value, but Jose's claim would represent the majority of that value. The settlement value of the Elizondo claim is not distinguished as compensatory, non-economic or exemplary in nature, but instead is a single value offered by BP so that BP could avoid a trial or jury verdict.

The affidavit sets out the information reviewed by Gonzalez and details why, in Gonzalez's opinion, the Attorneys failed to exercise due diligence in their representation of the Elizondos. It then states:

> The settlement offer made by BP for the Elizondos' claim was basically for nuisance value. Given the extraordinary circumstances surrounding the BP explosion[] claims, a reasonably competent plaintiff's lawyer should have continued to prosecute the claim until a fair and reasonable offer was made by BP. In my opinion, had that been done, the Lawyers would have garnered far in excess of the $50,000 offer which was supposedly the most that BP would ever pay.

It then concludes that, in light of the risk of punitive damages in the BP explosion cases, "these cases were heavily evaluated and settlements obtained were significantly higher as compared to the average personal injury lawsuit in the [S]tate of Texas."

At the outset, the Attorneys contend that the Gonzalez affidavit is defective because a legal-malpractice suit is a "suit within a suit," and proof of malpractice damages requires proof of what the plaintiff would have recovered by way of a judgment after *trial* absent his attorney's negligence. For example, the Attorneys argue in their brief that plaintiffs alleging malpractice damages "must prove that the 'true value' of their case is a collectible recovery, after a trial, that is greater than the actual result they received," and that "[t]o show the existence of malpractice damages, the Elizondos had to show the *true value* of their claims was greater than what they received, *i.e.*, that they would have recovered by way of judgment an amount greater than they did from BP." They contend that Gonzalez only analyzed why the *settlement* was inadequate for various reasons, and he did not discuss what amount the Elizondos would have recovered if the case had proceeded to judgment after a trial. We disagree with this argument.

We have recognized that in a legal-malpractice case damages consist of "the amount of damages recoverable and collectible . . . if the suit had been properly prosecuted."[5] In *Keck, Mahin & Cate v. National Union Fire Insurance Co.*, we described damages in such cases as the difference between the result obtained and the case's "true value," defined as the recovery that would have been obtained "following a trial" in which the client had "reasonably competent, malpractice-free" counsel.[6]

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[5] *Cosgrove v. Grimes*, 774 S.W.2d 662, 666 (Tex. 1989); *see also Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Research Corp.*, 299 S.W.3d 106, 112 (Tex. 2009).

[6] 20 S.W.3d 692, 703 n.5 (Tex. 2000).

These cases recognize that legal-malpractice damages are the difference between the result obtained for the client and the result that would have been obtained with competent counsel. They do not require that damages can only be measured against the result the client would have obtained if the case had been tried to a final judgment.

In this case, it is undisputed that BP, a large, solvent corporation, made the decision to settle every case arising from the plant explosion. Here, where the same defendant settled thousands of cases, and indeed made the business decision to settle all cases and not try any to a verdict, we see no reason why an expert cannot base his opinion of malpractice damages on a comparison of what similarly situated plaintiffs obtained from the same defendant. This data is perhaps the best evidence of the real-world settlement value of the case. Under Evidence Rule 703, experts may base their testimony on facts or data that are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject."[7] That test is met when, in a mass tort litigation involving thousands of similar claimants and arising out of the same event, the expert measures the "true" settlement value of a particular case by persuasively comparing all the circumstances of the case to the settlements obtained in other cases with similar circumstances arising from the event.

Nevertheless, the Attorneys argue that the Gonzalez affidavit was conclusory, while the Elizondos maintain that it was sufficiently specific to raise a fact issue on damages.

"Bare, baseless opinions will not support a judgment even if there is no objection to their admission in evidence,"[8] and we have "often held that such conclusory testimony cannot support a

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[7] TEX. R. EVID. 703.

[8] *City of San Antonio v. Pollock*, 284 S.W.3d 809, 816 (Tex. 2009).

judgment."[9] "A conclusory statement of an expert witness is insufficient to create a question of fact to defeat summary judgment."[10] Further, "a claim will not stand or fall on the mere *ipse dixit* of a credentialed witness."[11] Expert testimony fails if there is "simply too great an analytical gap between the data and the opinion proffered."[12] Courts are not required "to ignore fatal gaps in an expert's analysis or assertions."[13] Stated another way, in a legal-malpractice case, we have observed that even where an attorney-expert was qualified to give expert testimony, his affidavit "cannot simply say, 'Take my word for it, I know: the settlements were fair and reasonable.'"[14] Conversely, in this case, an attorney-expert, however well qualified, cannot defeat summary judgment if there are fatal gaps in his analysis that leave the court to take his word that the settlement was inadequate.

Our decision in *Burrow v. Arce* is instructive. In that case as in today's case, attorneys had settled numerous suits in a mass tort proceeding arising out of a plant explosion. The plaintiffs, former clients of the attorneys, contended that the settlements they received were inadequate for various reasons, including the failure of the attorneys to "fully investigate and assess individual claims."[15] The trial court granted summary judgment for the attorneys on grounds that the

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[9] *Coastal Transp. Co. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227, 232 (Tex. 2004).

[10] *McIntyre v. Ramirez*, 109 S.W.3d 741, 749–50 (Tex. 2003).

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

[12] *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 726 (Tex. 1998) (quoting *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)).

[13] *Volkswagen of Am., Inc. v. Ramirez*, 159 S.W.3d 897, 912 (Tex. 2004).

[14] *Burrow*, 997 S.W.2d at 236.

[15] *Id.* at 232.

settlements were fair and reasonable and therefore the clients had suffered no actual damages and were not entitled to the forfeiture of fees they sought.[16]

We held that the affidavits submitted by the attorneys were conclusory and therefore insufficient to entitle the attorneys to summary judgment. We considered three affidavits. The most detailed affidavit, from retained expert-attorney Malinak, set out numerous criteria that were important in evaluating settlements in the case, including the underlying liability facts, the identity of the employer, the elements of damages available to each plaintiff, and the losses to each plaintiff.[17] The expert then declared that he had evaluated the criteria as to each plaintiff and had concluded that the settlement as to each was reasonable and fair.[18] We held that the affidavit was too conclusory to sustain a summary judgment on the element of damages:

> The affidavit says no more than that Malinak, an experienced attorney, has considered the relevant facts and concluded that the Clients' settlements were all fair and reasonable. . . . Credentials qualify a person to offer opinions, but they do not supply the basis for those opinions. The opinions must have a reasoned basis which the expert, because of his "knowledge, skill, experience, training, or education [,"] is qualified to state. That basis is missing in Malinak's affidavit. He does not explain why the settlements were fair and reasonable for each of the Clients. His affidavit . . . is nothing more than a sworn denial of plaintiffs' claims and no more entitles the Attorneys to summary judgment than a lawyer's equally conclusory affidavit stating that the Clients had suffered $10 million damages would entitle them to summary judgment. . . . [T]he issue is whether Malinak's affidavit states a sufficient basis for his opinions. Malinak might have analyzed the Clients' injuries by type, or related settlement amounts to medical reports and expenses, or compared these settlements to those of similar claims, or provided other information showing a relationship between the plaintiffs' circumstances and the amounts received. He

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[16] *Id.* at 233.

[17] *Id.* at 235.

[18] *Id.*

> did not do so. The absence of such information did not merely make the affidavit unclear or indirect; it deprived Malinak's opinions of any demonstrable basis. We therefore conclude that summary judgment could not rest on Malinak's affidavit.[19]

The Gonzalez affidavit in today's case is similarly conclusory. Like the Malinak affidavit, the Gonzalez affidavit is from an experienced attorney whose credentials are not the problem. The problem is the lack of a demonstrable and reasoned basis on which to evaluate his opinion that the settlement was inadequate. Like the Malinak affidavit, the Gonzalez affidavit explains in some detail the factors or criteria that should inform a determination of the value of the case. Like the Malinak affidavit, the Gonzalez affidavit confirms that the affiant considered the facts relevant to the case, but it fails to offer specifics on why the value of the case was $2–3 million as opposed to the $50,000 received in settlement. A fatal analytical gap divides the recitation of the facts of the Elizondo case and the declaration of its settlement value.

Gonzalez did not evaluate what the Elizondo case would have yielded by way of a judgment if the case had gone to trial. On the contrary, he based his opinion on what the Attorneys should have obtained in *settlement*. The affidavit makes clear throughout that Gonzalez's opinion of the value of the case stems from his opinion of the settlement the Attorneys should have obtained. As noted above, none of the approximately 4000 claims arising from the BP plant explosion was tried to a verdict. Gonzalez states in the affidavit that through his experience he gained knowledge of the "settlement ranges or case values" in the BP litigation. He then lists the criteria BP used in "determining the general value of a case for settlement purposes." He states his value of the case

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[19] *Id.* at 235–36 (quoting TEX. R. EVID. 702).

based on his "knowledge of general settlement values and . . . the criteria and protocol relied upon to establish general settlement values." He states that "[t]he settlement offer made by BP . . . was basically for nuisance value" and that, given the extraordinary circumstances of the BP plant explosion, "a reasonably competent plaintiff's lawyer should have continued to prosecute the claim until a fair and reasonable offer was made by BP." He concludes by stating that the Attorneys could have "greatly enhanced the settlement value of the Elizondo claim" by developing facts supporting exemplary damages. As explained above, we conclude that an analysis of settlements of cases with injuries and circumstances similar to the Elizondo case *might* be sufficient to raise a fact issue as to the inadequacy of the settlement, but Gonzalez did not undertake to compare the Elizondo settlement with other actual settlements obtained in the BP litigation. As in *Burrow*, the expert might have compared this settlement "to those of similar claims, or provided other information showing a relationship between the plaintiffs' circumstances and the amounts received [but he] did not do so."[20] We are simply left to take his word that the settlement here was inadequate. In this regard, we agree with the court of appeals:

> [A]lthough Gonzalez lists specific criteria he contends BP "focused on" when determining settlement values, he offers no analysis to explain how these factors would be applied to the Elizondos' situation. He also fails to link settlement amounts to specific injuries and circumstances, and provides no comparison of settlement amounts of similar claims. Thus, Gonzalez's affidavit offers only conclusory and speculative opinions.[21]

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[20] *Id.* at 236.

[21] 338 S.W.3d at 21–22.

We conclude, therefore, that the affidavit did not raise a genuine issue of material fact sufficient to defeat summary judgment.

The dissent reasons that the affidavit raised a fact issue on whether competent counsel would have obtained a settlement in excess of $50,000, which Gonzalez characterized as nuisance value. We differ because, for the reasons stated, the affidavit was devoid of a demonstrable basis, whether we consider that portion of the affidavit claiming the case had a settlement value of $2–3 million, or that portion declaring the settlement value was "far in excess of the $50,000" actually received. These assertions are equally conclusory, suffer from the same fatal gap in analysis, and, as in *Burrow*, rely on nothing more than the *ipse dixit* of the expert. We are simply left to take the expert's word as to the adequacy of the settlement, the same defect we recognized in *Burrow*.

B. Discovery Disputes in the Trial Court Did Not Warrant Denial of the Summary Judgment Motions on Damages.

The court of appeals dissent noted that at various points in the litigation the Lawyers objected to the discovery of information about other settlements, and this dissent thought it "fundamentally unfair for the Lawyers to thwart discovery as to other settlements and at the same time use the lack of that information to strike Gonzalez's affidavit."[22] It noted that "[t]he Elizondos asked for a court order to allow Gonzalez to reveal specifics from the BP settlements, and the Lawyers opposed the order."[23] On the other hand, the court of appeals majority concluded that the Elizondos did not assign as error on appeal that the trial court erred in denying their request to obtain discovery on or

[22] *Id.* at 28 (Christopher, J., concurring and dissenting).

[23] *Id.* (footnote omitted).

otherwise reveal information regarding settlements in other cases.[24] On this issue, we ultimately are not persuaded by the court of appeals dissent—essentially urging that, because the Lawyers objected to discovery regarding other settlements, the Lawyers should be estopped from prevailing on grounds that the Gonzalez affidavit was inadequate. Nevertheless, we find the issue difficult and discuss it at some length herein.

The settlement agreements in the BP cases contained a confidentiality provision prohibiting disclosure of the details of the settlements to third parties. The Elizondos' expert, Gonzalez, stated in his affidavit that he was bound by this provision. The Attorneys were also bound by this provision.[25] To the extent the Attorneys contended as an initial discovery response that they and others could not disclose information regarding other settlements for contractual reasons, we believe they argued within the bounds of zealous advocacy in contending that the information should not be disclosed even if it might be helpful to the Elizondos.

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[24] The court of appeals majority noted:

> The Elizondos sought to obtain discovery regarding various documents relating to the BP settlements and, in response, the Lawyers asserted various objections. The Elizondos also asked for a court order under which Gonzalez could reveal specific information regarding the BP settlements, and the Lawyers opposed this motion. But, the Elizondos have not asserted on appeal that the trial court sustained the Lawyers' discovery objections or denied this motion, and the Elizondos have not cited any place in the record in which the trial court made any ruling in this regard. In addition, the Elizondos have not assigned error or presented argument challenging any such ruling by the trial court.

Id. at 21 n.2 (majority opinion).

[25] The Elizondo release applies to the Elizondos and their attorneys and other agents, and provides: "The parties agree to keep confidential and not to disclose to third parties any of the consideration paid under this Agreement or any of the other terms of this Agreement, except that any party may disclose such portions of the Agreement, and to such limited extent, as may be necessary for obtaining tax or legal advice or as may be required by law or court order."

Further, we can find no place in the record where the Elizondos contended that their expert needed to review and reveal information about other specific settlements in order to prepare a valid expert opinion. The voluminous record before us indicates several pretrial skirmishes where other settlements came up.[26] But the Elizondos point to nothing in the record indicating that, but for objections raised by the Attorneys, Gonzalez would have augmented his affidavit with a more revealing analysis and comparison of other specific settlements obtained in similar cases. On the contrary, he stated in his affidavit that "I am precluded pursuant to the confidentiality provisions from divulging specific settlement amounts related to the monetary payments by BP to specific plaintiffs." Gonzalez did not indicate that he wished to analyze and describe other specific settlements to buttress his opinion but had been thwarted by the objections of the Attorneys.

In addition, the Elizondos did not ask the trial court to defer ruling on the summary judgment motions until they could obtain from the Lawyers or third parties evidence of other settlements. The Elizondos should have made such a request if they thought their expert needed this data.[27] Moreover, they do not even now contend that they needed discovery of other settlements so that Gonzalez could provide a comparison of them in opining on the adequacy of the Elizondo settlement. In their

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[26] For example, the Elizondos sought from the Lawyers production of settlement documents of other BP explosion clients and sought production of settlement documents from third-party law firms who had represented BP. They also sought the production of any matrix or grid used by BP in valuing claims. The Lawyers raised various objections to these requests.

[27] *See* Tex. R. Civ. P. 166a(g) ("Should it appear from the affidavits of a party opposing the [summary judgment] motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."); *Tenneco Inc. v. Enter. Prods. Co.*, 925 S.W.2d 640, 647 (Tex. 1996) ("When a party contends that it has not had an adequate opportunity for discovery before a summary judgment hearing, it must file either an affidavit explaining the need for further discovery or a verified motion for continuance.").

principal brief, they argue to us only that the Lawyers' refusal to produce information about other settlements should lead us to hold "that the trial court abused its discretion in striking portions of Gonzalez's affidavit." As detailed above,[28] even if we consider the entire Gonzalez affidavit, including the portions struck by the trial court, we still conclude that it failed to raise a material issue of fact as to damages.

As noted above, the Elizondos filed a motion, mentioned by the court of appeals majority and dissent, seeking a trial court order allowing Gonzalez to reveal information regarding other settlements under a proposed protective order.[29] But from the record before us the Attorneys were not actually opposing such disclosures.[30] In fact, the motion sought entry of an order allowing Gonzalez to testify in his deposition about other settlements because the Elizondos anticipated that *the Lawyers* would ask about these other settlements.[31] Gonzalez sought a court order because the settlement agreements authorized disclosure of settlement amounts if "required by law or court order."

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[28] *See supra* note 3 and Part II.A.

[29] *See supra* notes 23–24 and accompanying text. The protective order would have limited disclosure to this lawsuit only.

[30] The court of appeals majority and dissent perhaps noted that the Lawyers opposed the motion because the certificate of conference to this motion stated that counsel for the two sides "have been unable to work out any resolution of this motion," and that counsel for Kevin Krist was unavailable and would likely oppose the relief requested.

[31] The motion states: "The Lawyer Defendants have made it clear that they intend to inquire of Mr. Gonzalez, or seek documents from him, regarding the specific amounts paid by BP to settle other similar claims . . . as referenced by Mr. Gonzalez in his affidavit. Plaintiffs are more than willing for such information to be disclosed, but want to do so in a way that limits disclosure to *this* lawsuit only and for no other use or purpose. Likewise, Mr. Gonzalez has advised that he is willing to disclose such information under a fair protective order."

In several pleadings in our record the Elizondos requested a continuance or more discovery before the trial court ruled on the summary judgment motions. These requests met with some success, in that the trial court agreed not to set a hearing on the summary judgment motions until two weeks after the depositions of the Lawyers were taken. In a motion for continuance filed in April 2008, the Elizondos contended that they needed settlement-related documents pertaining to other BP clients of the Lawyers. However, this pleading disclaimed any need for information regarding the amounts of other settlements, stating that the Elizondos were content with redaction of settlement amounts if that information raised confidentiality concerns[32] and that the Attorneys' summary judgment motions on damages were based on a "faulty premise," namely that the "only way of proving damages is by showing that someone else with identical injuries and claims against BP received a larger settlement." A pleading styled "Demonstration of Need for Additional Discovery Prior to Hearing on Defendants' Sixteen Motions for Summary Judgment," also filed in April 2008, stated that the Elizondos needed settlement documents related to other BP clients of the Lawyers, but the stated need was to refute the Lawyers' contention that they did not represent Guillermina, the wife of the plaintiff directly injured in the blast. At least two other pleadings—plaintiffs' April 2008 motion for continuance and a March 2008 motion to compel production of documents—made the same argument. Again, the Demonstration of Need disclaimed any need for discovery of the amounts of the other settlements, stating that "Plaintiffs would not object to limited redactions

[32] The motion states: "The only apparent confidentiality concern raised by anyone concerns the 'confidential' settlement amounts paid to injured BP claimants, as set out in settlement/release agreements. This concern does not apply to any settlement demand made by a plaintiff's lawyer to BP's defense counsel. To the extent the concern is legitimate in regard to any settlement/release agreement, the Court can permit the producing party to redact any actual settlement amounts and thereby protect confidentiality."

necessary to comply with confidentiality provisions, such as dollar amounts . . . ."[33] Another motion for continuance, filed in October 2008 and relating specifically to the summary judgment motions on damages, made no request for additional discovery on settlements in other cases. It contended, on the contrary, that the Gonzalez affidavit was adequate to refute all the Lawyers' arguments in favor of summary judgment on grounds that no evidence had been presented on damages, including the Lawyers' argument that "Plaintiffs cannot identify anyone who obtained a larger settlement for the same claims, much less the amount received, which demonstrates that Plaintiffs cannot prove damages." It asked for a continuance only if the Court was considering granting summary judgment on grounds that Guillermina had no consortium claim because Jose's injuries were not sufficiently "serious, permanent, and disabling," grounds unrelated to the alleged inadequacy of the Elizondo settlement that might be revealed by an expert comparison of other BP settlements.

In sum, none of these discovery skirmishes indicate that the Elizondos took the position in the trial court that (1) discovery of the dollar amount of other settlements in similar cases was needed so their expert could make a valid, non-conclusory determination of the adequacy of the Elizondo settlement or better describe his analysis, and (2) consideration of the summary judgment motions on damages should be continued until such discovery was provided. Accordingly, we do not agree with the court of appeals dissent insofar as it would hold that the Lawyers were not entitled to summary judgment because of their attempts to limit discovery regarding other settlements.

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[33] The March 2008 motion to compel similarly states that "Plaintiffs are willing to allow Defendants to redact the actual dollar amounts contained in any demands and in any settlement/release agreements signed by their other clients, so Defendants have no basis to object on these purported confidentiality grounds."

C. The Lay Testimony of the Elizondos Did Not Raise a Genuine Issue of Material Fact on Malpractice Damages.

The Elizondos contend that their own deposition testimony raised fact issues as to damages sufficient to defeat summary judgment. Jose testified about his pain and suffering, and Guillermina testified about her loss of consortium. The Elizondos contend that these unliquidated damages are best left to a jury and that summary judgment therefore was not warranted.

We agree with the Lawyers that even if the Elizondos presented some evidence of actual damages, this does not mean they raised a material issue of fact as to *malpractice* damages. The two are not the same here, because the case settled for $50,000. Even if the Elizondos suffered some compensable damages, they suffered as a result of the Attorneys' conduct only if, absent malpractice, they probably would have recovered a settlement for more than $50,000. As explained above, the general measure of damages in a legal-malpractice case is the difference between the amount the plaintiff probably would have recovered in the absence of malpractice, and the amount recovered. While a "suit within a suit" analysis is not required in a case like this one, for the reasons explained, the alternative method available to establish attorney-malpractice damages requires an analysis of settlements made under comparable circumstances. While this alternative method is sometimes available, we conclude that such an analysis requires expert testimony. We have in the past noted that proof of attorney malpractice requires expert testimony, because establishing such negligence requires knowledge beyond that of most laypersons.[34] The same is true of proof of damages under

[34] *See Alexander v. Turtur & Assocs., Inc.*, 146 S.W.3d 113, 119–20 (Tex. 2004) (noting that "the wisdom and consequences" of "tactical choices made during litigation are generally matters beyond the ken of most jurors" and that "when the causal link is beyond the jury's common understanding, expert testimony is necessary").

a theory that a settlement was inadequate. The Elizondos' own expert attested that a calculation of a reasonable settlement in this case required an analysis of at least ten factors considered by BP in determining settlement values, a balancing and evaluation of which is surely "beyond the ken of most jurors."[35] We conclude that even these factors are inadequate if considered in a vacuum without evaluation of settlements of comparable cases. Given the complexity of these factors, we conclude that such an analysis requires expert testimony. It cannot be based solely on the testimony of the claimants, particularly where Jose testified that he did not know the value of his claim, he testified that he had "no idea" of the value of his wife's claim, and both husband and wife testified that they did not know whether anyone had received a larger settlement in a case involving similarly situated claimants.

The Elizondos also argue that summary judgment was not warranted as to Guillermina because she recovered nothing. They argue that Guillermina did not sign the release and therefore still had an unsettled claim, and that she received nothing in the settlement. The parties disagree on whether the Lawyers ever represented Guillermina. But even if Guillermina is correct that the Lawyers represented her and had a duty to obtain a settlement for her, or at least advise her that her claim should be pursued before limitations ran, we cannot agree that she raised a fact issue on damages in light of the Elizondos' own evidence proffered in response to the summary judgment motions. The Elizondos offered proof that (1) William Wells advised BP that he represented Jose and Guillermina and made a settlement demand on behalf of both husband and wife; (2) BP

[35] *Id.* at 119.

responded with a settlement offer to settle "all claims of Jose L. Elizondo and his family" for $50,000; (3) the settlement offer was accepted, and BP drafted a release to be signed with disbursement of the settlement proceeds, defining the "releasors" to include both Jose and Guillermina; (4) the release had signature lines for both husband and wife; (5) Jose alone met with Wells and Kevin Krist to go over the release; (6) Jose was told that Guillermina (who could not speak or read English) did not need to sign the release; and (7) Jose signed the release and received the settlement proceeds. To prevail under the theory that Guillermina received nothing on her claim of loss of consortium, she would have to prove that her claim survived the release because Jose did not have authority to sign the release and accept the settlement proceeds on behalf of both of them, and that she and her lawyers tricked BP into paying $50,000 to settle both claims and BP remained liable on the loss of consortium claim. She would also have to prove that BP could have been persuaded to pay an additional settlement or a trier of fact could have been persuaded to award additional damages in such unsavory circumstances. We have reviewed the record and conclude that Guillermina failed to proffer evidence, expert or otherwise, upon which a reasonable and fair-minded trier of fact could have found damages for her under such a novel theory.[36]

III. Conclusion

We affirm the court of appeals' judgment.

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[36] *See Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 755 (Tex. 2007) ("An appellate court reviewing a summary judgment must consider whether reasonable and fair-minded jurors could differ in their conclusions in light of all the evidence presented.").

_____

Don R. Willett
Justice

OPINION DELIVERED: August 30, 2013

IN THE SUPREME COURT OF TEXAS

NO. 11-0438

JOSE L. ELIZONDO AND GUILLERMINA ELIZONDO, PETITIONERS,

v.

RONALD D. KRIST, THE KRIST LAW FIRM, P.C.,
KEVIN D. KRIST, AND WILLIAM T. WELLS, RESPONDENTS

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

JUSTICE BOYD, joined by JUSTICE LEHRMANN, dissenting.

To prove the existence of legal malpractice damages, clients who sue their attorneys must establish that "the result obtained for the client" was less (or lower or worse) than "the result that would have been obtained with competent counsel." *See ante* at __. The Court holds that Jose and Guillermina Elizondo failed to submit any evidence that could meet that burden, despite their expert's testimony that, in his opinion, the attorneys' breaches of their duties caused the Elizondos to settle their claims "basically for nuisance value," and "a reasonably competent plaintiff's lawyer . . . would have garnered far in excess" of that amount. I believe the Court imposes too strict a standard at this summary judgment stage. Because the expert based his opinion on facts that could support a finding that the Elizondos' claims had substantial merit but were settled as if they had no merit at all, I would hold that the Elizondos created a fact issue on the existence of malpractice damages. I therefore respectfully dissent.

I.
Standard of Review

This is an appeal from a summary judgment. We must consider the evidence in the light most favorable to the Elizondos, indulging every reasonable inference and resolving any doubts in their favor. *See City of Keller v. Wilson*, 168 S.W.3d 802, 824 (Tex. 2005); *see also Shah v. Moss*, 67 S.W.3d 836, 844 (Tex. 2001). The trial court found that the Elizondos submitted no evidence that they incurred any damages as a result of the defendants' alleged breaches. At this stage of the case, the Elizondos did not have to prove the amount of their damages; they only had to create a fact issue as to the existence of damages—that is, whether they sustained any damages at all. To do this, they had to "produce some evidence from which a reasonable jury could infer" that they sustained some damages. *See Garcia v. Gomez*, 319 S.W.3d 638, 642 (Tex. 2010) (observing that even though there was no evidence of amount of damages, there was evidence that some damages were incurred); *see also Alexander v. Turtur & Assocs., Inc*., 146 S.W.3d 113, 117 (Tex. 2004) (noting that plaintiff must "produce evidence from which a jury may reasonably infer that the attorney's conduct caused the damages alleged") (citing *Haynes & Boone v. Bowser Bouldin, Ltd.*, 896 S.W.2d 179, 181 (Tex. 1995)). If they have done this, we must reverse the trial court's summary judgment.

II.
A Qualified Expert Witness

The Elizondos relied primarily on the affidavit of their expert witness, Arturo J. Gonzalez. According to his affidavit, Gonzalez is a Texas lawyer who has specialized in personal injury claims for over twenty years. Following a 2005 explosion at BP Amoco Chemical Company's plant in Texas City, Gonzalez assisted in the representation of over 525 plaintiffs who, like the Elizondos,

asserted claims for damages against BP. For most of that time, Gonzalez served as the plaintiffs' court-appointed liaison counsel to facilitate discovery and the exchange of information between the parties. He "was intimately involved on a day to day basis with the settlement process" involving these claims, and participated in numerous settlement conferences with BP's representatives and attorneys. He was "directly responsible" for negotiating and settling three cases, and has personal knowledge of the values for which most of the other claims were settled. The defendants may ultimately dispute Gonzalez's assertions and qualifications and, at trial, would be free to disprove them or otherwise undermine his credibility or the reliability of his opinions. But for purposes of summary judgment, as the Court acknowledges, Gonzalez's affidavit establishes that he is "an experienced attorney whose credentials are not the problem."[1] *Ante* at ___.

III.
An Acceptable Method of Proof

We have previously held that a client who was the plaintiff in an underlying case can establish the existence of malpractice damages by proving that the amount the client recovered was less than the amount "that would have been recoverable and collectible if the other case had been properly prosecuted." *Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Research Corp.*, 299 S.W.3d 106, 112 (Tex. 2009). Because we have focused on the recoverable and collectible amount of a judgment following trial, courts often refer to this method of proving damages as a "suit-

[1] The Court holds that expert testimony is necessary to establish the existence of damages under the comparison-of-settlements method that it approves today, because the balancing and evaluation of factors necessary to compare different claims and their settlement values is "beyond the ken of most jurors." *Ante* at ___ (quoting *Alexander*, 146 S.W.3d at 119–20). Because I would hold that Gonzalez's affidavit was sufficient, under a different method, to create a fact issue and defeat summary judgment, I need not decide in this case whether expert testimony would be necessary in all such cases.

within-a-suit." *See, e.g.*, *Taylor v. Alonso, Cersonsky & Garcia, P.C.*, 395 S.W.3d 178, 183 (Tex. App.—Houston [1st Dist.] 2012, no pet.) ("This causation burden in this type of legal malpractice claim has been called the 'suit-within-a-suit' requirement.") (citing *Greathouse v. McConnell*, 982 S.W.2d 165, 173 (Tex. App.—Houston [1st Dist.] 1998, pet. denied)).

Today, the Court holds that a client who was a plaintiff "in a mass tort litigation involving thousands of similar claimants and arising out of the same event" can also establish the existence of malpractice damages by proving that the amount the client received in settlement is lower than the amounts of "the settlements obtained in other cases . . . arising from the event." *Ante* at ___. This holding is consistent with the Court's comments in *Burrow v. Arce*, 997 S.W.2d 229, 236 (Tex. 1999) (noting that the expert "might have . . . compared these settlements to those of similar claims"), and I agree with it. I also agree with the Court's holding that Gonzalez's affidavit was insufficient under this "comparison-of-settlements" method. Gonzalez "did not undertake to compare the Elizondo settlement with other actual settlements obtained in the BP litigation." *Ante* at ___. He did not state the values for which any of the other cases settled, and he did not assert that the Elizondos' claims were comparable to, but settled for less than, any of the other cases.[2]

But the Elizondos did not rely on the comparison-of-settlements method. Instead, they challenged the defendants' "faulty premise" that the "only way of proving damages is by showing that someone else with identical injuries and claims received a larger settlement." *See ante* at ___.

[2] As the Court notes, Gonzalez did not use the "comparison-of-settlements" method because confidentiality agreements prevented him from disclosing the amounts for which the other cases settled. I agree with the Court that, to the extent the Elizondos are now arguing that the attorney defendants thwarted their efforts to compare the values of other settlements, they waived that argument in the court of appeals and in the trial court. *Ante* at ___.

I agree with the Elizondos that the suit-within-a-suit and the comparison-of-settlements methods are not the *only* ways to prove the existence of legal malpractice damages. Just as our decisions "do not require that damages can only be measured against the result the client would have obtained if the case had been tried in court to a final judgment," a*nte* at __, they also do not require that damages can only be measured against the result the client would have obtained if the case had settled for the amounts for which similar cases settled. Since malpractice damages are "the difference between the result obtained and the case's 'true value,'" *see ante* at ___, I would hold that any method that provides competent evidence that the case's "true value" was greater than the "results obtained" will suffice to raise a fact issue on the existence of malpractice damages. And I would hold that, by submitting sufficient expert opinion evidence that their claims had merit but were settled as if they had none, the Elizondos satisfied that burden.

IV.
Sufficient Expert Opinions

Gonzalez did not utilize the comparison-of-settlements method because confidentiality agreements prohibited him from disclosing the amounts for which other cases settled. Nor did he utilize the suit-within-a-suit method, presumably because BP settled every one of the 2005 explosion claims prior to the entry of any judgment. Instead, after stating his experience and qualifications, explaining the confidentiality of BP's settlement amounts, listing the factors that BP considered when determining the settlement value of a case, stating his opinion of the general settlement value of the Elizondos' claims, listing the sources on which he relied, describing the things that a reasonably diligent attorney would have done to pursue the Elizondos' claims, and listing the specific

ways in which the attorney defendants failed to meet that standard, Gonzalez stated his opinions as follows:

> The settlement offer made by BP for the Elizondos' claim *was basically for nuisance value*. Given the extraordinary circumstances surrounding the BP explosions claims, a reasonably competent plaintiff's lawyer should have continued to prosecute the claim *until a fair and reasonable offer was made* by BP. In my opinion, had that been done, the Lawyers would have garnered far in excess of the $50,000 offer[.]

(Emphasis added.) In Gonzalez's opinion, the $50,000 that the Elizondos received to settle their claim was "basically for nuisance value" and not a "fair and reasonable" amount based on the merits of the claim.

Although Gonzalez did not define "nuisance value," its meaning is common knowledge, at least among American litigators and judges: a nuisance value settlement is a settlement of meritless, frivolous, or groundless claims for an amount that is less than the defendant would have to spend to defeat them. *See, e.g.*, *Valores Corp. v. McLane Co.*, 945 S.W.2d 160, 169 (Tex. App.—San Antonio 1997, writ denied) (noting that summary judgment rule was intended to dispose of "groundless actions instituted by plaintiffs seeking to harass defendants into nuisance value settlements") (quoting Roy W. McDonald, *Summary Judgment*, TEX. L. REV. 286, 286 (1952)); *Wolcott v. Trailways Lines, Inc.*, 774 So. 2d 1054, 1055 n.1 (2nd Cir. 2000) ("The 'nuisance value' of a claim is generally considered to be the cost of defending a claim in which it is doubtful the plaintiff will prevail, but is unwilling to simply dismiss."); *Fletcher v. City of Fort Wayne, Ind.*, 162 F.3d 975, 976 (7th Cir. 1998) ("[a] compromise for less than the cost of defense is a good working definition of a nuisance-value settlement"); R. Kozel & D. Rosenberg, *Solving the Nuisance-Value Settlement Problem: Mandatory Summary Judgment*, 90 VA. L. REV. 1849, 1851 (2004) (defining

a nuisance-value settlement as "a payoff extracted by a threat to litigate a meritless claim or defense that both parties know the court would readily dismiss as 'untriable' or otherwise legally untenable on an applicable dispositive motion for merits review").[3]

Reading Gonzalez's affidavit in the light most favorable to the Elizondos, and indulging every reasonable inference in their favor, it is Gonzalez's opinion that the Elizondos were paid as if their claims had no merit, when in fact they had substantial merit. If, in fact, the Elizondos' claims had substantial merit but were settled as if they had no merit, a reasonable jury could at least infer that the Elizondos sustained damages of some amount. Although Gonzalez's opinions could not establish any particular amount of damages, in my view they are sufficient to create a fact issue on the existence of damages.

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[3] *See also Fed. Land Bank of Hous. v. Brooks*, 124 S.W.2d 161, 167 (Tex. Civ. App.—Beaumont 1938) (Combs, J., dissenting) (expressing concern that majority's holding would "give to many an unfounded and unjust claim, 'a nuisance value' which may encourage such claims being asserted merely in the hope of a settlement"), *rev'd,* 135 Tex. 370, 143 S.W.2d 928 (Tex. Comm'n App. 1940); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 548 (1949) (characterizing suits brought to "realize upon their nuisance value" as suits "brought not to address real wrongs"); *Owens Corning v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 257 F.3d 484, 495 n.6 (6th Cir. 2001) (explaining that suit's "nuisance value" is "based on the prospective litigation costs required to effect a dismissal of the action"); *Travelers Ins. Co. v. Motorists Mut. Ins. Co.*, 178 N.E.2d 613, 619 (Ct. App. Ohio, 1961) ("The fact that insurers agree to defend groundless claims, otherwise within the coverage of their policies, is a recognition that even groundless claims have a nuisance value subject to defense and settlement."); Robert A. Sachs, *Product Liability Reform and Seller Liability: A Proposal for Change*, 55 BAYLOR L. REV. 1031, 1040 n.25 (2003) (noting that parties "pay 'nuisance value' to avoid continuing with the defense of a frivolous claim"); Geoffrey P. Miller, *Payment of Expenses in Securities Class Actions: Ethical Dilemmas, Class Counsel, and Congressional Intent*, 22 REV. LITIG. 557, 592 (2003) (characterizing strike suits and "nuisance value" suits as "litigation without substantial merit"); Cym H. Lowell & Jack P. Governale, U.S. INT'L TAX: PRAC. & PROC. ¶ 6.02 (2012) (noting that, under 26 C.F.R § 601.106(f)(2), the IRS will not settle based on "nuisance value," described as"any concession made solely to eliminate the inconvenience or cost of further negotiations or litigation and is unrelated to the merits of the issues").

V.
An Adequate Factual Basis

Gonzalez's opinions, however, are not enough. Absent an adequate factual basis, an expert's bare opinion that a claim had merit or that it was settled for nuisance value would be conclusory and, therefore, incapable of creating a fact issue to avoid summary judgment. Gonzalez cannot just expect us to "take his word" for it, *see ante* at ___; he must provide facts to support his opinions. *See, e.g.*, *Jelinek v. Casas*, 328 S.W.3d 526, 536 (Tex. 2010) ("We have rejected expert opinions not grounded in a sound evidentiary basis: '[I]f no basis for the opinion is offered, or the basis offered provides no support, the opinion is merely a conclusory statement and cannot be considered probative evidence, regardless of whether there is no objection.'" (citation omitted)); *see also Elizondo v. Krist*, 338 S.W.3d 17, 25–28 (Tex. App.—Houston [14th Dist.] 2010) (Christopher, J., dissenting) (discussing Gonzalez affidavit). In my view, Gonzalez's affidavit recites numerous facts that, taken in the light most favorable to the Elizondos, constitute evidence that the Elizondos' claims had merit but were settled for nuisance value, as if they did not.

A. Facts supporting merit

Gonzalez provided an extensive recitation of facts supporting his conclusion that the Elizondos' claims had merit. First, he listed ten "criteria or factors" that BP "focused on" when determining the value of claims arising out of the 2005 explosion:

- proximity to ground zero of the explosion;
- when injury was reported to a supervisor;
- corroboration of proximity and reporting of injuries to supervisor or management;

- age of the victim;
- wage earning capacity and wage loss (present and future);
- injuries and biomechanics of injuries—e.g., nature, extent, and duration;
- medical treatment received and duration of (physical and mental/PTSD);
- surgical vs. nonsurgical intervention(s);
- single or married/residual consortium claims; and
- onsite vs. offsite claims.

He then listed the facts of the Elizondos' claims that were relevant to these factors:

- On the date of the explosion, Jose was working for a subcontractor at the BP facility. He was 37 years old.
- Jose was approximately 200 to 300 feet from the blowdown stack when the explosion occurred. The force of the explosion blew him a number of feet into a port-a-potty.
- Jose was near Mr. Eamello at the time of the blast.
- Jose sustained injuries to his neck and lower back and suffered such mental anguish and emotional distress that he was considered to have post-traumatic stress disorder.
- Jose was first treated for his neck and back injuries by Dr. Ron Kirkwood and Dr. English of Kirkwood Medical Associates, on March 26, 2005.
- Jose saw Dr. David Winberly at Fondren Orthopedic on April 1, 2005, for complaints of neck and lower back pain, and had a follow-up visit on June 7, 2005 for persistent neck and back pain.
- Jose received physical therapy at TIRR twelve times over the six-

week period between April 7 and May 19, 2005.

- Jose was first treated for mental anguish or emotional distress by Dr. Susana Rosin on May 6, 2005. He attended additional therapy sessions on May 20, July 6, and August 3, 2005. His treatment lasted approximately three months.

- Jose is married to Guillermina Elizondo, and they had four children at the time of the explosion. They now have five children.

- Jose earned about $23 per hour at the time of the explosion, and worked about 50 to 60 hours each week.

- Jose missed work as a result of the explosion.

- Jose has not been physically or medically restricted from working, but he was injured in the explosion.

Based on these facts and the "criteria and protocol relied upon to establish general settlement values in the BP litigation," Gonzalez opined that the Elizondo case "would have had a general value, by way of settlement or verdict, in the range of between Two Million . . . and Three Million . . . dollars," and he later summarized his view by opining that the claims were worth "far in excess" of the $50,000 that BP paid. Whether the facts that Gonzalez recited were sufficient to support his $2–3 million valuation is doubtful (at best), but, in my view, they constitute some evidence that the Elizondos' claims had merit.

B. Facts supporting nuisance value

Next, Gonzalez recited facts to support his view that the claims were settled "basically for nuisance value," as if they had no merit. First, he described in some detail what a "plaintiff's attorney using reasonable due diligence" would have done to establish the claims' merit. Specifically, a reasonably diligent attorney would have:

> taken steps that included prosecuting the case to its fullest extent including investigation, prosecution and filing of a lawsuit . . . , the taking of depositions or sworn statements of important witnesses, requesting or obtaining and reviewing liability documents, coordinating efforts to develop liability and damages in this matter, interviewing other potential fact witnesses that can determine the extent and location of the injuries sustained by their client, determining any and all responsible parties, determining all claims that their clients could respectfully (sic) have . . . , and addressing and developing facts and issues relevant to establishing the egregious conduct of BP.

He then described specifically how the attorneys failed to do these things: they did not file a lawsuit; conduct any investigation into the liability and damages facts; send out any discovery requests; take any depositions; investigate and develop evidence of gross negligence; or investigate and determine how BP valued the explosion claims. Instead, Gonzalez asserted, the attorneys "perform[ed] no work other than to review a demand package prepared by a referring lawyer."

These facts, if true, would certainly support the duty and breach elements of the Elizondos' malpractice claims. But in my view, they also support Gonzalez's opinion that the claims were settled for nuisance value, as if they had no merit. If, in fact, the attorney defendants did nothing to develop the claims and establish their merit, a reasonable jury could infer that the amount BP paid reflected the cost of defense and the claims' lack of merit, and that the amount was lower than BP would have paid for a meritorious claim. Again, although this cannot constitute evidence of any particular amount of damages, in my view it does constitute evidence of the existence of damages.

VI.
Distinguishing *Burrow v. Arce*

In rejecting Gonzalez's affidavit, the court of appeals relied heavily on our decision in *Burrow v. Arce*, 997 S.W.2d 229 (Tex. 1997), as does this Court. In *Burrow*, the defendants' expert

testified by affidavit that he had considered the relevant factors (including the underlying facts, the identity of the defendant, the elements of damages available, and the losses each plaintiff incurred) and concluded based on these factors that each plaintiff was "reasonably and fairly compensated." *Id.* at 235. The Court held that this affidavit was conclusory because the expert "[did] not explain why the settlements were fair and reasonable." *Id.* at 235–36. To do this, the Court explained, he "might have analyzed the Clients' injuries by type, or related settlement amounts to medical reports and expenses, or compared the settlements to those of similar claims, or provided other information showing a relationship between the plaintiffs' circumstances and the amounts received." *Id.* at 236.

In the present case, the Court concludes that Gonzalez's affidavit is "similarly conclusory" because it "fails to offer specifics on why the value of the case was $2–3 million as opposed to the $50,000 received in settlement." *Ante* at __. But to avoid summary judgment, Gonzalez did not have to establish that the case was worth $2–3 million as opposed to $50,000; he only had to establish that the case was worth more than $50,000. By providing specifics on why $50,000 reflects the value of a case that had "basically" no merit, and specifics on why the Elizondos' case had merit, I would hold that he has done that.

Burrow is distinguishable from this case in all material aspects. In *Burrow*, the defendants sought and obtained a traditional summary judgment—they had the burden to prove the absence of damages as a matter of law. 997 S.W.2d at 234. Here, the Elizondos are defending against a no-evidence summary judgment—they need only raise a question of fact on the existence of damages. More importantly, the expert in *Burrow* provided no facts to support his opinion that the "fair and reasonable" amounts the plaintiffs received were equal to or greater than their true value. Here, by

contrast, Gonzalez provided extensive facts to support his conclusion that the Elizondos' settlement was "basically for nuisance value," meaning it did not reflect any merit at all. Because a reasonable jury can infer that a claim that lacks merit is worth less than a claim that has merit, I would hold that Gonzalez's testimony was sufficient to defeat summary judgment, and that *Burrow* does not counsel otherwise.

VII.
Conclusion

In response to the attorney defendants' motions for summary judgment, the Elizondos' expert testified that, in his opinion, their claims had merit but were settled as if they had no merit, and he did so in an affidavit in which he identified numerous facts that support each of these two propositions. Because I would hold that the expert's affidavit constitutes competent evidence from which a reasonable jury could infer the existence of damages, I respectfully dissent.

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Jeffrey S. Boyd
Justice

OPINION DELIVERED: August 30, 2013

IN THE SUPREME COURT OF TEXAS

NO. 11-0441

IN RE MICHAEL N. BLAIR, RELATOR

ON PETITION FOR WRIT OF MANDAMUS

Argued October 17, 2012

JUSTICE HECHT announced the decision of the Court and delivered an opinion, in which JUSTICE GREEN, JUSTICE GUZMAN, and JUSTICE DEVINE joined.

JUSTICE BOYD filed an opinion concurring in the decision, in Part IV of which JUSTICE WILLETT and JUSTICE LEHRMANN joined.

JUSTICE LEHRMANN filed a dissenting opinion, in which CHIEF JUSTICE JEFFERSON, JUSTICE JOHNSON and JUSTICE WILLETT joined.

The Tim Cole Act[1] entitles a person who has been wrongfully imprisoned to compensation from the State, but payments terminate "if, after the date the person becomes eligible for compensation . . . , the person is convicted of a crime punishable as a felony."[2] The issue in this case is whether the Act requires payments to a felon who remains incarcerated for a conviction that occurred before he became eligible for compensation. We conclude it does not and therefore deny relief.

[1] TEX. CIV. PRAC. & REM. CODE §§ 103.001–.154.

[2] *Id.* § 103.154(a).

Michael N. Blair has a lengthy criminal record. In November 1988, at age 18, he was charged with two felonies, burglary of a habitation and indecency with a child, and sentenced to 10 years' imprisonment on each, the sentences to run concurrently. He served 18 months of those sentences and was paroled in April 1990. His parole was revoked after he was arrested in September 1993 for the murder of a seven-year-old girl, Ashley Estelle. A year later, he was convicted and sentenced to death.[3] Though Blair staunchly maintained that he was innocent of murder, he freely admitted to having sexually abused children on many occasions. In June 2001, a journalist who interviewed him on death row reported that he acknowledged having sexually assaulted more than a dozen children, both boys and girls, and was, "by his own accounts, . . . a serial child molester".[4] In 2003, still awaiting execution, Blair wrote to the district court, confessing to molesting the children of a witness who later testified against him in the murder trial. An investigation led to four indictments for indecency with a child, committed in 1992 and 1993, to which Blair pleaded guilty in June 2004. He was given four life sentences, three consecutive and one concurrent. He continues to serve these sentences and will likely spend the rest of his life in prison.

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[3] Ashley's death prompted the Legislature in its next session to enact heightened reporting, registration, and supervision requirements, and stricter punishments, for persons convicted of sexual assault of a child. The enactments were called "Ashley's Laws". *See* Act of May 26, 1995, 74th Leg., R.S., ch. 256, 1995 Tex. Gen. Laws 2190 (SB 111) (amending TEX. CODE CRIM. PROC. arts. 42.12 and 42.18, and adding TEX. GOV'T CODE § 493.017); Act of May 19, 1995, 74th Leg., R.S., ch. 257, 1995 Tex. Gen. Laws 2194 (SB 149) (amending TEX. CODE CRIM. PROC. § 42.12 and adding TEX. REV. CIV. STAT. ANN. art. 4512g-1); Act of May 19, 1995, 74th Leg., R.S., ch. 258, 1995 Tex. Gen. Laws 2197 (SB 267) (amending TEX. REV. CIV. STAT. ANN. art. 6252-13c.1 and TEX. CODE CRIM. PROC. arts. 42.01, 42.12, 42.18, and 60.051).

[4] Jacque Hilburn, *Did This Creep Really Kill Ashley Estell?*, D MAGAZINE (June 2001).

In 2008, the Court of Criminal Appeals set aside Blair's murder conviction based on DNA evidence establishing his actual innocence,[5] and the State dismissed the charge. In June 2009, Blair applied to the Comptroller for more than $1 million compensation for having been wrongfully incarcerated from 1993, when he was arrested for murder, to 2004, when he was sentenced for the 1992–1993 sexual abuse offenses.[6] The Comptroller initially denied Blair's application because he had not provided a court order showing his "actual innocence" of murder[7] and had not "negate[d] whether a concurrent sentence was served, either in prison or on parole, for another crime or crimes" while he was on death row, apparently referring to the 1988 offenses. Blair moved for reconsideration, arguing that the Court of Criminal Appeals' ruling established his actual innocence, and that he had served concurrent sentences for other crimes only because his murder conviction resulted in his parole being revoked for the 1988 offenses. But for the murder conviction, Blair argued, he would not have been returned to prison, and therefore he was entitled to compensation for the full period claimed. The Comptroller again denied Blair's application, this time because "he is currently incarcerated" and "[t]he Legislature clearly intends [compensation under the Act] to be provided only to eligible applicants in order that they might put their lives back together after their

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[5] *Ex parte Blair*, Nos. AP-75954 and AP-75955, 2008 Tex. Crim. App. Unpub. LEXIS 469, 2008 WL 2514174 (Tex. Crim. App. June 25, 2008) (per curiam) (not designated for publication) ("The trial court finds, 'The State of Texas has conceded that, in light of the remaining inculpatory evidence in the record, [Blair] has established by clear and convincing evidence that no reasonable juror would have convicted him in light of newly discovered [DNA] evidence.'").

[6] Blair sought compensation of $100,000 per year allowed for death row inmates at the time, for a period of 10 years, 253 days. *See* Act of May 25, 2007, 80th Leg., R.S., ch. 1190, § 2, 2007 Tex. Gen. Laws 4054 (codified as TEX. CIV. PRAC. & REM. CODE § 103.052(a-1)).

[7] At the time, a requirement for compensation was that the applicant had been "granted relief on the basis of actual innocence of the crime for which the person was sentenced." Act of May 27, 2001, 77th Leg., R.S., ch. 1488, § 1, 2001 Tex. Gen. Laws 5280 (codified as TEX. CIV. PRAC. & REM. CODE § 103.001(a)(2)(B)).

release." The Comptroller added that even if Blair were entitled to compensation, it would not cover "the period during which he served [his 1988 sentences] concurrently with his sentence and incarceration for capital murder" as a result of his parole revocation. We denied review.[8]

The Comptroller asserted this latter position regarding parole revocation in *In re Smith*.[9] Smith's wrongful conviction had resulted in revocation of his parole for a prior offense, and for awhile he was imprisoned for both. When his wrongful conviction was set aside, he claimed compensation for the entire time he had been imprisoned, including as a result of his parole revocation. The issue was "whether a parolee, whose parole is revoked because of a wrongful conviction, is entitled to compensation under the Act for the period of imprisonment the parolee would have otherwise served out of prison on parole."[10] We concluded that the Act does not preclude compensation for time that would have been spent on parole. Following our decision in that case, Blair filed a second application with the Comptroller in March 2011, arguing that his situation was similar to Smith's. In one respect it was: Blair's wrongful murder conviction in 1994 resulted in the revocation of his parole for prior offenses — burglary and indecency with a child. But the Comptroller responded that Blair's claim had been denied not because he, like Smith, had been imprisoned for awhile as a result of both his parole revocation as well as for the offense of which he was wrongly convicted, but rather because, unlike Smith, he was incarcerated for yet other offenses — the 2004 child molestation convictions — when he became eligible for compensation

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[8] 53 Tex. Sup. Ct. J. 561, 564 (Apr. 12, 2010).

[9] 333 S.W.3d 582 (Tex. 2011).

[10] *Id.* at 586.

in 2009. Observing that Blair's second application was "virtually identical" to the first, the Comptroller again denied compensation.

Section 103.001(a) of the Act states in pertinent part:

> A person is entitled to compensation if:
>
> (1) the person has served in whole or in part a sentence in prison under the laws of this state; and
>
> (2) the person: . . .
>
> (B) 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 . . . .[11]

The Comptroller does not dispute that Blair meets all these requirements but argues that the purpose of the Act is to help released inmates rebuild their lives and reintegrate into society, which would not be advanced by paying compensation to someone still in prison. The Legislature could not have intended so absurd a result, the Comptroller continues, and therefore the Act cannot be read literally.

We are not persuaded that providing support for rejoining society is the only, or even a principal, purpose of the compensation required by the Act. For one thing, Section 103.001(c), two paragraphs below the provision just quoted, states that "[i]f a deceased person would be entitled to compensation under Subsection (a)(2) if living, including a person who received a posthumous pardon, the person's heirs, legal representatives, and estate are entitled to lump-sum compensation . . . ."[12] The Act thus requires compensation to be paid even if the wrongfully convicted person

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[11] TEX. CIV. PRAC. & REM. CODE § 103.001(a).

[12] *Id.* § 103.001(c).

cannot rejoin society because he is dead. For another thing, criminal justice officials have a responsibility for helping wrongfully convicted inmates return to society that is independent of the compensation required by the Act. The Department of Criminal Justice is statutorily tasked with "develop[ing] a comprehensive plan to ensure the successful reentry and reintegration of wrongfully imprisoned persons into the community following discharge", including "the provision of financial assistance to aid a wrongfully imprisoned person in the reentry and reintegration process and in covering living expenses following discharge, in an amount not to exceed $10,000."[13] And the Texas Correctional Office on Offenders with Medical or Mental Impairments is required to assist wrongfully imprisoned persons in obtaining medical and dental services.[14] The Comptroller argues that these two latter provisions show that the State's policy is to aid a wrongfully imprisoned person only after discharge, not while he remains imprisoned, and that payment of compensation to a decedent's beneficiaries is simply an exception that proves the rule. But these provisions strongly suggest that the compensation required by the Act is different from the simple support the provisions provide for reintegration into society and is better viewed as reparation for the wrong done in the State's name.

And from the history of the Act, that view is compelling. First adopted in 1965,[15] the Act contained legislative findings that wrongfully convicted persons should be provided "compensation

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[13] TEX. GOV'T CODE § 501.102(b).

[14] TEX. HEALTH & SAFETY CODE § 614.021(b).

[15] A constitutional amendment adopted in 1956 authorized the Legislature to "grant aid and compensation to any person who has heretofore paid a fine or served a sentence in prison, or who may hereafter pay a fine or serve a sentence in prison, under the laws of this State for an offense for which he or she is not guilty". TEX. CONST. art. III, § 51-c.

to reimburse and compensate them for their losses."[16] The Act allowed a cause of action against the State for "compensation" for "damages" — specifically, up to $25,000 for physical and mental pain and suffering, plus all reasonable and necessary medical expenses incurred, the total of both not to exceed $50,000.[17] In 2001, the Act was substantially revised.[18] A claimant could sue the State to recover the expenses and attorney fees incurred in his criminal proceedings and in obtaining his discharge from imprisonment, plus lost wages and medical expenses incurred.[19] Alternatively, the Act provided an administrative remedy: a claimant could simply request payment from the Comptroller of $25,000 for each year he was wrongfully imprisoned.[20] Either way, recovery was capped at $500,000.[21] In 2007, the per-year compensation was raised to $50,000, or $100,000 for a person sentenced to death, a provision for the recovery for child support payments that became due during imprisonment was added, and the cap was removed.[22] In 2009, the per-year compensation was raised to $80,000 for all sentences, and the cause of action for damages was abolished, leaving

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[16] Act of May 28, 1965, 59th Leg., R.S., ch. 507, § 1, 1965 Tex. Gen. Laws 1022 (codified as TEX. PENAL CODE art. 1176a, §§ 1–7). The Act was recodified as TEX. REV. CIV. STAT. ANN. art. 6252-25, § 1 in 1973, and later as TEX. CIV. PRAC. & REM. CODE §§ 103.001–.007. Act of May 17, 1985, 69th Leg., R.S., ch. 959, § 1, 1985 Tex. Gen. Laws 3242, 3307– 3308.

[17] *Id.* § 6 (former TEX. PENAL CODE art. 1176a, § 6, TEX. REV. CIV. STAT. ANN. art. 6252-25, § 6, TEX. CIV. PRAC. & REM. CODE § 103.006).

[18] Act of May 27, 2001, 77th Leg., R.S., ch. 1488, § 1, 2001 Tex. Gen. Laws 5280, 5282 (codified as TEX CIV. PRAC. & REM. CODE, ch. 103).

[19] *Id. See* former TEX. CIV. PRAC. & REM. CODE § 103.105(a), *repealed by* Act of May 27, 2009, 81st Leg., R.S., ch. 180, § 12, 2009 Tex. Gen. Laws 523, 526.

[20] *Id.* §§ 103.051–.052.

[21] *Id.* §103.105.

[22] Act of May 25, 2007, 80th Leg., R.S., ch. 1190, § 2, 2007 Tex. Gen. Laws 4054, 4055.

only the administrative remedy.[23] Thus, for 48 years, the Act's compensation schemes have all been backward-looking, providing either for damages actually incurred or suffered, or for what amounts to liquidated damages based on time served. The compensation required by the Act has never been based on or related to the costs of an inmate's reentry into society.

Moreover, when the Legislature first exhibited concern for those costs, it created an independent remedy: as noted above, criminal justice institutions were given the responsibility to assist wrongfully imprisoned persons in reentering society.[24] But this did not occur until 2009, decades after damages had been paid for wrongful imprisonment.

The Comptroller is correct that courts will not interpret statutes to work absurd results.[25] But though it would be absurd to make payments to a wrongfully convicted person to assist him in reentering society at a time when he remains imprisoned and cannot use the money for that purpose,[26] it is certainly not absurd to pay reparation for the wrong done while he is still incarcerated. It is simply a policy choice for the Legislature.[27]

We thus cannot agree with the Comptroller that Blair's claim must be rejected because it is inconsistent with the Act's purpose. But there is another difficulty with Blair's claim. The

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[23] Act of May 27, 2009, 81st Leg., R.S. ch. 180, §§ 3–5, 2009 Tex. Gen. Laws 523, 523–524.

[24] *Id*. §§ 10–15.

[25] *E.g. Jose Carreras, M.D., P.A. v. Marroquin*, 339 S.W.3d 68, 73 (Tex. 2011) ("We . . . interpret statutes to avoid an absurd result."); *see also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 234 (Thomson/West 2012) ("A provision may be either disregarded or judicially corrected as an error (when the correction is textually simple) if failing to do so would result in a disposition that no reasonable person could approve.").

[26] *See Thiel v. Harris Cnty. Democratic Exec. Cmte*., 534 S.W.2d 891, 895 (Tex. 1976) (refusing to accept an interpretation of a statute that "would convict the Legislature of a futile and foolish act").

[27] We do not, of course, consider the validity of such an approach.

compensation due a wrongfully convicted person, with exceptions not applicable here, is payable only through an annuity.[28] Section 103.154(a) states:

> [C]ompensation payments to a person . . . terminate if, after the date the person becomes eligible for compensation . . . , the person is convicted of a crime punishable as a felony. Compensation payments terminate under this subsection on the date of the subsequent conviction.[29]

Blair argues that under this provision, payments to a person convicted of a felony terminate only if the conviction first occurs after he becomes eligible for compensation, not if it occurs before. But Blair's argument assumes that "is convicted" refers only to the act of adjudication. The day after adjudication, however, assuming nothing has changed, the person, still, is convicted. Thus used, the phrase refers to the convict's status — he stands convicted or is under conviction. Other adjectives can similarly be read in this dual sense. For example, a visiting judge is assigned to a case the day the order is signed and as long as the assignment lasts. Likewise, a person in military service is detached to special assignment the day the order issues and as long as it remains in effect. Texas statutes use the phrase, "is convicted", to refer to a person's status. For example, Article 42.12 of the Texas Code of Criminal Procedure provides that a judge "after conviction [] may . . . place the defendant on community supervision."[30] The statute authorizes the judge to impose a specific condition on "a defendant who is convicted" of offenses of a certain nature, and in modifying

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[28] TEX. CIV. PRAC. & REM. CODE § 103.053. Payments to the state disbursement unit, *see* TEX. FAM. CODE § 101.0302, for child support owed by the wrongfully convicted person are payable in a lump sum, TEX. CIV. PRAC. & REM. CODE § 103.052(c), as are payments to a decedent's beneficiaries, *id.* § 103.001(c).

[29] *Id.* § 103.154(a).

[30] TEX. CODE CRIM. PROC. art. 42.12, § 3(a).

community supervision, to impose particular conditions "if . . . the defendant is convicted" of certain crimes.[31]

In Section 103.154(a), the phrase, "is convicted", can reasonably be read to refer to the claimant's status and not only the moment guilt is adjudicated.[32] Thus construed, the statute denies compensation payments for wrongful imprisonment to a claimant who, during the time he would receive them, is convicted of a felony, regardless of when the conviction was adjudicated, whether before or after he became eligible for compensation. The second sentence clarifies that if the adjudication occurs after the date of eligibility, compensation ceases, though the claimant is not required to refund payments already received. For the claimant adjudicated before eligibility, payments never begin, and refund is not an issue. Though payments never begin, the right to compensation the claimant would have afterward can be said to "terminate" the moment it arises.

The statutory text thus admits of two linguistically reasonable interpretations, but the consequences of one, conditioning compensation on the date conviction is adjudicated, are, we think, plainly unreasonable. This is not because a person who remains incarcerated should not be compensated. That is a policy decision for the Legislature. Rather, granting or denying compensation based on the date a conviction is adjudicated, rather than on the status of having been convicted, is plainly unreasonable because it treats similar situations disparately. If "is convicted" refers to the claimant's status, all eligible claimants are treated alike: those under felony conviction are not paid compensation. But if the phrase refers instead to the act of adjudication, the claimant

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[31] *Id.* §§ 13H(b); 22(a)(4)(A).

[32] TEX. CIV. PRAC. & REM. CODE § 103.154(a).

whose conviction occurs the day before he is eligible for compensation is entitled to payments for the remainder of his life, while the claimant whose conviction occurs the next day never receives compensation. The unreasonableness of such a result is manifest in this case. It would entitle Blair to over $800,000 in compensation to be paid while he remains imprisoned on three consecutive life sentences imposed in 2004, even though he would receive nothing if he had been convicted of a felony the day after he became eligible for compensation in 2008.

Despite such consequences, there might yet be some justification for construing "is convicted" to refer to an act. One might argue that the threat of loss of compensation, once it has begun, deters further criminal activity. But the threat does nothing to deter pre-eligibility crimes. An inmate on the verge of being eligible for compensation might not be discouraged from committing a crime before the determination is made, as he certainly would be afterward. Further, a prosecutor, knowing that an inmate charged with a crime was about to qualify for compensation, might delay criminal proceedings to ensure that payments would be denied. If Blair had confessed to child molestation in 2009 instead of 2004, delaying conviction until after his eligibility for compensation for wrongful imprisonment for murder would have denied him payments to which he would have been entitled had conviction followed swiftly. At a more basic level, Section 103.154(a) does not even hint that deterrence might be its purpose; rather, it strongly suggests that compensation is not to be paid a claimant incarcerated for a felony. Apart from this flawed deterrence argument, we are unable to discern any justification for granting or denying compensation based on the date of conviction for another felony.

We pause to add a word in response to the concurring opinion, which would hold that Blair failed to follow the Act's procedures, though the Comptroller does not make that argument, and that Blair's second application is improper because it is the same as the first.

On the first point, the concurrence argues that a claimant denied compensation must, as a prerequisite for seeking judicial review, submit an application to cure to the Comptroller, even if there is nothing to cure. Section 103.051(d) states: "Not later than the 30th day after the date the denial is received, the claimant must submit an application to cure any problem identified."[33] Plainly, if no identified problem can be cured, no application is required. As the concurrence notes, "cure" does not mean "reconsider". After the Comptroller's first denial of compensation, Blair filed what he called a motion for reconsideration, and should have called an application to cure, that provided a cure for the problems identified: the Comptroller's mistaken view that Blair had not been determined to be actually innocent of murder, and the effect of the parole revocation. After the Comptroller's denial of Blair's second application, now on review, there was nothing to cure. The Comptroller stated a legal basis for denying compensation that, if correct, Blair could not cure. Even if a claimant does not apply to cure a problem in the denial of compensation, we are not convinced that the failure precludes judicial review. The Act's procedures should not be applied to trick unwary applicants out of the compensation they are due.

As for the second point, the Act does not prohibit successive applications, even when circumstances have not changed, and in the absence of such a prohibition, we believe one should not be judicially imposed. The concurrence concedes that a denial of compensation is not res judicata

[33] TEX. CIV. PRAC. & REM. CODE § 103.051(d).

of a subsequent application, but it would apply much the same bar to relieve the Comptroller of having to decide multiple applications. We do not regard the burden of denying an application for the reasons previously given to be oppressive, but if it should become so, and repeat applications cannot be enjoined, the Legislature may wish to consider an appropriate remedy. Prohibiting successive applications, like requiring unnecessary applications to cure, unnecessarily impedes a claimant seeking compensation.

"We . . . presume that the Legislature intended a just and reasonable result by enacting [a] statute."[34] We will not read a statute to draw arbitrary distinctions resulting in unreasonable consequences when there is a linguistically reasonable alternative, as there is with Section 103.154(a). Accordingly, we conclude that the Comptroller correctly denied Blair's claim for compensation. Blair's petition for mandamus is denied.

Nathan L. Hecht
Justice

Opinion delivered: August 23, 2013

[34] *Presidio Indep. Sch. Dist. v. Scott*, 309 S.W.3d 927, 930 (Tex. 2010) (citing TEX. GOV'T CODE § 311.021(3)) ("In enacting a statute, it is presumed that . . . a just and reasonable result is intended . . . .")).

IN THE SUPREME COURT OF TEXAS

NO. 11-0441

IN RE MICHAEL N. BLAIR, RELATOR

ON PETITION FOR WRIT OF MANDAMUS

JUSTICE BOYD, joined as to Part IV by JUSTICE WILLETT and JUSTICE LEHRMANN, concurring in the decision.

I cannot join Justice Hecht's construction of section 103.154(a) of the Tim Cole Act because I do not agree that it is "a linguistically reasonable alternative"; even if it does achieve a "just and reasonable result," the language the Legislature chose to use in section 103.154(a) simply will not support it. *Ante* at ___. But I agree that this petition for mandamus must be denied, albeit for a different reason: the petitioner failed to comply with the Act's mandatory procedural requirements. I therefore concur in the judgment denying the petition.

I.
Background

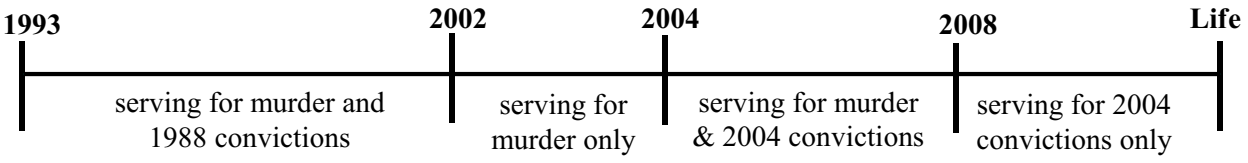
Michael Blair was arrested in 1993 and charged with the abduction and murder of a seven-year-old girl. Blair was out on parole at the time, following his convictions in 1988 for burglary of a habitation and sexual molestation of a child. After his 1993 arrest, the State revoked Blair's parole and required him to serve out the remainder of the sentences for his 1988 convictions. Although Blair claimed innocence, a jury convicted him of capital murder in September 1994. The trial court

imposed a death sentence, and Blair was placed on death row, where he also continued to serve his concurrent sentences for the 1988 convictions. The appellate courts affirmed Blair's murder conviction and death sentence, but he continued to seek habeas corpus relief throughout the ensuing years.

In 2002, while still on death row, Blair completed his concurrent sentences for the 1988 convictions. In 2003, while Blair continued his efforts to establish his innocence on the murder conviction, he voluntarily disclosed in interviews and letters that he was a serial child molester. In these confessions, Blair provided detailed descriptions of numerous sexual assaults of children and identified several of his victims. The district attorney then charged Blair with four counts of sexually molesting two of the children he identified. In 2004, Blair pleaded guilty to these charges and was given four life sentences, three of them to run consecutively. Thus, even if successful in his efforts to prove his innocence of capital murder and avoid the death penalty, he would likely remain in prison for the rest of his life.

Ultimately, DNA tests established that certain hairs and fibers that were crucial evidence in the murder case could not be associated with either Blair or the murder victim. On June 25, 2008, the Court of Criminal Appeals (CCA) issued an order granting Blair's petition for writ of habeas corpus, setting aside the murder conviction and sentence, and finding that Blair had "established by clear and convincing evidence that no reasonable juror would have convicted him in light of newly discovered evidence." *See Ex parte Blair*, Nos. AP–75954 and AP–75955, 2008 WL 2514174, at *1 (Tex. Crim. App. June 25, 2008) (per curiam) (not designated for publication). The trial court then granted the district attorney's motion to dismiss the charges and, on July 28, 2008, Blair was

transferred from death row to another correctional unit, where he continues to serve his four life sentences. The following time line summarizes the convictions for which Blair served in prison during the relevant periods:



On July 10, 2009, Blair filed an application with the Comptroller's judiciary section requesting compensation under the Texas Wrongful Imprisonment Act, now known as the Tim Cole Act. *See* TEX. CIV. PRAC. & REM. CODE §§ 103.001–.154. In his application, Blair acknowledged that he was not entitled to compensation "for any part of a sentence . . . during which [he] was also serving a concurrent sentence for another crime." *Id.* § 103.001(b). Yet he sought compensation from the date he was first arrested on the murder charge in 1993 until 2004, when he began serving the life sentences for sexually molesting children. At the then-applicable statutory rate of $100,000 per year, Blair requested payment of just over $1 million.[1]

Blair's application contained incorrect social security information, so he later filed additional documentation providing correct information. After receiving the additional documentation, the Comptroller agreed to treat the application as if Blair had submitted it on August 4, 2009, even though he had actually filed it nearly a month earlier. On September 18, 2009, the forty-fifth day

[1] Although Blair acknowledged that the 2007 version of the Act governed his request, he also requested lifetime annuity payments in an amount equal to the lump-sum payment, relying on recently enacted (but not yet effective) 2009 amendments. *See* Acts of May 27, 2009, 81st Leg., R.S., ch. 180, §§ 2, 14(b), 2009 Tex. Gen. Laws 523, 526.

after August 4, the Comptroller issued a determination denying Blair's application on the grounds that (1) the CCA's order did not establish that Blair obtained habeas relief based on actual innocence, and (2) the application did "not negate whether a concurrent sentence was served, either in prison or on parole, for another crime or crimes."

After receiving the Comptroller's denial, Blair's counsel obtained from the Texas Department of Criminal Justice (TDCJ) a corrected certificate of Blair's time served in prison and discovered, apparently for the first time, that the State had revoked Blair's parole on the 1988 convictions and thus Blair had served those sentences concurrently with the death sentence from 1993 until 2002. On September 22, 2009, Blair's counsel sent an email to the Comptroller, "formally" requesting an extension of the ten-day deadline to submit an application to cure. The following day, the Comptroller denied that request, noting that the statute did not give the Comptroller authority to grant such an extension.

On September 28, 2009, the tenth day after the Comptroller's denial of Blair's application for compensation, Blair filed a document entitled "Motion for Reconsideration of Denial of Compensation for Wrongful Incarceration and Submission of Newly Discovered Evidence" and a document entitled "Objection to Denial of Extension of Time for Curing of Record." In his motion for reconsideration, Blair challenged the Comptroller's denial of his application for compensation. Responding to the first ground for denial, Blair argued that the CCA's order did establish on its face that Blair was actually innocent of murder. Responding to the second ground, Blair attached the TDCJ's amended time credit certificate and acknowledged that, due to the parole revocation, Blair had concurrently served prison sentences for the 1988 convictions until 2002, and thus might only

be entitled to compensation for wrongful imprisonment from 2002 until 2004. But Blair argued that he was nevertheless entitled to "substantially more" than that because the State had revoked his parole only because of the wrongful arrest on the murder charge.

Shortly after Blair filed his motion for reconsideration, the Texas Board of Pardons and Paroles (at the urging of Blair's counsel) issued an order rescinding the 1993 parole revocation. On October 21, 2009, Blair's counsel submitted a copy of this order to the Comptroller, along with a document entitled "Motion to Reconsider Supplemental Curing Documents," arguing that, in light of the Board's order rescinding the parole revocation, Blair was entitled to compensation for 1993–2004, as he requested in his original application.

On November 9, 2009, forty-two days after Blair filed his second motion for reconsideration, the Comptroller issued a second determination, again denying Blair's application. In this determination, the Comptroller agreed to consider Blair's two motions for reconsideration as a single "application to cure" under the Act. But the Comptroller denied the claim on the ground that Blair was not eligible because, due to the 2004 convictions, Blair was "incarcerated and will remain so indefinitely" and, "[s]imply put, Mr. Blair currently is not a free man, as required by the Act."

Unlike her first determination, the Comptroller's second determination did not deny the claim on the ground that the CCA's order failed to establish Blair's actual innocence. She did, however, restate her position that, even if Blair were eligible, his "concurrent sentences for his 1988 crimes, regardless of whether his parole revocation for those crimes was recently rescinded, constitute a concurrent sentence for purposes of Section 103.001(b)," and thus he was not entitled to compensation for the time he concurrently served between 1993 and 2002. The Comptroller closed

the November 9 letter by inviting Blair to submit another application to cure: "Should Mr. Blair wish to submit another application to cure regarding this denial letter, he should do so not later than 10 days from the receipt of this denial letter, and the Comptroller's office will promptly reconsider any additional curing documents, if any, or further arguments that Mr. Blair may want to submit in light of the stated bases in this denial letter."

Nine days later, on November 18, 2009, Blair accepted the Comptroller's invitation and submitted a document entitled "Supplemental Motion to Cure." In this document, Blair argued that nothing in the plain language of the statute authorized the Comptroller to deny the claim on the ground that he is currently still imprisoned. In addition, Blair again argued that the amount of compensation should not be reduced due to the concurrent sentences Blair served from 1993–2002 following the revocation of parole for the 1988 crimes.

On December 30, 2009, forty-two days after Blair's November 18 submission, the Comptroller issued a third determination denying Blair's claim. This time, the Comptroller (as in her second determination) did not rely on the ground that the CCA order did not establish actual innocence and (unlike her first two determinations) did not address the concurrent sentences for the 1988 convictions. Instead, the Comptroller relied solely on the ground that Blair is "not a person entitled to compensation" because he remained imprisoned on the sexual molestation convictions. The Comptroller again reasoned that the Legislature "clearly intends Chapter 103 compensation to be provided only to eligible applicants in order that they might put their lives back together after their release," and that Blair is not eligible because he is "currently incarcerated and will remain so indefinitely."

On January 28, 2010, Blair filed a petition for writ of mandamus in this Court in Cause No. 10-0067, styled *In re Michael Nawee Blair*. In that petition, Blair argued that the Comptroller had erred in finding that his current imprisonment makes him ineligible for compensation and in finding that the statute prohibited compensation for the time he concurrently served for the 1988 convictions. We denied Blair's petition on April 9, 2010, and we denied his motion for rehearing on May 28, 2010. *See* 53 Tex. Sup. Ct. J. 564 (Apr. 9, 2010).

Nine months later, on March 4, 2011, we issued our decision in *In re Smith*, in which we held that the Act's "concurrent-sentence restriction does not apply when the wrongful conviction is the cause of the person serving a concurrent sentence in prison." 333 S.W.3d 582, 590 (Tex. 2011). As Blair points out, this holding was contrary to the Comptroller's position (stated in her first and second determinations, but not in her third) that, if Blair were eligible for compensation, he would not be eligible for the period from 1993–2002, when he was serving concurrent sentences for the 1988 convictions and the 2004 murder conviction.

On March 29, 2011, Blair filed a new application with the Comptroller, seeking compensation on the same bases on which he had relied in his previous submissions. In this application, which Blair referred to as his "second claim," Blair argued that "the law has been changed in a substantial manner by a Supreme Court decision." He urged that, "for justice and equity," the Comptroller should "reconsider petitioner's second claim" and reconsider "documents submitted in the *original* case for consideration of this claim." Specifically, he argued that the Comptroller's prior determination that any compensation must be reduced due to the concurrent sentence for the 1988 convictions was erroneous in light of our decision in *In re Smith*. Finally, he

asserted that the 2009 version of the Act governed this application and he was entitled to receive just over $850,000 under the amended compensation rate.

On May 13, 2011, the Comptroller issued a determination denying Blair's new claim on three grounds. First, the Comptroller noted that the new claim was "virtually identical" to the original claim and thus must be denied on the same grounds as the first. Second, the Comptroller reasoned that the new application was effectively a challenge to the denial of the first application, which had "already been fully adjudicated and finally resolved." Finally, the Comptroller asserted that *In re Smith* had "no bearing" on the Comptroller's decision because she based her determination not on any concurrent sentence but solely on the ground that, "as was stated in the Comptroller's final denial letter of December 30, 2009, . . . Blair was not a person entitled to compensation under Chapter 103."

Blair did not submit an application to cure in response to the May 13 denial. Instead, on June 9, 2011, he filed the petition for writ of mandamus that we address today. Blair challenges the Comptroller's denial of his second application on a single ground: his current imprisonment does not disqualify him from compensation for the time he served only under the wrongful conviction. The Comptroller disagrees with Blair's construction of the Act but also responds that the Comptroller did not have a duty to consider Blair's second application for the same compensation that the Comptroller previously denied.

II.
Standard of Review

"As Chapter 103 claims are entirely a statutory creation, we look to the words of the statute" to resolve those claims. *State v. Oakley*, 227 S.W.3d 58, 60 (Tex. 2007) (relying on statutory language to determine that Chapter 103 claims are not assignable). "The construction of a statute is a question of law that we review de novo," and "[o]ur task is to effectuate the Legislature's expressed intent." *In re Allen*, 366 S.W.3d 696, 703 (Tex. 2012). Our search for legislative intent begins with the statute's language: "Legislative intent is best revealed in legislative language." *In re Office of Att'y Gen.*,— S.W.3d —, —, 2013 WL 854785, at *4 (Tex. Mar. 8, 2013). When the statute's language is unambiguous and does not lead to absurd results, our search also ends there: "Where text is clear, text is determinative." *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437 (Tex. 2009).

We will not apply rules of construction or other extrinsic aids when the statute is not ambiguous. *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 865–66 (Tex. 1999); *see City of Rockwall v. Hughes*, 246 S.W.3d 621, 626 (Tex. 2008) ("When a statute's language is clear and unambiguous, it is inappropriate to resort to rules of construction or extrinsic aids to construe the language."). Instead, we take the Legislature at its word, as the truest measure of what it intended is what it enacted. *See Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson*, 209 S.W.3d 644, 651–52 (Tex. 2006). This text-based approach requires us to study the language of the specific section at issue in the context of the statute as a whole. *In re Office of Att'y Gen.*, — S.W.3d at —, 2013 WL 854785, at *4; *Fitzgerald*, 996 S.W.2d at 866. We endeavor to give "effect to every word,

clause, and sentence." *Tex. Dep't of Ins. v. Am. Nat'l Ins. Co.*,— S.W.3d —, —, 2012 WL 1759457, at *8 (Tex. May 18, 2012).

III.
The Tim Cole Act

In 1956, the people of Texas amended the Texas Constitution to authorize the legislature to "grant aid and compensation" to any person who has "paid a fine or served a sentence in prison . . . for an offense for which he or she is not guilty." TEX. CONST. art. III, § 51–c. The Legislature enacted the first wrongful imprisonment statute in 1965, and later codified it as the Texas Wrongful Imprisonment Act in Chapter 103 of the Civil Practices and Remedies Code. *See In re Allen*, 366 S.W.3d at 699–700; *In re Smith*, 333 S.W.3d at 585; *see also* TEX. CIV. PRAC. & REM. CODE §§ 103.001–.154.

In 2001, the Legislature amended the Act in two ways that are pertinent to this appeal. First, it excluded from compensation any time served under a concurrent sentence for another crime for which the person was not wrongfully convicted. *See* Act of May 18, 2001, 77th Leg., R.S., ch. 1488, § 1, 2001 Tex. Gen. Laws 5280, 5283; TEX. CIV. PRAC. & REM. CODE § 103.001(b) ("A person is not entitled to compensation under Subsection (a) for any part of a sentence in prison during which the person was also serving a concurrent sentence for another crime to which Subsection (a) does not apply."). Second, it provided for termination of compensation payments "if, after the date the person becomes eligible for compensation under Section 103.001, the person is convicted of a crime punishable as a felony. Compensation payments terminate under this subsection on the date of the

subsequent conviction." *See* Act of May 18, 2001, 77th Leg., R.S., ch. 1488, § 1, 2001 Tex. Gen. Laws at 5283; TEX. CIV. PRAC. & REM. CODE § 103.154.

When Blair first sought compensation in July 2009, the Act permitted a claimant to either administratively apply for compensation with the Comptroller's judiciary section or to file suit against the State in a court of competent jurisdiction. *See* Act of May 18, 2001, 77th Leg., R.S., ch. 1488, § 1, 2001 Tex. Gen. Laws 5280, 5283 (formerly TEX. CIV. PRAC. & REM CODE § 103.002 (repealed)) ("A person entitled to compensation . . . may proceed by following the provisions for administratively awarded compensation under Subchapter B or by filing suit under Subchapter C, but a person may not seek compensation under both Subchapters B and C."). That same year, the legislature amended the Act to remove the litigation option, leaving the administrative process as the only authorized procedure. *See* Act of May 11, 2009, 81st Leg., R.S., ch. 180, § 12(1), (2), 2009 TEX. GEN. LAWS 523, 526 (repealing section 103.002 and subchapter C). Although Blair could have filed a suit for compensation in July 2009, he elected to pursue his claim through the administrative process.

For the administrative process, the Act establishes detailed procedures by which a claimant may obtain benefits and services, and imposes certain duties on the Comptroller for the administration of these procedures. *See* TEX. CIV. PRAC. & REM. CODE §§ 103.001–.154. To qualify for compensation, a claimant "must" file an application with the Comptroller "not later than the third anniversary of the date" the claimant received a pardon or was granted habeas corpus relief on the basis of innocence. *Id.* § 103.003. The claimant "must" file certain documents with the application, including a verified copy of the pardon or court order and a statement provided by the TDCJ

verifying the length of the incarceration. *Id.* § 103.051(a). Upon receipt of the application, the Comptroller "shall" determine the claimant's eligibility and the amount of any compensation owed, *id.* § 103.051(b), "shall" do so by considering only the verified documents that must accompany the application, *id.* § 103.051(b–1), and "must" do so "not later than the 45th day after the date the application is received." *Id.* § 103.051(c). The Comptroller's duty to determine eligibility is "purely ministerial." *Id.* § 103.051(b–1).

If the Comptroller determines that the claimant is eligible for compensation, she "shall" make the payment to the claimant, "to the extent that funds are available and appropriated for that purpose, not later than the 30th day after the date the comptroller grants the application." *Id.* § 103.151(a). If, on the other hand, the Comptroller denies the claim, she "must state the reason for the denial." *Id.* § 103.051(d). Then, under the version of the Act applicable to Blair's claim, the claimant "must" submit an application to cure "not later than the 10th day after the date the denial is received." *See* Act of May 18, 2011, 82nd Leg., R.S., ch. 698, § 5, 2011 TEX. GEN. LAWS 1663, 1665 (amending TEX. CIV. PRAC. & REM CODE § 103.051, which currently gives the claimant thirty days to submit an application to cure). The Comptroller "shall" then re-determine eligibility and the amounts owed "not later than the 45th day" after she receives the application to cure. *Id.* If the Comptroller denies the claim after the claimant submits an application to cure, the claimant "may" then bring an action for mandamus relief. *Id.* § 103.051(e). The mandamus action "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 at 585.

IV.
The Impact of Other Convictions

The Comptroller contends that Blair is not eligible to receive any compensation because he has been convicted of child molestation, is currently imprisoned for those convictions, and will likely remain in prison for the rest of his life. According to the Comptroller, the purpose of the Act is to help released inmates rebuild their lives and reintegrate into society after they are released from prison, and this purpose would not be advanced by paying compensation to someone who is in prison for other crimes and will spend the rest of his life there. The Legislature could not have intended so absurd a result, the Comptroller continues, and therefore the Act cannot be read literally. Justice Hecht rejects this argument, pointing to several of the Act's provisions that demonstrate that helping the claimant reintegrate into society is not the Act's sole legislative purpose. On this point, I agree with Justice Hecht, for the reasons he has described.

But Justice Hecht goes on to hold that section 103.154(a) bars Blair from receiving compensation, and I do not agree with his construction of that section. Section 103.154(a) provides:

> [C]ompensation payments to a person . . . terminate if, after the date the person becomes eligible for compensation . . . , the person is convicted of a crime punishable as a felony. Compensation payments terminate under this subsection on the date of the subsequent conviction.

TEX. CIV. PRAC. & REM. CODE § 103.154(a).[2] Although neither Blair nor the Comptroller argues that

[2] This provision does not apply to compensation for child support payments and interest on child support arrearages. *Id.* § 103.154(a), (c).

section 103.154(a) applies in this case,[3] Justice Hecht concludes that this provision preemptively terminates Blair's right to compensation.[4] But that position cannot be squared with the statute's plain language. By its express terms, section 103.154(a) terminates compensation payments if the claimant is convicted of a felony "*after* the date the person becomes eligible for compensation." *Id.* (emphasis added). Because Blair was convicted of child molestation *before* he became eligible for compensation, there is no "subsequent conviction" to "terminate" his payments. I agree with the parties that section 103.154(a) does not apply. *See id.*

Justice Hecht contends that the phrase "is convicted" refers not "to the act of adjudication," but to the status of the claimant as a person who "stands convicted" of a felony. I agree that, under some circumstances, the phrase "is convicted" could reasonably be interpreted to mean "stands convicted," but not in the context of this statute. The statute states that payments "*terminate* if, *after* the date the person becomes eligible . . . the person *is convicted* of a crime punishable as a felony. Compensation payments terminate under this subsection on the date of the *subsequent conviction*." *Id.* (emphases added). For payments to "terminate," the payment process, or at least the right to receive payments, must have commenced in some form in the first place, and the terms "after" and "subsequent" clarify that a conviction that "terminates" the payments is one that has not yet occurred

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[3] The Comptroller contends that "[s]ection 103.154(a) is irrelevant to Blair's claim" because Blair's current imprisonment renders him ineligible for compensation in the first place. Blair agrees that section 103.154(a) does not apply to him for the different reason that he was convicted of other crimes before he became eligible for compensation while section 103.154(a) only applies to an individual convicted of other crimes after becoming eligible for compensation.

[4] The compensation Blair seeks is paid through an annuity. *See* TEX. CIV. PRAC. & REM. CODE § 103.053. If section 103.154(a) terminates payment of the annuity from the date of Blair's child molestation convictions, the annuity payments to Blair will never begin in the first place.

when the claimant becomes eligible to receive the payments. While Blair may "stand convicted" of child molestation after he became eligible to receive payments, his is not a "subsequent conviction" that occurred "after" his date of eligibility.

Thus, I disagree with Justice Hecht that section 103.154 "admits of two linguistically reasonable interpretations." *Ante* at __. While the phrase "is convicted" alone is subject to more than one reasonable interpretation, the statute as a whole is subject to only one. *See* TEX. CIV. PRAC. & REM CODE § 103.154; *see also TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 441 (Tex. 2011) ("Language cannot be interpreted apart from context. The meaning of a word that appears ambiguous when viewed in isolation may become clear when the word is analyzed in light of the terms that surround it."). If the Legislature intended to bar compensation for all claimants who had ever been convicted of a felony, whether before or after they become eligible for compensation, it could have done so and may still do so. But we may not read into the statute a legislative intent that is directly contrary to the language the Legislature selected and enacted into law. *See Tex. Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 637 (2010) ("[W]e must take statutes as we find them and first and primarily seek the Legislature's intent in its language. Courts are not responsible for omissions in legislation, but we are responsible for a true and fair interpretation of the law as it is written.") (internal citation omitted). Even if we believe the Legislature "may have made a mistake" in their wording of section 103.154(a), we "are not empowered to 'fix' the mistake by disregarding direct and clear statutory language that does not create an absurdity." *Id.* at 638. Though it may not be desirable under the circumstances of this

case, it is not absurd for the State to compensate Blair for the ten years he spent on death row for a murder he did not commit.

Importantly, the Legislature expressly prohibited claimants from receiving compensation for any time served when serving a sentence for another crime in addition to the crime of which the claimant is innocent. TEX. CIV. PRAC. & REM. CODE § 103.001(b). The Legislature has thus addressed the impact of other convictions that occur *before* the claimant becomes eligible for compensation, and has done so by denying compensation for the time served on those other convictions, not by denying eligibility for compensation completely. *See id.* Justice Hecht contends this construction of the statute, while "linguistically reasonable," has unreasonable consequences because it treats convictions differently depending on whether they occur before or after the date the person becomes eligible for compensation under the Tim Cole Act. *Ante* at __. He acknowledges that such a distinction could be reasonable in light of the deterrent effect termination of compensation could have on future crimes (but not past crimes), but then rejects that basis for the distinction on the ground that the statute does not indicate that the Legislature was so motivated. *Ante* at __.

But we must construe statutes based on the text the Legislature enacted, not on speculation about individual legislators' motivations. *See Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 216 (1983) ("[I]nquiry into legislative motive is often an unsatisfactory venture. What motivates one legislator to vote for a statute is not necessarily what motivates scores of others to enact it.") (citation omitted). Moreover, reasonableness is not the standard for eschewing plain statutory language; rather, "[i]f a statute is worded clearly, we must

honor its plain language, unless that interpretation would lead to *absurd* results." *Combs v. Health Care Servs. Corp.*, 401 S.W.3d 623, 629 (Tex. 2013) (emphasis added). Justice Hecht does not assert, and I do not think he reasonably could assert, that it would be absurd for the Act to distinguish between past and present crimes in deciding who may receive compensation. Even if this distinction "seems strange"—and I do not agree that it is an unusual or unreasonable distinction to make—"we read unambiguous statutes as they are written, not as they make the most policy sense." *Id.*

In light of the language of the statute, I conclude that Blair's 2004 convictions prohibit him from receiving compensation for time served beginning in 2004 but do not prohibit him from receiving compensation for time served prior to that date.

V.
Failure to Comply with Procedural Requirements

The Comptroller contends that we should deny Blair's petition for writ of mandamus because she did not abuse her discretion by denying Blair's second application. At least in the absence of a material change in circumstances, she argues, she was "under no duty to reconsider her denial of Blair's resubmitted claim" because "the Act clearly contemplates that, once a mandamus action is denied, as it was in Blair's case, the matter is ended, and no further proceedings on the same claim are contemplated." I agree, although I conclude that Blair's failure to comply with other procedural requirements also precludes his claim. This Court has previously observed that a Tim Cole Act claimant is "*required* to follow certain statutory procedures to obtain compensation," *In re Smith*, 333 S.W.3d at 585 (emphasis added), but we have not had occasion to address these procedures in detail. As I read the language of the statute, Blair cannot receive the compensation that he seeks

because (1) he repeatedly failed to comply with the Act's procedural requirements and deadlines, which are mandatory and are the exclusive means for obtaining compensation under the Act and for obtaining judicial review of the Comptroller's eligibility determination, and (2) the Act's application-for-compensation procedure does not authorize multiple applications or petitions for writ of mandamus for the same compensation, at least in the absence of any material change in circumstances.

A. "May," "Must," and "Shall"

To determine whether the Legislature intended a statutory provision to be mandatory, "we consider the plain meaning of the words used, as well as the entire act, its nature and object, and the consequences that would follow from each construction." *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 494 (Tex. 2001) (quoting *Albertson's, Inc. v. Sinclair*, 984 S.W.2d 958, 961 (Tex.1999); *Chisholm v. Bewley Mills*, 155 Tex. 400, 287 S.W.2d 943, 945 (1956)). I would hold that the plain language of the Tim Cole Act's procedural provisions, by their terms and considered in light of the Act as a whole, demonstrates the Legislature's intent that a claimant must satisfy each of the Act's step-by-step mandates before he may proceed to the next step in the process, and the claimant must complete all of the steps before he may seek mandamus relief from the Comptroller's decision to deny eligibility.

1. Plain Language

As described above, the Tim Cole Act's prescribed administrative process applies different directives—"may," "must," or "shall"—for different procedural steps:

- The claimant "must" file an application accompanied by specified documentation within three years of an eligible pardon, order, or relief.[5]

- The Comptroller "shall" determine eligibility and the amount owed by considering only the specified documentation and "must" do so within forty-five days after receiving the application.[6]

- If the Comptroller grants the claim, she "shall" make the payment within thirty days, to the extent funds are available and appropriated.[7]

- If the Comptroller denies the claim,

    - she "must" state the reason for the denial, and

    - the claimant "must" submit an application to cure within ten days (thirty days under the current version of the Act).[8]

- If the claimant submits an application to cure, the Comptroller "shall" again determine eligibility and the amounts owed within forty-five days.[9]

- If the Comptroller denies the claim after an application to cure, the claimant "may" then bring an action for mandamus relief.[10]

The Legislature has expressly defined each of these directives: with limited exceptions, when a statute uses the term "must," it "creates or recognizes a condition precedent," TEX. GOV'T CODE § 311.016(3); when a statute uses the term "shall," it "imposes a duty," *id.* § 311.016(2); and when

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[5] TEX. CIV. PRAC. & REM. CODE § 103.003.

[6] *Id.* § 103.051(b–1), (c).

[7] *Id.* § 103.151.

[8] *Id.* § 103.051(d); *see* Act of June 15, 2001 77th Leg., R.S. ch. 1488, § 1, 2001 TEX. GEN. LAWS 5280, 5283 (enacting TEX. CIV. PRAC. & REM. CODE § 103.051(d); Act of May 18, 2011 82nd Leg., R.S., ch. 698, § 5, 2011 TEX. GEN. LAWS 1663, 1665 (amending TEX. CIV. PRAC. & REM. CODE § 103.051(d)).

[9] TEX. CIV. PRAC. & REM. CODE § 103.051(d).

[10] *Id.* § 103.051(e).

a statute uses the term "may," it "creates discretionary authority or grants permission or a power," *id.* § 311.016(1). These definitions apply to all statutes, "unless the context in which the word or phrase appears necessarily requires a different construction" or "a different construction is expressly provided by statute." TEX. GOV'T CODE § 311.016. The Tim Cole Act does not provide an alternative meaning for these terms, and as discussed below, nothing in the Act contextually compels a contrary construction. In fact, giving the words "may," "must," and "shall" in the Act's procedural provisions their plain meaning, as specified by the Legislature in the Code of Construction, results in an orderly administrative process for claimants to receive compensation without undue burden or delay for the claimants or the Comptroller. *See* TEX. CIV. PRAC. & REM. CODE § 103.051.

Thus, I construe the statutorily-required process in the following manner:

- Blair had to file an application for compensation, accompanied by the documents listed in the statute, within three years of eligibility, as a condition precedent to compensation under the Act.[11]

- If Blair satisfied this prerequisite, then the Comptroller had a duty to determine Blair's eligibility and the amount owed, by considering only the documents listed in the statute; and she had a duty to deny the claim if the documents did not clearly indicate on their face that Blair was entitled to compensation.[12]

- The Comptroller's determination, within forty-five days, that Blair was not eligible and her statement of the reasons that he was not eligible were conditions precedent to Blair's obligation to file an application to cure within ten days.[13]

- After the Comptroller satisfied these conditions, Blair's filing of an application to cure within ten days was a condition precedent to any further duty or obligation by

[11] TEX. CIV. PRAC. & REM. CODE § 103.003, 103.051(a); TEX.GOV'T CODE § 311.016(3).

[12] TEX. CIV. PRAC. & REM. CODE § 103.051(b), (b-1); TEX. GOV'T CODE § 311.016(2).

[13] TEX. CIV. PRAC. & REM. CODE § 103.051(c), (d); TEX.GOV'T CODE § 311.016(3).

the Comptroller.[14]

- If Blair timely submitted an application to cure, the Comptroller had a duty to re-determine eligibility for compensation within forty-five days.[15]

- Blair had permission to bring an action for mandamus relief if the Comptroller denied his claim after he submitted an application to cure.[16]

2. The Nature of the Act and the Consequences of Construction

This construction of the Act's procedural requirements is consistent not only with the plain meaning of the words used, but also the Act as a whole, its nature and object, and the consequences that follow from the construction. *See Wilkins*, 47 S.W.3d at 494 (identifying considerations for construction). It obligates the Comptroller to act with relative expediency but, at each step in the process, conditions the Comptroller's duty on the claimant's previous filing of documents that will assist the Comptroller in performing that duty. *See* TEX. CIV. PRAC. & REM. CODE § 103.051. The claimant is not the only participant subject to procedural prerequisites—the Comptroller's timely performance of her duty to determine eligibility and state the reasons for her denial of a claim is a condition precedent to the claimant's obligation to file an application to cure within ten days after the denial. *See id.* § 103.051(c), (d). As the claimant's application and supporting documentation assist the Comptroller in evaluating his eligibility, the Comptroller's statement of reasons for her denial of the claim assist the claimant in his efforts to cure the cause of the Comptroller's denial.

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[14] *See* Act of June 15, 2001 77th Leg., R.S., ch. 1488, § 1, 2001 TEX. GEN. LAWS 5280, 5283 (enacting TEX. CIV. PRAC. & REM. CODE § 103.051(d).

[15] *See* Act of June 15, 2001 77th Leg., R.S., ch. 1488, § 1, 2001 TEX. GEN. LAWS 5280, 5283 (enacting TEX. CIV. PRAC. & REM. CODE § 103.051(d)); TEX. CIV. PRAC. & REM. CODE § 103.051(d); TEX. GOV'T. CODE § 311.016(2).

[16] TEX. CIV. PRAC. & REM. CODE § 103.051(e); TEX. GOV'T. CODE § 311.016(1).

But once the Comptroller has satisfied her duty by providing the claimant with the reasons for her denial, the onus shifts back to the claimant to comply with his duty to timely file an application to cure. *See id.* § 103.051(d). The Act's process for an application to cure and re-determination of eligibility give both the claimant and the Comptroller one opportunity to correct any errors. A claimant's failure to satisfy his part of this process—a timely application to cure—precludes him from proceeding to the next step in his quest for compensation; and the Comptroller's failure to fulfill her part of this process—re-determination of eligibility—subjects her to this Court's mandamus authority. *See id.* § 103.051(a), (d), (e); *In re Allen*, 366 S.W.3d at 701; *In re Smith*, 333 S.W.3d at 585.

The procedure for judicial review of the Comptroller's decision is likewise consistent with the Act as a whole. The Act provides that the Comptroller's "duty to determine the eligibility of a claimant" is "purely ministerial," *id.* § 103.051(b–1), and thus a claimant could, under general law, seek a writ of mandamus to compel the Comptroller to make a determination of eligibility if the Comptroller failed to do so within the time provided by the statute. *See, e.g.*, *In re Smith*, 333 S.W.3d at 585 ("The Court's mandamus authority extends 'to order or compel the performance of a judicial, ministerial or discretionary act or duty that, by state law, the officer or officers are authorized to perform.'") (citing TEX. GOV'T CODE § 22.002(c) and TEX. CONST. art. V, § 3). But the Legislature has also afforded claimants under the Act a specific avenue for judicial review of the Comptroller's decision to deny a claim, if the claimant filed an application to cure and complied with the other required steps. *See* TEX. CIV. PRAC. & REM CODE § 103.051(e).

To allow Blair to seek mandamus review of the Comptroller's substantive decision without

first filing an application to cure and invoking the Comptroller's duty to re-determine his eligibility would render the statute's re-determination process optional for claimants (though not for the Comptroller), contrary to the statute's mandatory language with respect to both the Comptroller's actions and the claimant's actions. *See id.* § 103.051(a)–(d). And if substantive review of the correctness of the Comptroller's eligibility determination is available at any stage of the compensation process, the language in subsection (e) that grants permission for a mandamus action "[i]f the comptroller denies a claim after the claimant submits an application [to cure]" is superfluous. TEX. CIV. PRAC. & REM CODE § 103.051(e); *see also Columbia Med. Ctr. of Las Colinas, Inc. v. Hogue*, 271 S.W.3d 238, 256 (Tex. 2008) ("The Court must not interpret the statute in a manner that renders any part of the statute meaningless or superfluous.").

Moreover, the Legislature's creation of a right to review under expressly defined circumstances evidences a legislative expectation that the same right to review is not available when those circumstances are not present. *See PPG Indus., Inc. v. JMB/Houston Ctrs. Partners Ltd. P'ship*, 146 S.W.3d 79, 84 (Tex. 2004) ("When the Legislature includes a right or remedy in one part of a code but omits it in another, that may be precisely what the Legislature intended," and "we must honor that difference."); *cf.* 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. . . . Statutory prerequisites to a suit, including the provision of notice, are jurisdictional requirements in all suits against a governmental entity.").

3. Other Cases Construing Statutory Use of "Must"

This construction of the Act's procedural requirements is also consistent with this Court's precedent in analogous situations. *See, e.g.*, *Jose Carreras, M.D., P.A. v. Marroquin*, 339 S.W.3d 68, 72 (Tex. 2011) (holding that health care liability claimants' failure to include authorization form with notice precluded claimants from availing themselves of statutory tolling provision because statute provided that "notice *must* be accompanied by the authorization form") (quoting TEX. CIV. PRAC. & REM CODE § 74.251(a)) (emphasis added)); *Edwards Aquifer Auth. v. Chem. Lime, Ltd.*, 291 S.W.3d 392, 404–05 (Tex. 2009) (holding that provision in Edwards Aquifer Authority Act that "declaration of historical use *must* be filed [on or before March 1, 1994]" prohibited late-filed applications) (emphasis added); *see also Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 492 (Tex. 2001) (holding that use of "must" in Texas Seed Arbitration Act meant that "the purchaser *must submit* the claim to arbitration as provided by this chapter *as a prerequisite* to the exercise of the purchaser's right to maintain a legal action against the labeler").

In *Edwards Aquifer*, we observed:

> We have said that "[t]he word 'must' is given a mandatory meaning when followed by a noncompliance penalty" but this does not suggest that when no penalty is prescribed, "must" is non-mandatory. "When the statute is silent [regarding the penalty for noncompliance], we have looked to its purpose for guidance." The EAAA does not suggest that an applicant can be fined for a late filing or that the water allocated should be reduced accordingly. The only penalty the EAAA suggests is that late applications will not be considered.

291 S.W.3d at 404 (citation omitted); *see also Wilkins*, 47 S.W.3d 486, 494 ("When a statute is silent about the consequences of noncompliance, we look to the statute's purpose to determine the proper consequences.").

Here too, the only penalty suggested by the Tim Cole Act for a claimant's failure to take a mandatory step in the application process is that he has not invoked the Comptroller's duty to take responsive action and, in the case of a failure to file an application to cure under subsection (d), he may not avail himself of subsection (e)'s avenue for substantive review of the Comptroller's re-determination of eligibility—a determination that the Comptroller has no duty to make absent an application to cure.

This case is readily distinguishable from those instances when a statute's context dictated that we not construe the term "must" to create a condition precedent. *See, e.g.*, *Wilkins*, 47 S.W.3d at 492 (although Texas Seed Arbitration Act made arbitration a condition precedent to filing suit, the context of the statute demonstrated that failure to file arbitration "within the time necessary to permit effective inspection of the plants under field conditions" did not bar suit) (applying TEX. AGRIC. CODE §§ 64.002, 64.006(a)); *City of DeSoto v. White*, 288 S.W.3d 389, 395–96 (Tex. 2009) (holding that police chief's suspension letter omitting statutorily required information about process for appeal of suspension did not deprive hearing examiner of jurisdiction over suspended officer's appeal and require reinstatement of officer); *see also* TEX. GOV'T CODE § 311.016 (providing exception to general construction of term "must" when "the context in which the word or phrase appears necessarily requires a different construction.").

This is not a statutory scheme that expressly provides an alternative penalty for failure to fulfill its procedural requirements, nor does the Act indicate an expectation that claimants who fail to fulfill the procedural requirements will be permitted to proceed to compensation anyway. *Cf. Wilkins*, 47 S.W.3d at 495–96 (observing that statutory provision for jury consideration of

arbitrator's findings regarding delay in bringing arbitration indicated that Legislature did not intend delay to bar suit). The statutory procedures for compensation under the Tim Cole Act are not mere notice requirements—each step in the process serves as a foundation for the next step in the process, and one party's fulfillment of a statutory duty at each step of the process gives rise to either a complimentary duty or a right under the statute. *See* TEX. CIV. PRAC. & REM CODE § 103.051; *cf. White*, 288 S.W.3d at 395–96 (addressing failure to include statutorily-mandated notice of limited right of review from hearing in otherwise timely and compliant suspension letter). The effect of enforcing the Act's mandatory procedures as written does not deprive non-compliant claimants of rights they had at common law or that exist outside of the Act; rather, the only effect of failing to fulfill the Act's statutory prerequisites is that the claimant may not receive the benefits otherwise available under the Act. *Cf. Wilkins*, 47 S.W.3d at 492–96 (declining to construe failure to comply with promptness requirement to bar suit on common law cause of action). And because the right to compensation Blair seeks is created by the Act and did not exist at common law, the Open Courts provision of the Texas Constitution is not implicated. *See* TEX. CONST. art. I, § 13; *see also Sax v. Votteler*, 648 S.W.2d 661, 665–66 (Tex. 1983) (holding that "the right to bring a well-established common law cause of action cannot be effectively abrogated by the legislature absent a showing that the legislative basis for the statute outweighs the denial of the constitutionally-guaranteed right of redress").

4. Application

Blair failed to comply with the procedural conditions precedent necessary to authorize this Court to grant him the relief he seeks in this action for mandamus. After the Comptroller denied his

first application, he filed a "Motion for Reconsideration of Denial" within ten days, and then filed another "Motion to Reconsider" twenty-three days later. We need not, and I would not, hold that the Act required Blair to title his tenth-day filing an "Application to Cure" rather than a "Motion for Reconsideration of Denial," but future claimants should follow that practice to avoid confusion. In any event, the Act did not permit Blair to file the subsequent "Motion to Reconsider," and the Comptroller should not have considered it. Nor should the Comptroller have invited, accepted, considered, or ruled on Blair's subsequent "Supplemental Motion to Cure," as the Act does not authorize any action following the denial of an application to cure other than a petition for writ of mandamus. Once Blair's deadline to file an application to cure passed, his ability to submit information to the Comptroller ceased, and his only remaining avenue was to seek mandamus relief as the Act allows. Instead, he continued to submit additional documents to the Comptroller, and then relied on the information in those documents to support his first mandamus petition. Blair failed to comply with the Act's procedural requirements in his first application for compensation, and we denied his first petition for mandamus.

Then, contending that he was entitled to file a second application for the same relief (a contention I discuss further below), Blair submitted a successive application and, upon the Comptroller's denial, immediately sought mandamus relief without first filing an application to cure, as the statute says he "must" do. Since this is the denial for which he now seeks mandamus, his failure to submit an application to cure following the Comptroller's denial of his second application is, by itself, a reason we must deny his petition.

Justice Hecht disagrees that the Act required Blair to file an application to cure before seeking mandamus relief a second time; the statute does not require an application to cure, according to Justice Hecht, when the application for compensation is denied on a "legal basis." But the statute makes no such distinction between grounds for denial. It states only that "[i]f the comptroller denies the claim, the comptroller must state the reason for the denial," and within thirty days after the denial is received, "the claimant must submit an application to cure any problem identified." TEX. CIV. PRAC. & REM CODE § 103.051(d). More importantly, the statute specifically permits mandamus only "[i]f the comptroller denies a claim *after the claimant submits an application under Subsection (d)*"—i.e., an application to cure. *Id.* § 103.051(e). These procedural "musts" create "conditions precedent," *see* TEX. GOV'T CODE § 311.016(3), and we (and Blair) are bound by them.

There is nothing unreasonable or even undesirable about giving the claimant and the Comptroller a second chance to achieve the right result—within the statutorily provided timeframe—even when the Comptroller denies the claim for legal reasons rather than a defect in the paperwork. Other statutes contain similar time-sensitive but mandatory second chances. The Administrative Procedure Act (APA), for example, requires a motion for rehearing as a prerequisite to appeal from most contested cases. *See* TEX. GOV'T CODE § 2001.145(a) ("A timely motion for rehearing is a prerequisite to an appeal in a contested case except . . . ."). Like an application to cure under the Tim Cole Act, a motion for rehearing under the APA must be filed with a certain number of days after the agency's decision, and like the Comptroller's re-determination of eligibility under the Tim Cole Act, the agency has a certain number of days to act on the motion. *See id.* § 2001.146(a), (c) (twenty days to file motion for rehearing, forty-five days to act on the motion). While I agree with Justice

Hecht that an application to cure is not the same as a "motion for reconsideration," and likewise neither of these is the same as a "motion for rehearing," all of these filings have the same general purpose—an opportunity to correct a potentially erroneous decision—and none of them are inherently limited to the correction of only one specific kind of error. *See Tex. Water Comm'n v. Dellana*, 849 S.W.2d 808, 810 (Tex. 1993) (observing that motion for rehearing under APA predecessor statute is designed to "allow the agency opportunity to correct the error or to prepare to defend it") (quoting *Suburban Util. Corp. v. Pub. Util. Comm'n*, 652 S.W.2d 358, 365 (Tex. 1983)).

B. Successive Applications

Blair's petition and the Comptroller's response also raise the question of when, if ever, a claimant may file successive applications or successive mandamus petitions after the Comptroller has denied an earlier application and we have denied an earlier petition for mandamus relief. I would hold that, although res judicata does not bar successive applications and petitions, the Act does not permit them, at least in the absence of materially changed circumstances.

1. Res Judicata

The Comptroller contends that res judicata bars Blair's second application because the Comptroller's determination of Blair's first application is a final agency decision. Blair responds that the "final agency decision rule" applies only when an agency is acting in a judicial capacity following a contested testimonial hearing, and it does not apply when, as here, the comptroller's duty is "purely ministerial." Blair also contends that this Court's denial of his first petition for writ of mandamus was not a decision on the merits and thus has no res judicata effect.

I agree that neither the Comptroller's prior determination of eligibility nor this Court's previous denial of mandamus relief bars Blair's second application under the principles of res judicata. The process for obtaining compensation under the Tim Cole Act is unique to that Act. It is administered by the Comptroller and does not lead to a "contested case" proceeding under the APA. *Cf.* TEX. GOV'T CODE § 2001.003(1) (defining a "contested case" 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*") (emphasis added). The Comptroller's determination of eligibility is ministerial and must be based solely on the verified documents filed with the application; it is not the result of an adjuratory process in which the Comptroller acts in a judicial or quasi-judicial capacity. *See* TEX. CIV. PRAC. & REM CODE § 103.051. Thus, the Comptroller's determination of eligibility, even when final, does not have res judicata effect. *Cf. Igal v. Brightstar Info. Tech. Grp., Inc.*, 250 S.W.3d 78, 87 (Tex. 2008) (res judicata generally applies to TWC final orders because TWC acts in judicial capacity in deciding wage claims and parties had "an adequate opportunity to litigate their claims through an adversarial process in which TWC finally decided disputed issues of fact"); *Coal. of Cities for Affordable Util. Rates v. Pub. Util. Comm'n of Tex.*, 798 S.W.2d 560, 561 (Tex. 1990) (PUC hearing and final order on rate increase precluded re-litigation of same issue in subsequent PUC proceeding); *see also United States v. Utah Constr. & Min. Co.*, 384 U.S. 394, 422 (1966) (administrative proceeding can have preclusive effect when the administrative agency "is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate").

Nor does this Court's denial of Blair's previous petition for writ of mandamus have res judicata effect. The doctrine of res judicata is implicated only by "a prior final determination on the merits." *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010) (listing elements of res judicata). Our denial of Blair's first petition for writ of mandamus was not a determination on the merits. *See In re AIU Ins. Co.*, 148 S.W.3d 109, 119 (Tex. 2004) ("[T]his Court's failure to grant a petition for writ of mandamus is not an adjudication of, nor even a comment on, the merits of a case in any respect, including whether mandamus relief was available.").

2. Statutory Language

Although res judicata does not bar Blair's subsequent application for compensation, we must still determine whether the Act itself permits successive applications. Blair contends that the Act places no limit on the number of applications he may file seeking the same compensation, as long as he files them within the statute's three-year limitation period. The Comptroller argues that the Act prohibits successive applications, at least in the absence of an intervening material change in circumstances, because holding otherwise "could lead to the futile filing of seriatim applications of the same denied claim despite no changed circumstances during the Act's three-year limitations period, forcing the Comptroller to re-deny the same claim over and over again." *See Young Trucking, Inc. v. R.R. Comm'n*, 781 S.W.2d 719, 721 (Tex. App.—Austin 1989, no writ) (holding that, once an order becomes administratively final, an agency does not have inherent authority to reopen the proceeding and can reconsider its order only if provided for by statute or on a showing of changed circumstances). Justice Hecht agrees with Blair; I agree with the Comptroller.

The Act sets forth a series of specific procedural requirements that, together, provide a simple

and efficient process for those who were wrongfully imprisoned to obtain the compensation to which they are entitled. But the process includes requirements, and these requirements are mandatory. Justice Hecht's construction of the Act as permitting multiple applications by the same claimant based on the same wrongful imprisonment renders these mandatory requirements meaningless. For example, a claimant who failed to file an application to cure within ten days (now thirty days) of the Comptroller's initial denial could negate the statutory deadline by simply starting the process over.

This Court recently prohibited this kind of circumvention of procedural deadlines in an analogous circumstance. *See City of Houston v. Estate of Jones*, 388 S.W.3d 663 (Tex. 2012). In *City of Houston*, we held that a court of appeals may not hear an interlocutory appeal from the denial of a governmental unit's plea to the jurisdiction if the plea merely re-urges the same grounds argued in a prior plea to the jurisdiction. *Id.* at 666–67 (construing TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8)). We noted that "[p]ermitting appeals under circumstances such as these would effectively eliminate the requirement that appeals from interlocutory orders must be filed within twenty days after the challenged order is signed" because the governmental unit could just re-file the plea to the jurisdiction after twenty days had expired. *See id.* We concluded that because the city's second plea to the jurisdiction "did not assert a new ground, [it] was substantively a motion to reconsider," for which the statute did not authorize interlocutory appeal. *Id.*

Here too, permitting Blair to file a second application or pursue mandamus relief from the Comptroller's denial of his second application for the same compensation, at least absent a material change in circumstances, "effectively eliminates" the Act's procedural deadlines. *See id.* As in *City of Houston*, Blair's second application for the same compensation was just another untimely request

for reconsideration of his original application. *See id.* Justice Hecht notes that the Act does not expressly prohibit Blair from filing duplicative applications. But the Act's detailed procedural provisions necessarily prohibit conduct that conflicts with its mandates or renders them entirely ineffective, like allowing redundant re-filing of applications renders the statutes procedural deadlines meaningless.

The conduct at issue here—seeking compensation under the Act—is not something Blair has a right to do independent of the Act. Unlike statutes that place limits on existing rights, there is no reason for a statute that creates a right under limited circumstances—e.g., the right to compensation if the Act's procedures are satisfied—to identify all other circumstances in which the right does not exist. The Comptroller has no power to grant compensation to claimants like Blair except that power granted by the Act. *Cf. Tex. Natural Res. Conservation Comm'n v. Lakeshore Util. Co.*, 164 S.W.3d 368, 377 (Tex. 2005) (observing "well-established principle" that administrative agencies "may exercise only those powers that the Legislature confers upon [them] in clear and express language, and cannot erect and exercise what really amounts to new or additional power for the purpose of administrative expediency."); *see also TGS-NOPEC Geophysical*, 340 S.W.3d at 438 (identifying the Comptroller as an administrative agency).

For all of these reasons, I would hold that the Act does not permit multiple applications and petitions by the same claimant based on the same claim under the same facts.

3. Material Change in Circumstances

Blair next argues that successive applications should at least be permitted if there was a material change in circumstances after the denial of a prior application, which he contends is the case

here. The Comptroller disagrees that there has been a material change in circumstances. I agree with the Comptroller, and therefore I need not decide whether a material change in circumstances could ever justify a successive application.

Attempting to show a material change of circumstances, Blair first argues that our decision in *In re Smith* created a change in law that justifies his new application. Specifically, Blair notes that our holding in *In re Smith* was contrary to the Comptroller's conclusion, in response to Blair's first application, that Blair could not be eligible for the period from 1993–2002, when he was serving concurrent sentences for the 1988 convictions. But the Comptroller did not ultimately deny Blair's application on that ground. Although she relied on that ground in her first determination, she did not do so in her second or her third. Thus, our decision in *In re Smith* was not material to the Comptroller's denial of Blair's first application for compensation, and could not constitute a change in the law to justify a successive application.

Next, Blair contends that the Legislature's 2009 amendments to the Act also constitute a change in the law that justifies his second application. Among other things, the 2009 amendments increased the lump-sum compensation available to claimants under the Act and added a new provision for annuity payments. *See* Acts of May 11, 2009, 81st Leg., R.S., ch. 180, § 2, 2009 TEX. GEN. LAWS 523, 526. The Legislature expressly provided that the increased lump-sum payment "applies only to an application for compensation . . . filed on or after the effective date of this Act," *id.* § 14(a), but the annuity payments were available to "a person who received compensation under [the Act] before September 1, 2009 . . . based on a present value sum equal to the amount the person would receive . . . if the person were to receive compensation . . . on September 1, 2009," *id.* § 14(b).

Blair argues that these amendments demonstrate the Legislature's intent to allow successive applications. I disagree. To the contrary, the 2009 amendments demonstrate that the Legislature knows how to allow a redetermination of a previously decided claim for compensation when it chooses to do so. Had the Legislature intended to authorize successive applications by claimants who previously received compensation, rather than only allowing an adjustment to the annuity payment rights of claimants previously determined to be eligible, it could have, and would have, done so. Because it did not, I would hold that the 2009 amendments do not constitute a material change in circumstances that would permit Blair to file a second application.

VI.
Conclusion

I agree with Blair that the Tim Cole Act does not provide for "termination" of his right to compensation based on felony convictions that occurred before he became eligible for compensation, and the fact that he remains in prison for those conviction does not preclude him from eligibility under the plain language of the Act. But I agree with the Comptroller that the Act does not permit Blair to eschew the Act's procedural requirements or file a successive application seeking the same compensation, at least in the absence of any material change in circumstances.

Blair invites the Court to ignore the Act's procedural requirements, as a matter of policy and "in the interest of justice," so that he can receive the compensation to which he contends he is otherwise entitled. But the Legislature has imposed those procedural requirements, and "policy arguments cannot prevail over the words of the statute," *In re Allen*, 366 S.W.3d at 708 (citing *McIntyre v. Ramirez*, 109 S.W.3d 741, 748 (Tex. 2003)).

> [T]he question before us is not one of policy but of statutory construction, and our duty is to give effect to the Legislature's intent. While the limitations in Chapter 103 may sometimes be harsh, the common-law rule was harsher still, entitling claimants to nothing from a state that wrongfully imprisoned them. As Chapter 103 is intended to ameliorate that rule, it is the Legislature's prerogative to set its boundaries.

Oakley, 227 S.W.3d at 62.

In the Tim Cole Act, the Legislature has set forth a simple and efficient, but mandatory, process for those who were wrongfully imprisoned to obtain compensation. The Act requires claimants to follow the steps in this process by specific deadlines, and imposes a ministerial duty on the Comptroller to determine the claimant's eligibility if, but only if, the claimant meets those requirements. Because Blair failed to comply with those requirements, he is not eligible to receive compensation. The Act did not permit Blair to file a second application and, even if it did, he failed to file an application to cure within ten days of the Comptroller's denial of that application—a prerequisite to mandamus review. I therefore concur in the Court's decision to deny Blair's petition for writ of mandamus.

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Jeffrey S. Boyd
Justice

OPINION DELIVERED: August 23, 2013

IN THE SUPREME COURT OF TEXAS

NO. 11-0441

IN RE MICHAEL N. BLAIR, RELATOR

ON PETITION FOR WRIT OF MANDAMUS

JUSTICE LEHRMANN, joined by CHIEF JUSTICE JEFFERSON, JUSTICE JOHNSON, and JUSTICE WILLETT, dissenting.

In 1994, Michael Blair was convicted of and sentenced to death for a murder he did not commit. In 2004, while still on death row for the murder conviction, Blair pled guilty to four counts of molesting a child and began serving life sentences for those convictions. The murder conviction was set aside in 2008, and Blair then began his quest for compensation under the Tim Cole Act. *See* TEX. CIV. PRAC. & REM. CODE §§ 103.001–.154.

For the reasons stated in the plurality opinion, I agree that, to the extent the Comptroller preserved the argument, Blair is not procedurally barred from seeking judicial review in this Court of the Comptroller's denial of his second application for compensation under the Tim Cole Act. More specifically, I do not believe the Act requires claimants to submit an application to cure to the Comptroller after a denial of compensation "if there is nothing to cure." ___ S.W.3d at ___. Nor do I believe the Act prohibits successive applications.

However, I also join Part IV of JUSTICE BOYD'S concurrence and would hold that Blair's 2004 felony conviction does not foreclose Blair's eligibility for any compensation under the Act. The plain language of the Act, when properly construed in context, confirms that an applicant who is convicted of a felony (meaning the act of conviction, not the status of being convicted) after he becomes eligible for compensation is not wholly deprived of such eligibility. *See* TEX. CIV. PRAC. & REM. CODE § 103.154(a) ("[C]ompensation payments to a person under this chapter *terminate* if, *after* the date the person becomes eligible for compensation . . . , the person is convicted of a crime punishable as a felony. Compensation payments *terminate* under this subsection *on the date of the subsequent conviction*.") (emphasis added). Under this section, the compensation payments to which Blair was otherwise entitled for the wrongful murder conviction terminated upon, but were not nullified by, the 2004 conviction. As the concurrence notes, while such a result may not be "desirable under the circumstances of this case," neither is it "absurd for the State to compensate Blair for the ten years he spent on death row for a murder he did not commit." ___ S.W.3d at ___.

I would conditionally grant mandamus relief and order the Comptroller to compensate Blair for time served prior to his conviction in 2004. Accordingly, I respectfully dissent.

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Debra H. Lehrmann
Justice

OPINION DELIVERED: August 23, 2013

IN THE SUPREME COURT OF TEXAS

NO. 11-0469

TEXAS A&M UNIVERSITY–KINGSVILLE, PETITIONER,

v.

GERTRUD MORENO, RESPONDENT

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

PER CURIAM

Gertrud Moreno sued her employer, Texas A&M University–Kingsville (TAMUK), alleging she was terminated in violation of the Texas Whistleblower Act (Act), TEX. GOV'T CODE § 554.002. Moreno, an assistant vice president and comptroller of TAMUK, claimed that her supervisor, Thomas Saban, fired her for reporting to the TAMUK president that Saban's daughter had received in-state tuition in violation of state law. The trial court granted TAMUK's plea to the jurisdiction, but the court of appeals reversed. 339 S.W.3d 902. In this appeal, TAMUK argues that Moreno's internal report falls short of what the Act requires: a good-faith report of a violation of law to an "appropriate law enforcement authority." We agree and accordingly dismiss Moreno's suit.

* * *

Moreno contends she satisfied the Act by reporting a violation of law to TAMUK's president, Rumaldo Juarez. However, as we explain today in *University of Texas Southwestern Medical Center*

v. Gentilello, ___ S.W.3d ___ (Tex. 2013), the Act's restrictive definition of "appropriate law enforcement authority" requires that the reported-to entity be charged with more than mere internal adherence to the law allegedly violated. The Legislature's language is "tightly drawn," *id*. at ___, and centers on law enforcement, not law compliance:

> The Act, by its text and structure, restricts "law enforcement authority" to its commonly understood meaning. That is, it protects employees who report to authorities that actually promulgate regulations or enforce the laws, or to authorities that pursue criminal violations. The specific powers listed in section 554.002(b) are outward-looking. They do not encompass internal supervisors charged with in-house compliance and who must refer suspected illegality to external entities.

Id. at ___.

Moreno only offered evidence that Juarez had authority within the university to compel compliance with state law governing tuition waivers. As the court of appeals correctly described Moreno's claim, "Moreno alleged that Saban violated a statute and produced evidence that Juarez had the authority to enforce that statute *at TAMUK*." 339 S.W.3d at 911 (emphasis added). Moreno "produced evidence that Juarez had the ability to enforce compliance with the tuition waiver provision *on his campus* and apparently did so, as Saban was required to pay the additional out-of-state tuition amount shortly after Moreno's report." *Id.* at 912 (emphasis added). Juarez stated in his deposition that, as president of the university, he was generally authorized to make sure the university followed applicable laws, rules, and regulations. Moreno cited statutory and regulatory provisions concerning in-state tuition for children of faculty members. *E.g.*, TEX EDUC. CODE § 54.211 (previously designated § 54.059). She also pointed to provisions directing the university to correct tuition charges if it erroneously classifies a student as a resident. *Id.* §§ 54.056–.057. She

attested that she met with Juarez and advised him that Saban's daughter was not entitled to in-state tuition, that Saban was thereafter required to reimburse the university for the appropriate tuition, and that Saban then fired her.[1]

This evidence does not support a good-faith belief by Moreno that Juarez had authority to "regulate under or enforce the law alleged to be violated" or to "investigate or prosecute a violation of criminal law." TEX. GOV'T CODE § 554.002(b). As we hold in *Gentilello*, the Texas Act, unlike whistleblower statutes in other jurisdictions, does not protect purely internal reports. Under our Act, a law-enforcement authority "must have authority to enforce, investigate, or prosecute violations of law against third parties outside of the entity itself, or it must have authority to promulgate regulations governing the conduct of such third parties." ___ S.W.3d at ___. A supervisor is not an appropriate law-enforcement authority where the supervisor lacks authority "to enforce the law allegedly violated . . . against third parties generally." *Id.* at ___. "Indeed, holding otherwise would transform every governmental entity that is subject to any regulation or that conducts internal investigations or imposes internal discipline into law-enforcement authorities under the Act. Such a result would collide head-on with the Act's limited definition and our cases interpreting that definition." *Id.* at ___.

Moreno only offered evidence that Juarez oversaw internal university compliance with the in-state tuition requirement. "[A] whistleblower cannot reasonably believe his supervisor is an appropriate law-enforcement authority if the supervisor's power extends no further than ensuring the

[1] Saban and TAMUK claimed that Juarez approved the termination and that Moreno was fired for reasons unrelated to the in-state tuition incident.

governmental body *itself* complies with the law." *Id.* at ___. Juarez made the decision on behalf of the university that Saban needed to reimburse the university, but "an entity capable only of disciplining its employees internally is not an 'appropriate law enforcement authority' under the Act." *Id.* at ___.[2]

Accordingly, without hearing oral argument, *see* TEX. R. APP. P. 59.1, we grant the petition for review, reverse the court of appeals' judgment, and dismiss the case.

OPINION DELIVERED: February 22, 2013

[2] Moreno contends that she also made disclosures to the Texas Higher Education Coordinating Board that were protected by the Act. Assuming the Board might sometimes qualify as an "appropriate law enforcement authority" under the Act, the Act requires that the plaintiff report "a violation of law" to the authority. TEX. GOV'T CODE § 554.002(a). Moreno's affidavit is clear that she did not report a violation of law to the Board. She attested only that she attended a conference where a representative of the Board was present, and that she made statements and posed questions about the rules governing in-state tuition for children of administrators that hold teaching positions, including a comment about the perceived practice at another campus. Her affidavit does not indicate that she stated at the conference a belief that a violation of law had occurred at TAMUK or elsewhere. Her deposition testimony confirmed that she did not report what she perceived to be the illegal tuition waiver to anyone outside of the university.

IN THE SUPREME COURT OF TEXAS

NO. 11-0473

TRACFONE WIRELESS, INC. AND VIRGIN MOBILE USA, L.P., PETITIONERS,

v.

COMMISSION ON STATE EMERGENCY COMMUNICATIONS, RESPONDENT

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

Argued October 17, 2012

JUSTICE WILLETT delivered the opinion of the Court.

Texas cellphone users help fund the State's 911 emergency networks via two distinct "e911 fee" statutes. The first, enacted in 1997, imposes on wireless subscribers a $0.50/month "emergency service fee"[1] collected on the customer's bill. The second, effective June 1, 2010, imposes on *prepaid* wireless subscribers a flat 2% fee,[2] collected by the retail seller when a consumer buys prepaid service. The 2010 law assesses the e911 fee on prepaid wireless customers; the question here is whether the pre-2010 law did so. We answer no.

[1] TEX. HEALTH & SAFETY CODE § 771.0711.

[2] Act of June 1, 2009, 81st Leg., R.S., ch. 1280, § 3.03, 2009 Tex. Gen. Laws 4032, 4045 (codified at TEX. HEALTH & SAFETY CODE § 771.0712).

In this case, the government seeks not judicial construction of a tax law[3] so much as judicial enlargement of it. We decline. Tax policy gap-filling—specifically, deciding *who* is taxed—is best left to legislators, not courts or agencies. The two e911 statutes are either ambiguous, meaning they must be construed narrowly in favor of the taxpayer, or they are unambiguous, meaning prepaid customers are impermissibly double-taxed. Either way, the original 1997 law—on the books before prepaid service was on the market—does not apply. Accordingly, we reverse the court of appeals' judgment.

I. Background

A. An Overview of Prepaid Wireless Service

TracFone Wireless, Inc. and Virgin Mobile U.S.A., L.P. (the Prepaid Providers) offer prepaid wireless telephone service. As the name suggests, prepaid service differs from traditional service by the manner in which customers are charged. The traditional "postpaid" arrangement involves a

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[3] Even though the Legislature referred to the e911 charges as "fees," both parties refer to tax laws throughout their briefing. That is, the parties themselves treat the so-called "fees" as taxes. We therefore do the same. After all, the Legislature's decision to label a charge a "fee" rather than a "tax" is not binding on this Court. *See Conlen Grain & Mercantile, Inc. v. Tex. Grain Sorghum Producers Bd.*, 519 S.W.2d 620, 623 (Tex. 1975) (statutory "assessment" is really a tax); *Hurt v. Cooper*, 110 S.W.2d 896, 899–900 (Tex. 1937) (statutory "license fee" is really a tax). A charge is a fee rather than a tax when the primary purpose of the fee is to support a regulatory regime governing those who pay the fee. *Tex. Boll Weevil Eradication Found. v. Lewellen*, 952 S.W.2d 454, 461 (Tex. 1997); *Conlen Grain & Mercantile*, 519 S.W.2d at 623–24; *H. Rouw Co. v. Tex. Citrus Comm'n*, 247 S.W.2d 231, 234 (Tex. 1952); *Hurt*, 110 S.W.2d at 899–900; *City of Fort Worth v. Gulf Refining Co.*, 83 S.W.2d 610, 617–19 (Tex. 1935). Here, no regulatory regime is created that regulates the consumers of wireless services, so the e911 fee is a tax rather than a fee.

We recognize that one unpublished, non-precedential court of appeals decision treated a similar, locally-imposed e911 fee as a fee rather than a tax. *City of Plano v. Sw. Bell Mobile Sys., Inc.*, No. 11-98-00293-CV, 2000 WL 34234855, at *1–3 (Tex. App.—Eastland Jan. 6, 2000, no pet.) (not designated for publication). However, we are unpersuaded by that case's reasoning. In particular, *City of Plano* erred when it found that the e911 fee was a fee rather than a tax because the funding of an e911 system is not primarily a revenue-raising purpose. *Id.* at *2. Funding an e911 system is a revenue-raising purpose, even though the revenue is put into a special fund for e911 services rather than the general revenue. "Because money is fungible," the determination of whether something is a fee or a tax "is not controlled by whether the assessments go into a special fund or into the State's general revenue." *Tex. Boll Weevil*, 952 S.W.2d at 461. Therefore, the e911 fee is a tax, just as the parties assume.

locked-in contract between provider and customer, with the customer billed monthly. By contrast, prepaid-wireless subscribers skip the long-term contract and instead pay up front for the handset and a defined amount of service—usually a specified dollar amount or block of minutes. Unlike traditional, monthly-billed wireless users, prepaid users receive no bills, have no obligation to remain a customer, and utilize the service purchased as quickly or as slowly as they wish (if at all). Users who exhaust their prepaid airtime can purchase more on a "pay as you go" basis, but they have no ongoing contractual obligation.

B. The Two e911 Fee Statutes for Wireless Customers

Chapter 771 of the Health and Safety Code governs the e911 fee, which has applied to wireless customers since 1997 (and landline customers for longer)[4]. The Commission on State Emergency Communications (CSEC) is charged with imposing an e911 fee on each "wireless telecommunications connection," to be collected from subscribers by the "wireless service provider."[5] "Wireless service provider" is defined as:

> a provider of commercial mobile service under Section 332(d), Federal Telecommunications Act of 1996 (47 U.S.C. Section 151 et seq.), Federal Communications Commission rules, and the Omnibus Budget Reconciliation Act of 1993 (Pub. L. No. 103-66), and includes a provider of wireless two-way communication service, radio-telephone communications related to cellular telephone service, network radio access lines or the equivalent, and personal communication service.[6]

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[4] TEX. HEALTH & SAFETY CODE § 771.071 (e911 fee for landline customers); *id.* § 771.0711 (e911 fee for wireless customers).

[5] *Id.* § 771.0711.

[6] *Id.* § 771.001(12).

The original 1997 e911 fee statute for wireless subscribers is Section 771.0711(b), which specifically mandates how the fee is to be billed, collected, and remitted:

> A wireless service provider shall collect the fee in an amount equal to 50 cents a month for each wireless telecommunications connection from its subscribers and shall pay the money collected to the comptroller not later than the 30th day after the last day of the month during which the fees were collected.

The monthly $0.50 fee is collected by the wireless providers "in the same manner it collects . . . charges for service."[7]

A dozen years later, in 2009, the Legislature, responding to technological and business innovation—namely the emergence of prepaid wireless services—amended Chapter 771 to also impose a distinct e911 fee specific to prepaid subscribers. This change, effective June 1, 2010, added Section 771.0712, which assesses a 2% upfront fee to each sale of prepaid wireless service:

> To ensure that all 9-1-1 agencies . . . are adequately funded . . . a prepaid wireless 9-1-1 emergency services fee of two percent of the purchase price of each prepaid wireless telecommunications service purchased by any method, shall be collected by the seller from the consumer at the time of each retail transaction of prepaid wireless telecommunications service occurring in this state and remitted to the comptroller consistent with Chapter 151, Tax Code, and distributed consistent with the procedures in place for the emergency services fee in Section 771.0711, Health and Safety Code.[8]

C. The Present Dispute

Between 2001 and 2005, the Prepaid Providers paid roughly $2.3 million in e911 fees under Section 771.0711, long before Section 771.0712 took effect on June 1, 2010. When the Prepaid Providers later concluded that tax-preparation errors caused them to remit millions erroneously (out

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[7] *Id.* § 771.073(a).

[8] *Id.* § 771.0712(a).

of their own pockets, not collected from customers), they stopped paying additional fees and sought refunds of the amounts already paid. (Interestingly, nothing in the record suggests the State ever sought to enforce the e911 fee against other prepaid wireless companies or that anyone besides these two providers actually remitted fees on their customers' behalf.)

The CSEC initiated a contested case against the Prepaid Providers to determine Chapter 771's applicability to prepaid services. An administrative law judge issued a proposal for decision construing Section 771.0711 as imposing the e911 fee on prepaid wireless, but noting that (1) "prepaid cellular phone services . . . were not contemplated by the legislature in the statutory scheme"; and (2) CSEC presented no evidence that, at any time during the relevant period, it had issued a rule, opinion, or policy letter stating the e911 fee applies to prepaid wireless. CSEC adopted the ALJ's proposal for decision and denied the Prepaid Providers' motion for rehearing.

Shortly thereafter, in 2009, the Legislature enacted Section 771.0712, the e911 fee statute specific to prepaid wireless service. This new statute did not amend the original $0.50/month fee enacted in 1997. Rather, it detailed a separate calculation and collection mechanism specifically tailored for prepaid wireless: 2% of the purchase price collected by the retailer at the point of sale.

Once the new e911 fee was adopted, the Prepaid Providers sought review in the trial court, which agreed with them and ordered refunds, holding that prepaid wireless was not covered by Section 771.0711. The court of appeals reversed, concluding the Prepaid Providers were obligated

to collect and remit the e911 fee in the original statute.[9] This appeal followed, posing a simple question: Does the pre-2010 statute tax prepaid service?

II. Discussion

The court of appeals held,[10] and CSEC argues, that the original e911 fee in Section 771.0711 unambiguously applied to prepaid wireless before June 1, 2010. Alternatively, the court of appeals held,[11] and CSEC argues, that even if the 1997 statute is deemed ambiguous, CSEC should still prevail.

Whether the pre-2010 statute unambiguously imposed a fee on prepaid customers is not instantly clear. On the one hand, Section 771.0711(a) seems to cover all wireless providers, including prepaid, stating broadly that "the commission shall impose on *each* wireless telecommunications connection a 9-1-1 emergency service fee."[12] Moreover, Section 771.001(13) states, "'Wireless telecommunications connection' means *any* wireless communication mobile station assigned a number containing an area code assigned to Texas . . . ."[13] On the other hand, the mandatory mechanics of the pre-2010 statute seem nearly impossible to apply coherently to prepaid service. For one thing, it requires providers to collect the fee from customers on a monthly basis,[14]

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[9] 343 S.W.3d 233.

[10] *Id.* at 235–46.

[11] *Id.* at 247–48.

[12] TEX. HEALTH & SAFETY CODE § 771.0711(a) (emphasis added).

[13] *Id.* § 771.001(13) (emphasis added).

[14] *Id.* § 771.0711(b).

even though prepaid is not sold in monthly increments, and customers use an unpredictable number of months of prepaid service. Similarly, the pre-2010 statute requires that the fee be billed "in the same manner" a service provider otherwise bills its customers,[15] even though prepaid customers are not billed on a recurring basis. These two charge-and-collection provisions are no less mandatory than the catch-all language regarding "each" wireless connection and "any" wireless station. Safe to say, there is a square-peg-round-hole mismatch between the unique characteristics of prepaid wireless and the ill-fitting billing/collection/remittance methods mandated almost 16 years ago in the original wireless e911 statute.

Section 771.0711 doubtless intended to tax all wireless service that then existed, and certainly an old statute can encompass new technologies if the statutory text is worded broadly enough, which raises the key question: What interpretive principles control our analysis of how the pre- and post-2010 fee statutes interrelate? Importantly, our result is the same whether Section 771.0711 is deemed ambiguous or unambiguous: Either way, the Prepaid Providers prevail.

A. The Prepaid Providers Prevail if Section 771.0711 Unambiguously Applies Because That Results In Double Taxation Violating the Texas Constitution's Equal and Uniform Clause.

There are two wireless e911 fees that raise revenue for CSEC, both of them mandatory. If CSEC is correct that Section 771.0711 unambiguously applies to prepaid wireless customers—as

[15] *Id.* § 771.073(a). This provision was amended in 2011 to exclude the tax imposed on prepaid wireless customers through Section 771.0712, but the amendment did not affect the tax imposed through Section 771.0711. Act of June 28, 2011, 82d Leg., 1st C.S., ch. 4, § 73.04, 2011 Tex. Gen. Laws 5254, 5348 (codified at TEX. HEALTH & SAFETY CODE § 771.073(a)).

Section 771.0712 unquestionably does—that would result in impermissible double taxation that offends the Equal and Uniform Clause.[16]

The parties both assume the law forbids double taxation, but neither side explains *why* that is so. It is true that no Texas constitutional provision explicitly discusses double taxation. But for at least 125 years, we have assumed and sometimes held that double taxation is forbidden. A careful examination of this precedent reveals that certain kinds of double taxation are indeed unconstitutional.

Admittedly, our double-taxation jurisprudence has not been a model of clarity. A case from 1868 held the Legislature could impose two $300 taxes on the exact same people (liquor retailers), payable to two different jurisdictions. We held this imposition of two $300 taxes was essentially the same as imposing one $600 tax.[17] However, in 1888, we stated in dicta that double taxation, "if permissible, will not be presumed to have been intended, in the absence of a law that will not bear any other reasonable construction," so any tax on real property assessed against a lessee should be treated as a credit against the property owner's property tax.[18] In 1901, we plainly held that double taxation "is not permitted," so a tax on tangible property could not be assessed against a company that already included the value of this property in its franchise tax assessment.[19] In 1948, we refused the writ of error in a case concluding that double taxation is "economically unsound, and we believe

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[16] TEX. CONST. art. VIII, § 1(a).

[17] *Napier v. Hodges*, 31 Tex. 287, 294–96 (Tex. 1868).

[18] *Daugherty v. Thompson*, 9 S.W. 99, 101 (Tex. 1888).

[19] *State v. Austin & N.W. R.R. Co.*, 62 S.W. 1050, 1051 (Tex. 1901).

unauthorized by law" and that "[a] construction that authorizes double taxation should not be adopted unless the language used admits of no other construction."[20]

Often, we have assumed that double taxation is unlawful but found that no double taxation occurred in the particular case. For example, in 1906 we held that assessing both a property tax and a use tax against one corporation was permitted under our double-taxation jurisprudence because the taxes were on different things, but we did not question the assumption that double taxation would be unlawful.[21] Later, we adopted the judgment of a 1921 Commission of Appeals decision that similarly assumed that double taxation was problematic and read double taxation out of a statute by finding a "clerical error" in the statute.[22] A 1932 writ-refused case also assumed that double taxation would be disallowed, but found no prohibited double taxation because two different entities with different purposes imposed the two taxes.[23] We similarly held in 1946 that there was no double taxation when two taxes were imposed by two different jurisdictions.[24] More recently, in 2005, a taxing district possibly required double appraisal of certain property for a property tax.[25] Although

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[20] *Big Lake Oil Co. v. Reagan Cnty.*, 217 S.W.2d 171, 174 (Tex. Civ. App.—El Paso 1948, writ ref'd).

[21] *State v. Galveston, H. & S. A. Ry. Co.*, 97 S.W. 71, 73, 76–77 (Tex. 1906), *rev'd on other grounds*, 210 U.S. 217 (1908).

[22] *Druesdow v. Baker*, 229 S.W. 493, 496–97 (Tex. Comm'n App. 1921, judgm't adopted), *aff'd*, 263 U.S. 137 (1923).

[23] *Kuhlmann v. Drainage Dist. No. 12 of Harris Cnty.*, 51 S.W.2d 784, 788 (Tex. Civ. App.—Galveston 1932, writ ref'd).

[24] *City of Pelly v. Harris Cnty. Water Control & Improvement Dist. No. 7*, 198 S.W.2d 450, 454 (Tex. 1946).

[25] *Matagorda Cnty. Appraisal Dist. v. Coastal Liquids Partners*, 165 S.W.3d 329, 334 (Tex. 2005). We also noted that sometimes it is impossible to prevent some overlap in taxation if the Legislature wants to ensure that every piece of property is appraised and taxed. *Id*. at 334–36.

we assumed that double taxation would be impermissible, we held that double taxation had not been proven.

Therefore, for 125 years (since 1888), we have at minimum assumed that double taxation is impermissible; double taxation has been held to be impermissible at least twice;[26] but we have never explained why double taxation is impermissible. Other states have done so, however, and we generally agree with their reasoning. In short, the problem is not so much that two taxes are assessed; the problem is that the double-tax burden is imposed on some taxpayers but not on others. This unequal imposition is what offends common constitutional requirements of uniformity. Specifically, this unevenness violates the Equal and Uniform Clause of the Texas Constitution, just as double taxation in other states has been held to violate the uniformity provisions of the Kentucky,[27] Michigan,[28] New Mexico,[29] and Oklahoma[30] constitutions. The Kentucky Court of Appeals (then the highest court of Kentucky) stated succinctly the rationale for forbidding double taxation:

> In the present Constitution there is a declaration that taxation must be uniform, but no direct prohibition against double taxation. But a prohibition against double taxation was hardly necessary, because there cannot be such a thing as double taxation where the taxation is uniform. "Double taxation" means taxing twice, for the same purpose, in the same year, some of the property in the territory in which the

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[26] *Big Lake Oil Co.*, 217 S.W.2d at 174; *Austin & N.W. R.R. Co.*, 62 S.W. at 1051.

[27] *City of Lexington v. Motel Developers, Inc.*, 465 S.W.2d 253, 256–57 (Ky. 1971); *Campbell Cnty. v. City of Newport*, 193 S.W. 1, 5–6 (Ky. 1917).

[28] *C.F. Smith Co. v. Fitzgerald*, 259 N.W. 352, 361 (Mich. 1935).

[29] *State ex. rel. Atty. Gen. v. Tittmann*, 75 P.2d 701, 703 (N.M. 1938).

[30] *Olson v. Okla. Tax Comm'n*, 180 P.2d 622, 625 (Okla.1947).

> tax is laid without taxing all of it. If all the property in the territory upon which the tax is imposed is taxed twice and for the same purpose and in the same year without discrimination or exemption, this is not double taxation in the sense that such taxation is prohibited, because, within constitutional limits, if the tax is uniform, the amount of it is in the discretion of the taxing authorities and it may all be levied at one time, or it may be the subject of several levies.[31]

This explanation of double taxation is consistent with our 1868 case that permitted a form of double taxation; there, the two $300 taxes were imposed on all liquor stores equally, so it was deemed a single $600 tax rather than double taxation in the constitutionally prohibited sense (i.e., unequal imposition).[32] We also note that the Attorney General has stated in several opinions that the double-taxation prohibition is rooted in the Equal and Uniform Clause.[33]

Turning to the two taxes here, CSEC contends that Section 771.0711 plainly assesses $0.50/month on prepaid customers (in addition to postpaid customers). But Section 771.0712 explicitly imposes a flat 2% fee on prepaid customers (but not postpaid customers). Thus, under CSEC's argument, Sections 771.0711 and 771.0712 impose two separate e911 fees on prepaid customers but not on postpaid customers, a construction that would require impermissible double taxation.

As discussed above, the double-taxation prohibition flows from our Equal and Uniform Clause. At least where non-property taxes are concerned, the Equal and Uniform Clause generally

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[31] *City of Newport*, 193 S.W. at 5; *see also Motel Developers*, 465 S.W.2d at 256–57 (reaffirming and quoting *City of Newport*).

[32] *See Napier*, 31 Tex. at 294–96.

[33] Op. Tex. Att'y Gen. No. JC-0150 (1999); Tex. Att'y Gen. Op. No. JM-930 (1988); *see also* Op. Tex. Att'y Gen. Op. No. WW-431 (1958) (double-taxation prohibition is based on article VIII, section 1 of the Constitution, of which Equal and Uniform Clause is a part); *cf.* Op. Tex. Att'y Gen. Op. No. M-241 ("[A] construction of a statute authorizing double taxation should not be adopted unless the language used admits of no other construction.").

only prohibits unequal or multiform taxes that are imposed on members of the same class of taxpayers.[34] However, the Legislature's decision to treat different classes in different ways must still be related to the purpose of the tax.[35]

CSEC has not argued that the Legislature intended prepaid and postpaid customers to be members of two separate classifications. Moreover, even if they *were* different classes of taxpayers, CSEC has not and probably cannot argue that the Legislature's imposition of significantly more tax on prepaid customers than on postpaid customers furthers the purpose of the e911 fee. The purpose of the tax seems to be to tax phone customers roughly in proportion to their use of the phones, but imposing the tax twice on prepaid customers would impose a disproportionate tax for no apparent reason. Therefore, at least in this case, we find that double taxation is impermissible.

CSEC denies the double-taxation charge, but its arguments are unpersuasive. First, CSEC argues that section 771.0712 essentially preempts and implicitly repeals Section 771.0711 as to prepaid providers because of the statutory-construction canon that a specific statutory provision prevails over a general one. But the specific-over-general canon applies only when two statutory provisions are irreconcilable.[36] For example, in *Auld* (the only case CSEC cites that applies this canon), one statute *required* the award of prejudgment interest in wrongful-death suits while another statute unambiguously *prohibited* prejudgment interest in certain healthcare liability wrongful-death

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[34] *See In re Nestle USA, Inc.*, 387 S.W.3d 610, 618–21 (Tex. 2012).

[35] *See id.* at 621–24.

[36] TEX. GOV'T CODE § 311.026 (statutory codification of canon). *See also Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 901 (Tex. 2000) (applying specific-over-general canon only to provisions of the statute that *expressly* conflict by "harmoniz[ing]" the statutory provisions as much as possible).

suits.[37] Because the literal terms of both statutes could not both be true (prejudgment interest could not be required in all cases but limited to zero in some cases), the Court applied the specific-over-general canon.[38] In today's case, unlike in *Auld*, Sections 771.0711 and 771.0712 are not irreconcilable as to prepaid customers. By their literal terms, both of the fees could apply; they would just result in illegal double taxation.

Second, CSEC argues that, while the pre-2010 statute covered prepaid wireless, only the newer statute now does, and courts owe deference to that determination. Specifically, CSEC notes that Comptroller rules have clarified that prepaid customers are now subject only to Section 771.0712's one-time 2% fee, not Section 771.0711's monthly $0.50 fee, so there is no illegal double taxation. This argument stumbles at the outset. Yes, courts sometimes defer to agencies' statutory interpretations, but only when a statute is ambiguous,[39] and here, CSEC insists the statute is *not* ambiguous. Agency deference has no place when statutes are unambiguous—the law means what it says—meaning we will not credit a contrary agency interpretation that departs from the clear meaning of the statutory language.

As double taxation is forbidden by the Equal and Uniform Clause, either Section 771.0711 or Section 771.0712 cannot apply to prepaid wireless. Section 771.0712 would be utterly meaningless if it did not apply, meaning we must construe Section 771.0711 as inapplicable.[40] And

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[37] *Auld*, 34 S.W.3d at 901.

[38] *Id.*

[39] *R.R. Comm'n of Tex. v. Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 625 (Tex. 2011).

[40] *See* TEX. GOV'T CODE § 311.021(2) ("In enacting a statute, it is presumed that . . . the entire statute is intended to be effective . . . .").

if Section 771.0711 does not apply to prepaid service today, then it never applied because it has never been repealed as to such service.

B. The Prepaid Providers Prevail if Section 771.0711 Is Ambiguous Because the Presumption Favoring Taxpayers Then Applies.

We have consistently applied an ancient pro-taxpayer presumption: The reach of an ambiguous tax statute must be construed "strictly against the taxing authority and liberally for the taxpayer."[41] In other words, a tax must apply unequivocally. This presumption arises from an old English rule that "the sovereign is bound to express its intention to tax in clear and unambiguous language."[42] We have even applied this presumption in reviewing a formal administrative adjudication that found against a taxpayer.[43]

Nonetheless, CSEC urges that this presumption is trumped by two contrary canons of statutory construction. First, CSEC argues that we should defer to CSEC's own formal administrative adjudication. However, as just mentioned, we have applied the presumption favoring taxpayers even after a formal administrative ruling found taxpayer liability.[44] Further, one reason for the presumption is that taxpayers should be given notice of their tax obligations before the State

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[41] *Morris v. Houston Indep. Sch. Dist.*, 388 S.W.3d 310, 313 (Tex. 2012) (per curiam); *see also Wilson Commc'ns, Inc. v. Calvert*, 450 S.W.2d 842, 844 (Tex. 1970); *Tex. Unemployment Comp. Comm'n v. Bass*, 151 S.W.2d 567, 570 (Tex. 1941).

[42] *Eidman v. Martinez*, 184 U.S. 578, 583 (1902).

[43] *Bullock v. Statistical Tabulating Corp.*, 549 S.W.2d 166, 169 (Tex. 1977).

[44] *Id.*

imposes them.[45] We acknowledge that deference to the regulations or interpretations of an agency charged with enforcing a tax has its place—for example when a tax unarguably applies and the court is weighing competing interpretations of the amount owed.[46] However, agency deference does not displace strict construction when the dispute is not over how much tax is due but, more fundamentally, whether the tax applies at all. The situation here involves CSEC's post hoc formal adjudication that the Prepaid Providers were subject to the pre-2010 e911 fee. Such after-the-fact decisions cannot trump the presumption in favor of taxpayers because such decisions deny taxpayers the necessary notice of what tax is due and how it must be paid *before* imposing the obligation. If we found that post hoc adjudications were enough to overcome the presumption when a statute is ambiguous, the presumption would lose all its teeth; an agency could skirt the presumption by simply obtaining a favorable agency adjudication before a lawsuit.

Moreover, even if we indulged CSEC's invitation to flip the pro-taxpayer presumption on its head by deferring to the taxing authority on the reach of an ambiguous tax, the authority's interpretation must be reasonable.[47] We are unconvinced that CSEC's interpretation of Section 771.0711 is reasonable. For one thing, it fails to explain how the Prepaid Providers and customers were supposed to comply with the statute's mandatory calculation and collection procedure. Simply saying that providers might invent various ways to comply is not enough. Tax policy is innately

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[45] *See Eidman*, 184 U.S. at 583 ("[T]he sovereign is bound to express its intention to tax in clear and unambiguous language.").

[46] *First Am. Title Ins. Co. v. Combs*, 258 S.W.3d 627, 631–32 (Tex. 2008) (applying agency deference when reviewing the amount of a tax owed).

[47] *Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d at 625.

confiscatory and carries steep noncompliance penalties, so policymakers must actually—not abstractly—instruct taxpayers how they are expected to comply. Here, the dispute is even more fundamental—not over the *amount* of a tax, but whether a tax *applies at all*. Government overreaching imperils liberty, and in Texas, citizens must have clear notice that they are subject to a tax.

CSEC's second argument against the presumption favoring taxpayers is that the Prepaid Providers are essentially claiming an exemption from the tax. When a tax exemption is claimed, there is a contrary presumption favoring the taxing entity rather than the taxpayer.[48] However, the heart of the Prepaid Providers' claim is that they are excluded from the tax in the first instance, not that they are entitled to an exemption from a tax that would otherwise cover them. The Prepaid Providers are claiming an exclusion rather than an exemption, making the presumption favoring the government inapplicable.[49]

III. Conclusion

Judicial construction of tax statutes eschews fuzzy math. Legislators must speak clearly, agencies heed assiduously, and courts review exactingly. Several cardinal, century-old principles dictate strictness in tax matters: (1) tax authorities cannot collect something that the law has not actually imposed; (2) imprecise statutes must be interpreted "most strongly against the government,

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[48] *Bullock v. Nat'l Bancshares Corp. of Tex.*, 584 S.W.2d 268, 271–72 (Tex. 1979).

[49] *Bass*, 151 S.W.2d at 570 (presumption in taxpayer's favor applies if it is "a case involving the question as to whether or not the tax is levied in the first instance" rather than whether there is a tax exemption); *see also Wilson Commc'ns*, 450 S.W.2d at 844 (presumption in taxpayer's favor applies if question is about preliminary "reach" of taxing statute).

and in favor of the citizen"[50]; and (3) we will not extend the reach of an ambiguous tax by implication, nor permit tax collectors to stretch the scope of taxation beyond its clear bounds.

As the communications marketplace inexorably evolves—landline to wireless; postpaid to prepaid—gaps in the legal landscape will need incremental filling. Payment practices evolve, meaning tax fee structures predicated on once-upon-a-time practices must evolve, too. In 2009 the Legislature enacted a new fee for a new practice. Believing that everyone with access to the 911 system should share in its cost, lawmakers enacted a prepaid-specific e911 fee (in Section 771.0712) distinct from the postpaid wireless e911 fee (in Section 771.0711) and the landline e911 fee (in Section 771.071). Because prepaid wireless is unique, the prepaid-tailored statute is unique—in how the fee is calculated, how it is collected, and how it is remitted. In short, it imposes a new fee, not merely a new way to collect the old fee. Texas law now imposes the e911 fee on all cellphone service, both prepaid and postpaid, but the pre-2010 enactment did not. The $0.50/month fee imposed since 1997 by Section 771.0711 does not reach prepaid wireless, unlike the 2% fee imposed since 2010 by Section 771.0712.

[50] *Gould v. Gould*, 245 U.S. 151, 153 (1917).

Rather than stretch Section 771.0711 beyond its textual reach, we reverse the court of appeals' judgment and render judgment that the pre-2010 statute imposed no e911 fee on the Prepaid Providers' wireless services.

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Don R. Willett
Justice

OPINION DELIVERED: April 5, 2013

IN THE SUPREME COURT OF TEXAS

NO. 11-0483

CHRISTUS HEALTH GULF COAST, ET AL., PETITIONERS,

v.

AETNA, INC. AND AETNA HEALTH, INC., RESPONDENTS

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

Argued December 5, 2012

JUSTICE WILLETT delivered the opinion of the Court.

The Texas Prompt Pay Statute entitles physicians and providers to swift payment of undisputed healthcare claims. This case asks whether the duty to pay promptly can be shifted from one company to another. Specifically, can several Houston-area hospitals seek prompt-pay penalties against a health maintenance organization (HMO) for nonpayment of medical services provided to patients under contracts the hospitals had with the HMO's delegated network, rather than with the HMO itself? The plain language of the Prompt Pay Statute forecloses such a suit: Providers must have contractual privity with the HMO directly, not merely with its delegated network. The statute's clear HMO-provider requirement is made clearer still by an amendment to the Prompt Pay Statute, which, while inapplicable here (as it postdates these contracts), gives the Commissioner of Insurance

the discretionary power to order an HMO to pay providers when its delegated network cannot, thus suggesting only regulatory intervention, not private litigation, is available.

In sum, we decline to depart from the words of the statute. The court of appeals correctly held that the providers alleged no recognized prompt-pay violation, and we affirm its judgment.

I. Facts

Christus Health Gulf Coast, Christus Health Southeast Texas, Gulf Coast Division, Inc., Memorial Hermann Hospital System, and Baptist Hospitals of Southeast Texas (collectively the Hospitals) sued Aetna, Inc. and Aetna Health, Inc. (collectively Aetna) for allegedly violating the Prompt Pay Statute.[1] The parties have previously appeared before the Court,[2] and we briefly summarize the facts.

Aetna and its predecessor provided a Medicare plan entitled "NYLCare 65" through an HMO called NYLCare.[3] It delegated the administration of its NYLCare plan, including claims processing, to North American Medical Management of Texas (NAMM), a third-party administrator.[4] IPA Management Services (Management Services), a physician-owned affiliate of NAMM, was formed to provide the actual "primary care and specialist" medical services to NYLCare enrollees. For any

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[1] Act of May 29, 1999, 76th Leg., R.S., ch. 1343, § 1, 1999 Tex. Gen. Laws 4556, 4556–57, *repealed by* Act of May 22, 2001, 77th Leg., R.S., ch. 1419, § 1, 2001 Tex. Gen. Laws 3658, 3658, 3793–95 (current version at TEX. INS. CODE § 843.336–.344) (hereinafter "Section 18B").

[2] *See Christus Health Gulf Coast v. Aetna, Inc.*, 237 S.W.3d 338 (Tex. 2007).

[3] *Id.* at 340 & n.5.

[4] *Id.* at 340.

other services that its physicians could not provide to NYLCare enrollees, Management Services contracted with other providers.

Management Services separately entered into contracts with the Hospitals to secure hospital services for the NYLCare enrollees. Aetna was not a party to these contracts, and it maintains it did not help negotiate or draft them. The Hospitals addressed the enrollees' hospital bills to "NYLCare" or "NYLCare 65" and submitted them to NAMM for payment. NAMM paid the Hospitals "hundreds of millions of dollars."

Aetna paid Management Services a capitated fee, or a fee per enrollee, for medical care provided to enrollees. Such a fee must be paid regardless of "the type, cost, or frequency of [medical] services furnished."[5] The parties dispute whether the capitated fee also included the contracted services that Management Services arranged for the enrollees on Aetna's behalf when Management Services could not provide the services itself.

NAMM and Management Services had financial difficulties and notified Aetna of their insolvency in early August 2000. Six days later, Aetna de-delegated NAMM and immediately assumed responsibility for processing and paying claims. However, Aetna instructed the Hospitals to continue submitting their bills to NAMM. Aetna refused to pay more than $13 million that the Hospitals had billed to NAMM for services incurred by NYLCare enrollees before Aetna de-delegated NAMM.

[5] 42 C.F.R. § 422.350(b) (2006).

The Hospitals argue that, pursuant to the Prompt Pay Statute, Aetna should have paid their claims not more than 45 days after they sent the NYLCare bills to NAMM.

II. Procedural History

Previously, we held that determining Aetna's responsibility for unpaid hospital bills was within the trial court's jurisdiction.[6] The Hospitals now claim that Aetna was liable under the Prompt Pay Statute for NAMM's failure to timely pay claims. At trial, the Hospitals moved for summary judgment on Aetna's alleged prompt-pay violation. Aetna filed a cross-motion for summary judgment, arguing it was not responsible for the $13 million in outstanding bills because it had already prepaid more than $53 million in capitated fees to Management Services in that year alone. The trial court granted Aetna's cross-motion for summary judgment and denied the Hospitals' motion.

The court of appeals affirmed, concluding "that the plain language of the Prompt Pay Statute requires contractual privity between the HMO and the provider . . . ."[7] That is, because the Hospitals entered into contracts with Management Services and not with Aetna directly, the Hospitals have no viable prompt-pay claim.

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[6] *Christus Health*, 237 S.W.3d at 339.

[7] 347 S.W.3d 726, 734.

III. Discussion

This is a pure statutory-construction case: What does the Prompt Pay Statute require? We review such questions de novo[8] and, as we recently explained, begin (and often end) with the Legislature's chosen language:

> [T]he truest manifestation of what lawmakers intended is what they enacted. This voted-on language is what constitutes the law, and when a statute's words are unambiguous and yield but one interpretation, "the judge's inquiry is at an end."[9]

We must take the Legislature at its word, respect its policy choices, and resist revising a statute under the guise of interpreting it.[10]

In this case, we agree with the court of appeals that the Prompt Pay Statute contemplates contractual privity between HMOs and providers. The statute provides:

> (c) Not later than the 45th day after the date that the health maintenance organization receives a clean claim from a physician or provider, the health maintenance organization shall:
>
> (1) pay the total amount of the claim in accordance with the contract between the physician or provider and the health maintenance organization;
>
> (2) pay the portion of the claim that is not in dispute and notify the physician or provider in writing why the remaining portion of the claim will not be paid; or
>
> (3) notify the physician or provider in writing why the claim will not be paid.[11]

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[8] *City of Rockwall v. Hughes*, 246 S.W.3d 621, 625 (Tex. 2008).

[9] *Combs v. Roark Amusement & Vending, L.P.*, _ S.W.3d _ (Tex. 2013) (footnotes omitted) (quoting *Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson*, 209 S.W.3d 644, 651–52 (Tex. 2006)).

[10] *See Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 443 (Tex. 2009).

[11] Section 18B(c).

Thus, an HMO is only required to pay within the 45-day deadline "the total amount of the claim *in accordance with the contract between the physician or provider and the health maintenance organization* . . . ."[12] As there were no contracts between Aetna and the Hospitals, Aetna could not have violated the statute.

The prompt-pay penalty likewise shows there must be a direct HMO-provider contract. If an HMO fails to timely pay, it is penalized with the "*contracted* penalty rate" or must pay the "full amount of billed charges."[13]

The Hospitals contend that "the capitation payments Aetna made to Management Services did not cover hospital services" under the contract between Aetna and Management Services. They also argue that Management Services was barred by the Insurance Code from assuming the risk of paying the Hospitals' bills because it would have had to be a health insurance provider to do so. We do not address whether the agreements, drafted and entered into in the 1990s by Aetna's predecessor, require Management Services to pay for hospital services provided to NYLCare enrollees out of the capitation fee paid by Aetna, or whether Aetna agreed to reimburse Management Services additionally for the hospital services. The existence of contractual liability between Aetna and Management Services is immaterial to whether Aetna has statutory liability under the Prompt Pay Statute. Regardless of the terms of Aetna's contract with Management Services, and regardless of whether Management Services could assume the financial risk of paying for hospital services under the Insurance Code, a violation of the Prompt Pay Statute presumes a direct HMO-provider contract

[12] Section 18B(c)(1) (emphasis added).

[13] Section 18B(f) (emphasis added).

between Aetna and the Hospitals. Any alleged violation of the Insurance Code or breach of the contract between Aetna and Management Services is a separate legal dispute, and not one governed by the Prompt Pay Statute.

The Hospitals argue that the unambiguous language requiring contractual privity is trumped by the overall structure of the statute. They stress that, under the Delegated Network provisions,[14] Aetna remains responsible for the provision of hospital services. Specifically, the Insurance Code required the delegation agreement between Aetna and Management Services to include:

> a provision that the delegation agreement may not be construed to limit in any way the health maintenance organization's authority or responsibility, including financial responsibility, to comply with all statutory and regulatory requirements . . . .[15]

The key inquiry is simply stated: What duties did Aetna have under the Insurance Code? An agreement between Aetna and Management Services that requires Aetna to abide by "all statutory and regulatory requirements" cannot enlarge Aetna's duties under the Prompt Pay Statute. The Delegated Network provisions detail the arrangement between Aetna and NAMM or Management Services; they do not broaden (or shrink) Aetna's prompt-pay exposure.[16] And the Prompt Pay provisions presume HMO-provider privity. The Legislature's words, and thus the result, are straightforward: Aetna must have directly contracted with the Hospitals to fall under the Prompt Pay Statute.

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[14] *See* Act of May 18, 1999, 76th Leg., R.S., ch. 621, § 2, 1999 Tex. Gen. Laws 3163, 3164–68, *repealed by* Act of May 22, 2003, 78th Leg., R.S., ch. 1274, § 26(a)(1), 2003 Tex. Gen. Laws 3611, 4138 (hereinafter "Section 18C").

[15] Section 18C(a)(4).

[16] *See* Section 18C.

The Hospitals argue that because Aetna was responsible for and continued to monitor NAMM and Management Services—even deciding to conduct an on-site audit of NAMM to ensure it was running smoothly—Aetna was therefore ultimately responsible for paying hospital bills pursuant to the contracts between Management Services and the Hospitals. Aetna counters by explaining that their monitoring and auditing activity was normal for any principal monitoring an independent-contractor relationship, and that the activity in no way belied a legal responsibility for payment. We agree that monitoring is no justification for eschewing the statute's explicit requirement for HMO-provider privity.

The Hospitals also note that Aetna, while disavowing prompt-pay responsibility due to a lack of contractual privity, continued paying certain providers following NAMM and Management Services' insolvency. Aetna explained these payments resulted merely from a need to ensure "continuity of care" for its members. Regardless of why Aetna continued to pay claims, whether incautiously or intentionally, doing so does not implicate, much less alter, the terms of the Prompt Pay Statue.

Finally, a 2001 amendment to the Prompt Pay Statute,[17] though inapplicable here,[18] is instructive, and underscores Aetna's nonliability for its delegated network's failure to pay the Hospitals. Specifically, the Legislature in 2001 gave the Insurance Commissioner the discretionary

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[17] Act of May 17, 2001, 77th Leg., R.S., ch. 550, § 4, sec. 18C(g)(1)(1), 2001 Tex. Gen. Laws 1041, 1047, *repealed by* Act of May 22, 2003, 78th Leg., R.S., ch. 1274, § 26(a)(1), 2003 Tex. Gen. Laws 3611, 4138 (current version at TEX. INS. CODE § 1272.208(b)(1)) (hereinafter "2001 Amendment").

[18] The amendment applies only to health insurance contracts "entered into or renewed on or after January 1, 2002." Act of May 17, 2001, 77th Leg., R.S., ch. 550, § 7, 2001 Tex. Gen. Laws 1041, 1050.

authority to compel an HMO to "reassum[e] the functions delegated to the delegated entity, including claims payments for services previously rendered to enrollees of the health maintenance organization . . . ."[19] Tellingly, the 2001 change provides *administrative* relief in situations like this, but it nowhere grants providers a *private* action against HMOs.[20] It authorizes administrative intervention but not private litigation. As the Legislature is presumed to know its previous enactments, we read statutes not in a vacuum but contextually, and the implication of this 2001 amendment is significant: There would be no need for the Legislature to impose such a duty on HMOs (notably, one triggered solely by discretionary administrative action) if the pre-2001 statute already imposed that duty (actionable by private lawsuit).

IV. Conclusion

The Prompt Payment Statute by its terms decides this case, and it requires HMO-provider contractual privity before the 45-day payment deadline applies. At bottom, this case is not about HMOs not paying providers, but about providers not paying providers—here a physician-owned entity not paying hospitals. The Prompt Pay Statute requires HMOs to honor their own contracts with providers, but here, there are no such contracts. These sophisticated providers opted for a different contractual model, and the resulting lack of privity between the Hospitals and Aetna precludes the Hospitals' suit.

The modern healthcare-insurance and -reimbursement system (like the healthcare-delivery system generally) is dizzyingly complex—the product of innumerable legislative judgments about

[19] 2001 Amendment.

[20] *See id.*

access, cost, and quality that courts are ill-suited to second-guess. Through the risk-shifting mechanism of capitation, a delegated-network system of managed care gives entrepreneurial providers greater control over their practices, including medical decisionmaking, and greater bargaining leverage with HMOs, but as seen here, it also introduces a host of risks attendant to patient care. Such risk-shifting, including the specter of insolvency, is inherent in the nature of delegation agreements.

Barring a constitutional violation, though, it is the Legislature's prerogative to allocate risk among medical service providers, HMOs, and delegated networks. In 2001, the Legislature rebalanced the equities in situations like this, giving the Insurance Commissioner the discretionary power to direct an HMO to reassume the claims-payment function of a delegated entity. While the Legislature enhanced the Insurance Commissioner's regulatory role over HMOs when their delegated networks don't fulfill their contractual obligations, the Legislature stopped short of giving private medical providers a cause of action against HMOs for their delegated networks' misjudgments or miscalculations. In short, there is recourse today against HMOs whose delegated networks misstep, but it belongs to the Insurance Commissioner, not to providers. We decline to impose judicially a legal or financial obligation that was not imposed legislatively.

We affirm the court of appeals' judgment.

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Don R. Willett
Justice

OPINION DELIVERED: April 19, 2013

IN THE SUPREME COURT OF TEXAS

NO. 11-0494

HOMER MERRIMAN, PETITIONER,

v.

XTO ENERGY, INC., RESPONDENT

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

Argued February 5, 2013

JUSTICE JOHNSON delivered the opinion of the Court.

This case involves the question of whether a mineral lessee failed to accommodate an existing use of the surface when the lessee drilled a gas well. Claiming that the lessee did not accommodate his existing cattle operation, the surface owner sought an injunction requiring the well to be moved. The trial court granted summary judgment for the mineral lessee and the court of appeals affirmed. We affirm the judgment of the court of appeals.

I. Background

Homer Merriman, a pharmacist by occupation, owns the surface estate of an approximately 40-acre tract (the tract) in Limestone County. His home and a barn are on the tract, and he has installed permanent fencing and corrals which he uses in a cattle operation. Merriman leases several

other tracts of land that he also uses in his cattle operation. Once a year he brings his cattle to the 40-acre tract in a "roundup" to sort and work them. The sorting and working activities involve using temporary corrals and catch-pens in conjunction with the permanent fencing and structures.

XTO Energy, Inc., the lessee of the tract's severed mineral estate, contacted Merriman in September 2007 about locating a gas well on the tract. Merriman claimed that the proposed location would interfere with his cattle operation, so he opposed it. Despite Merriman's opposition, XTO proceeded to construct a well site and drill the well. When XTO began construction of the well site Merriman filed suit seeking temporary and permanent injunctions enjoining it from drilling the well. After the well was drilled he amended his pleadings and sought a permanent injunction requiring XTO to remove it. Merriman's claim for injunctive relief was based on his assertion that XTO failed to accommodate his existing use of the surface for the annual sorting and working part of his cattle operation so XTO's acts exceeded its rights in the mineral estate and constituted a trespass.

Both parties filed motions for summary judgment, but because of our disposition of the appeal we need address only one of the grounds in XTO's combined traditional and no-evidence motion.[1] Among other grounds, XTO asserted that Merriman could not produce evidence XTO failed to accommodate Merriman's use of the surface, thus there was no evidence of the "wrongful act" Merriman alleged would support injunctive relief.

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[1] In XTO's motion, it claimed that injunctive relief was not appropriate, Merriman could not carry his burden of proof for breach of the accommodation doctrine, the express language of the mineral reservation in the warranty deed negated the implication of the accommodation doctrine, and there is no cause of action for exclusion of a lessee from the leased premises. It also asserted there was no admissible, probative evidence to establish any element of Merriman's cause of action for breach of contract or injunctive relief.

In Merriman's No-Evidence Motion for Summary Judgment, he argued that XTO did not produce any evidence to support its affirmative defenses of waiver, estoppel, laches, and failure to mitigate damages.

The trial court granted summary judgment for XTO without stating its reasons. The court of appeals affirmed. In concluding there was no evidence that XTO failed to accommodate Merriman's existing use, the appeals court focused on whether Merriman produced evidence that he did not have any reasonable alternative agricultural uses for the 40-acre tract, and also whether he produced evidence that relocating his sorting and working operations to the leased land was not a reasonable alternative. ___ S.W.3d ___, ___.

In arguing that the court of appeals erred, Merriman asserts that he is not required to show he cannot make any alternative agricultural uses whatsoever for the tract as required by the court of appeals. Rather, he argues, he is required to show only that he does not have reasonable alternatives for conducting his cattle operations. He maintains that he did so with competent, non-conclusory evidence. He further argues that the court of appeals erred by considering the availability of additional land he leased in determining whether he has reasonable alternatives for continuing his existing use of the single tract that he owns.[2]

II. Law

A. Summary Judgment

We review the granting of a motion for summary judgment de novo. *Buck v. Palmer*, 381 S.W.3d 525, 527 (Tex. 2012). When the trial court does not specify the grounds for its ruling, a summary judgment must be affirmed if any of the grounds on which judgment is sought are meritorious. *State v. Ninety Thousand Two Hundred Thirty-Five Dollars & No Cents in U.S.*

[2] We received amicus curiae briefs from Texas Farm Bureau and Texas Oil and Gas Association.

Currency, 390 S.W.3d 289, 292 (Tex. 2013). When both parties move for summary judgment and the trial court grants one motion and denies the other, we review all the summary judgment evidence, determine all issues presented, and render the judgment the trial court should have. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009).

Merriman contends that we should treat XTO's motion as only a traditional one because XTO did not sufficiently segregate the grounds for the different types of motions. But XTO labeled its motion as a combined traditional and no-evidence motion, and as long as a motion clearly sets forth its grounds and otherwise meets the requirements of a no-evidence summary judgment motion, as XTO's did, it is sufficient as one. *Binur v. Jacobo*, 135 S.W.3d 646, 651 (Tex. 2004); *see* TEX. R. CIV. P. 166a(i). When a party moves for summary judgment on both traditional and no-evidence grounds as XTO did here, we first address the no-evidence grounds. *See Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004). That is because if the non-movant fails to produce legally sufficient evidence to meet his burden as to the no-evidence motion, there is no need to analyze whether the movant satisfied its burden under the traditional motion. *Id.* No-evidence summary judgments are reviewed under the same legal sufficiency standard as directed verdicts. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 750 (Tex. 2003). Under that standard, evidence is considered in the light most favorable to the nonmovant, crediting evidence a reasonable jury could credit and disregarding contrary evidence and inferences unless a reasonable jury could not. *See Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 756 (Tex. 2007); *City of Keller v. Wilson*, 168 S.W.3d 802, 823 (Tex. 2005). The nonmovant has the burden to produce summary judgment evidence raising a genuine issue of material fact as to each challenged element of its cause of action.

TEX. R. CIV. P. 166a(i); *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 206 (Tex. 2002). A no evidence challenge will be sustained when

> "(a) there is a complete absence of evidence of a vital fact, (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (c) the evidence offered to prove a vital fact is no more than a mere scintilla, or (d) the evidence conclusively establishes the opposite of the vital fact."

King Ranch, 118 S.W.3d at 751 (quoting *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997)).

B. The Accommodation Doctrine

A party possessing the dominant mineral estate has the right to go onto the surface of the land to extract the minerals, as well as those incidental rights reasonably necessary for the extraction. *Tarrant Cnty. Water Control & Improvement Dist. No. One v. Haupt, Inc.*, 854 S.W.2d 909, 911 (Tex. 1993); *Getty Oil Co. v. Jones*, 470 S.W.2d 618, 621 (Tex. 1971). The incidental rights include the right to use as much of the surface as is reasonably necessary to extract and produce the minerals. If the mineral owner or lessee has only one method for developing and producing the minerals, that method may be used regardless of whether it precludes or substantially impairs an existing use of the servient surface estate. *Haupt*, 854 S.W.2d at 911; *Getty Oil*, 470 S.W.2d at 622. On the other hand,

> [i]f the mineral owner has reasonable alternative uses of the surface, one of which permits the surface owner to continue to use the surface in the manner intended . . . and one of which would preclude that use by the surface owner, the mineral owner *must* use the alternative that allows continued use of the surface by the surface owner.

Haupt, 854 S.W.2d at 911-12.

To obtain relief on a claim that the mineral lessee has failed to accommodate an existing use of the surface, the surface owner has the burden to prove that (1) the lessee's use completely precludes or substantially impairs the existing use, and (2) there is no reasonable alternative method available to the surface owner by which the existing use can be continued. *See Getty Oil*, 470 S.W.2d at 628 (op. on reh'g); *see also Humble Oil & Refining Co. v. Williams*, 420 S.W.2d 133, 135 (Tex. 1967); *Davis v. Devon Energy Prod. Co., L.P.*, 136 S.W.3d 419, 424 (Tex. App.—Amarillo 2004, no pet.). If the surface owner carries that burden, he must further prove that given the particular circumstances, there are alternative reasonable, customary, and industry-accepted methods available to the lessee which will allow recovery of the minerals and also allow the surface owner to continue the existing use. *Haupt*, 854 S.W.2d at 911-12.

In this case the court of appeals' decision turned on its conclusion that Merriman failed to produce competent evidence that he had no reasonable alternative method by which to continue his cattle operation. As to that element of the accommodation doctrine, a surface owner's burden to prove that his existing use cannot be maintained by some reasonable alternative method is not met by evidence that the alternative method is merely more inconvenient or less economically beneficial than the existing method. *See Getty Oil*, 470 S.W.2d at 628 (op. on reh'g) ("We have not held, as some have stated, that the issue is a question of inconvenience to the surface owner."); *Williams*, 420 S.W.2d at 135 ("[The surface owner's] testimony that the road [the mineral lessee built] interfered with his grazing operations and was a nuisance to him is not evidence that the road was not reasonably necessary."). Rather, the surface owner has the burden to prove that the inconvenience

or financial burden of continuing the existing use by the alternative method is so great as to make the alternative method unreasonable. *Getty Oil*, 470 S.W.2d at 628 (op. on reh'g).

III. Discussion

In determining whether the trial court properly granted summary judgment, the court of appeals primarily focused on two considerations. One was whether Merriman could make *any* alternative use of the surface for general agricultural purposes that was not impracticable or unreasonable. ___ S.W.3d at ___. Specifically, the court of appeals said that under the accommodation doctrine "[t]he surface owner must show that any alternative uses of the surface, other than the existing use, are impractical and unreasonable under all of the circumstances." *Id.* at ___. The court held that "[t]here was no violation of the accommodation doctrine because Merriman had reasonable means of developing his land for agricultural purposes." *Id.* at ___. The other was the availability to Merriman of several tracts of land he leased when determining whether he presented evidence that he did not have reasonable, alternative methods of conducting his cattle operation. *Id.* We agree with the court of appeals' conclusion that XTO was entitled to summary judgment, although as we explain, we do not completely agree with its analysis.

We first address whether part of Merriman's burden was to present evidence that he could not alternatively conduct his cattle operation on tracts that he held by short term leases. We conclude that it was not.

The accommodation doctrine focuses on balancing the respective rights of the parties. *Haupt*, 854 S.W.2d at 911. Requiring a surface owner to show that it could not alternatively conduct its existing use on land held by short term leases would too greatly alter the balance between those

who possess and have established a use of the surface estate and those who possess the mineral estate. Such a requirement would reduce the mineral owner's obligation to accommodate existing uses of the surface because of the fortuity that the surface owner had separate holdings, even though the holdings might soon be lost by the leases lapsing or being terminated. Under those circumstances the mineral owner could obtain long-term benefit from use of the surface while forcing the surface owner to relocate an existing use to a place where the use might be conducted for only a short term. Accordingly, the court of appeals improperly considered the land leased by Merriman in determining whether he produced evidence that he had no reasonable alternatives to continue his cattle operation.

We next consider whether Merriman was required to produce evidence that he had no reasonable alternatives for *any* type of agricultural use on the tract he owned, or whether he was required to produce only evidence that he had no such alternatives for his cattle operation. In doing so, it is clear that no bright lines can be drawn by which to categorize "existing uses" of surface estates. The issue is one of fairness to both parties in light of the particular existing use by the surface owner and the principle underlying the accommodation doctrine: balancing the rights of surface and mineral owners to use their respective estates while recognizing and respecting the dominant nature of the mineral estate. *See Haupt*, 854 S.W.2d at 911 ("The accommodation doctrine, also known as the 'alternative means' doctrine, was first articulated in *Getty* as a means to balance the rights of the surface owner and the mineral owner in the use of the surface . . . ."); *Getty Oil*, 470 S.W.2d at 627-28 (op. on reh'g) ("[I]n determining the issue of whether a particular manner of use of the dominant mineral estate is reasonable or unreasonable, we cannot ignore the condition

of the surface itself and the uses then being made by the servient surface owner."). Here, Merriman's use can, with fairness to both parties, be classified more narrowly than the broad "agricultural" category applied by the court of appeals. His use of the land was for a cattle operation and its essential parts. That use is what must be considered in balancing his rights with those of XTO. *See Getty Oil*, 470 S.W.2d at 627-28 (op. on reh'g). Therefore, we consider only whether Merriman produced legally sufficient evidence that he did not have any reasonable alternatives for conducting his cattle operations on the tract, not whether he produced evidence that he had no reasonable alternatives for general agricultural uses.

To begin with, there is some evidence that the roundup, sorting, working, and loading of the cattle were essential parts of Merriman's cattle operations. Thus, we look to see whether he met his burden to produce evidence that he did not have any reasonable alternatives for continuing his cattle operation, including those essential aspects, on the tract.

In arguing that he met his burden, Merriman references parts of the record he says show that the well's location interferes with the placement of his temporary corrals, interferes with the flow of his working stock pens, and makes his cattle sorting operation practically impossible to accomplish using the existing corrals and pens. In his affidavit he explained that

> XTO's activities on my property . . . prevent me from conducting my cattle operation. . . . The corral that is located close to the barn is now useless due to the fact the corral cannot be expanded to its full size and usefulness. Right now I can not use the pens because the fence around the well site blocks access to the pens. The wellhead, and other production equipment are located in the area where loading takes place prior to the livestock being moved . . . . I have attempted to devise a way to re-configure my corrals and catch-pens so as to conduct my cattle operation on my property with the well present. My efforts were unsuccessful.

Merriman asserts that the foregoing parts of his affidavit contain facts supporting his conclusion that his cattle operation has been precluded, and that the court of appeals was wrong when it said that "Merriman's affidavit and deposition testimony offer conclusory statements on the well site's effect on his cattle operation." ___ S.W.3d at ___. But, even if Merriman's statements contain sufficient factual underpinnings so they are not entirely conclusory, they do not provide facts or evidence showing that there was no reasonable alternative method for him to conduct the sorting, working, and loading activities somewhere else on the tract. He did not explain why corrals and pens could not be constructed and used somewhere else on the tract; and if they reasonably could be, then his existing use was not precluded.

Moreover, when he was asked at his deposition why he could not reconfigure the existing pens where he worked the cattle he stated that the pens were not portable. He responded that it was "easier" to add temporary pens to the area where he has permanent fencing and non-portable pens and that "[t]his arrangement that I have on this location has been -- through a number of years I have improved it, I have worked on it, and this plan as I have now works the best for me." In his pleadings and in a letter from his attorney to XTO he claimed that the space taken up by XTO's well interferes with the sorting operation because it causes a "need for more phases to occur, increasing the transportation costs and time spent, and causing other inefficiencies that will result in lost profits." In his deposition testimony he agreed that this statement was correct. He also testified that he owned a portable squeeze chute which could be used to work the cattle instead of using the pens and that the cost of constructing corrals and working pens on his leased land would be approximately

$5,000. Yet he did not discuss whether he could construct corrals and pens in another location on the tract, or if he could, what it would cost.

Merriman's affidavit and deposition testimony, even assuming they were not entirely conclusory, are evidence only that XTO's well precludes or substantially impairs the use of his existing corrals and pens, creates an inconvenience to him, and will result in some amount of additional expense and reduced profitability because to continue his cattle operation he will have to build new corrals or conduct his operations in more phases. Evidence that the mineral lessee's operations result in inconvenience and some unquantified amount of additional expense to the surface owner does not rise to the level of evidence that the surface owner has no reasonable alternative method to maintain the existing use. *See Getty Oil*, 470 S.W.2d at 623; *Williams*, 420 S.W.2d at 135. Thus, Merriman did not produce evidence sufficient to raise a material fact issue as to part of the initial element on which he had the burden of proof: that he had no reasonable alternative means of maintaining his cattle operations on the 40-acre tract. *See Wal-Mart Stores, Inc. v. Merrell*, 313 S.W.3d 837, 839-40 (Tex. 2010); *King Ranch*, 118 S.W.3d at 755.

IV. Conclusion

Merriman relied on his claim that XTO failed to accommodate his existing use to establish that XTO was committing a continuing wrongful act entitling him to permanent injunctive relief. Even assuming that the failure of XTO's operations to accommodate Merriman's existing use would have been sufficient to support injunctive relief, a contention XTO disputes and one we do not address, Merriman failed to raise a material fact issue as to whether XTO failed to accommodate his

use. Accordingly, the court of appeals did not err by affirming the trial court's summary judgment and we affirm the judgment of the court of appeals.

Phil Johnson
Justice

OPINION DELIVERED: June 21, 2013

IN THE SUPREME COURT OF TEXAS

NO. 11-0517

CERTIFIED EMS, INC. D/B/A CPNS STAFFING, PETITIONER,

v.

CHERIE POTTS, RESPONDENT

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

Argued October 17, 2012

CHIEF JUSTICE JEFFERSON delivered the opinion of the Court.

A patient alleged that a hospital nurse, who was temporarily placed with the hospital by a staffing service, assaulted her. The patient sued under the Texas Medical Liability Act, asserting that the staffing service was directly and vicariously liable for the nurse's conduct. The staffing service sought dismissal because the patient's expert reports did not specify how the service was directly negligent. The service has not challenged, in this Court, the reports' adequacy concerning its vicarious liability.

The trial court denied the motion to dismiss, and the court of appeals affirmed. It held that because the reports support a theory of vicarious liability against the staffing service, the lack of a description supporting direct liability is not fatal to the claimant's maintaining her cause of action. We agree with the court of appeals, but for different reasons. Accordingly, we affirm the court of appeals' judgment.

I. Background

Cherie Potts was admitted to Christus St. Catherine's Hospital for treatment of a kidney infection. One of the nurses assigned to her care, Les Hardin, was referred to the hospital by a staffing service owned by Certified EMS. Potts claims that Hardin assaulted her sexually and verbally during her hospital stay. Potts alleges that the assaults caused her anxiety and physical pain. She sued the hospital, Hardin, and Certified EMS.[1]

Potts claimed that Certified EMS was directly liable for Hardin's conduct because it failed to properly train and oversee its staff, enforce applicable standards of care, and employ protocols to ensure quality patient care and adequate staff supervision. Potts also alleged that Certified EMS was vicariously liable under the theory of *respondeat superior*.

Because Potts sued under the Texas Medical Liability Act, she was required to serve each defendant with an expert report that met certain statutory requirements. *See* TEX. CIV. PRAC. & REM. CODE § 74.351 (outlining requirements and guidelines for expert reports in health care liability claims). Potts timely served reports from Nurse S. Francis Scholl Foster and Dr. Kit Harrison, Ph.D. Certified EMS challenged the reports, and the trial court gave Potts thirty days to cure the alleged deficiencies. *See id*. § 74.351(c). In response, Potts supplemented Nurse Foster's original report and provided a new one from Dr. Milton Altschuler, M.D.

The relevant portions of Nurse Foster's supplemented report outline the appropriate standard of care for nurses and nursing agencies, describe the steps that should have been taken by Hardin and

[1] Christus St. Catherine's Hospital and Les Hardin are not parties to this interlocutory appeal.

Certified EMS to prevent the assaults, and conclude that Hardin's and Certified EMS's failures caused Potts's injuries. Dr. Altschuler's report states that Hardin engaged in sexually inappropriate and intrusive conduct, causing the injuries that Potts has alleged.

Certified EMS objected to the newly submitted reports and moved to dismiss on numerous grounds, among them that the reports omitted any explicit reference to Certified EMS's direct liability for Hardin's conduct.

The trial court denied the motion, and Certified EMS appealed. *See* TEX. CIV. PRAC. & REM. CODE § 51.014 (a)(9) (allowing interlocutory appeal of an order denying relief sought by motion under section 74.351(b) in certain circumstances). The court of appeals affirmed, holding (as relevant here) that "if the claimant timely serves an expert report that adequately addresses at least one liability theory against a defendant health care provider, the suit can proceed, including discovery, without the need for every liability theory to be addressed in the report." 355 S.W.3d 683, 693.[2] We granted Certified EMS's petition for review, which raises a single issue: Must a claimant in a health care liability suit provide an expert report for each pleaded liability theory? 55 Tex. Sup. Ct. J. 461 (Mar. 30, 2012).

II. Conflict Among the Courts of Appeals

Numerous appellate decisions have discussed the extent to which an expert report must examine every liability theory alleged. The cases reach varied results. Several courts of appeals, like the court of appeals in this case, have determined that a claimant's expert report(s) need address only

[2] The court of appeals also determined that the expert reports that Potts provided to Certified EMS sufficiently addressed her vicarious liability theory, but failed to address her direct liability theories. 355 S.W.3d at 686. Neither party has challenged those conclusions.

a single theory for the entire suit to proceed.[3] Some of those decisions rely on *Potts*, either indirectly or explicitly.[4] The *Potts* court focused on the Act's plain language, specifically on the requirement that an expert report be served "[i]n a health care liability claim," which the statute further defines as a "cause of action." *See* 355 S.W.3d at 690–92; *see also* TEX. CIV. PRAC. & REM. CODE § 74.001(a)(13) ("'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."). Relying on our discussion of "cause of action" in *In re Jorden*, 249 S.W.3d 416 (Tex. 2008), the *Potts* court reasoned that the Act requires an expert report only for each set of operative facts that give rise to one or more bases for suing. 355 S.W.3d at 691. Thus, if an expert report adequately addresses a single liability theory within a cause of action, the entire case may proceed. *Id*.

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[3] *See Laurel Ridge Treatment Ctr. v. Garcia*, No. 04-12-00098-CV, 2012 WL 3731748, at *1 (Tex. App.—San Antonio Aug. 29, 2012, pet. filed) (mem. op.) (holding that the trial court did not abuse its discretion when it denied defendant's motion to dismiss because an "expert report is required to be adequate with regard to only one liability theory within a cause of action in order for the claimant to proceed with the entire cause of action against the defendant"); *Nexion Health at Duncanville, Inc. v. Ross*, 374 S.W.3d 619, 626 (Tex. App.—Dallas 2012, pet. denied) (holding that an expert report need "not address each 'specific act of negligence' pleaded by a plaintiff . . . [to] satisfy the two intended purposes of the expert report requirement"); *Univ. of Tex. Med. Branch at Galveston v. Qi*, 370 S.W.3d 406, 415–16 (Tex. App.—Houston [14th Dist.] 2012, no pet.)(referencing the *Potts* court's reasoning when it held that an expert report need not address "every act or omission mentioned in the pleadings, so long as at least one liability theory within each cause of action is sufficiently addressed"); *Clear Lake Rehab. Hosp., L.L.C. v. Karber*, No. 01-09-00883-CV, 2010 WL 987758, at * 5 n.7 (Tex. App.—Houston [1st Dist.] Mar. 18, 2010, no pet.) (mem. op.) (suggesting that a report that is adequate as to one theory of liability can move an entire cause of action past the expert report stage).

[4] *See, e.g.*, *Laurel Ridge Treatment Ctr.*, 2012 WL 3731748, at *1; *Nexion Health*, 374 S.W.3d at 626–27.

Other courts insist that an expert report must specifically address each liability theory.[5] Unsupported theories must be dismissed. Those courts also look to the statute's language. Some interpret "health care liability claim" to mean a single theory of liability.[6] Thus, when the statute requires that a "liability claim" be supported by an expert report, these courts reason that the report must address each liability theory. Other courts of appeals interpret "health care liability claim" to mean a cause of action, or set of operative facts, like the *Potts* court did. But unlike the *Potts* court, they reason that different theories of liability must be based on different sets of operative facts and each, therefore, requires its own expert report. In that respect, several cases have held that direct and vicarious liability theories involve different sets of operative facts because "the facts required to establish the defendant's vicarious liability, i.e., the acts of [the agent and his relationship] to [the principal], differ from the facts required to establish the . . . defendant's direct liability, i.e., [its]

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[5] *See MSHC the Waterton at Cowhorn Creek, LLC v. Miller,* No. 06-12-00056-CV, 2012 WL 6218001, at *7 (Tex. App.—Texarkana Dec. 14, 2012, no pet.) (holding that the claimant's expert reports must address vicarious and direct liability claims separately because the theories were based on two different sets of operative facts, which were "qualitatively different from the facts necessary to establish [the employer's] vicarious liability for the acts or omissions of its staff"); *Fung v. Fischer*, 365 S.W.3d 507 (Tex. App.—Austin 2012, no pet.) (finding that because the claimant's theories of liability were both vicarious and direct and thus based on different sets of operative facts, the expert report that only addressed the employee's conduct was not sufficient to impose direct liability on the employer); *Hendrick Med. Ctr. v. Miller*, No. 11-11-00141-CV, 2012 WL 314062, at *3 (Tex. App.—Eastland Jan. 26, 2012, no pet.) (mem. op.) (holding that direct and vicarious liability claims must be evaluated separately to determine whether each claim was sufficiently supported by an expert report); *River Oaks Endoscopy Ctrs., L.L.P. v. Serrano*, No. 09-10-00201-CV, 2011 WL 303795, at *2 (Tex. App.—Beaumont Jan. 27, 2011, no pet.) (mem. op.) (holding that a claimant alleging theories of direct and vicarious liability must provide an expert report that addresses all theories so that the defendant can be made aware of the specific conduct being called into question); *Beaumont Bone & Joint, P.A. v. Slaughter*, No. 09-09-00316-CV, 2010 WL 730152, at *3–4 (Tex. App.—Beaumont Mar. 4, 2010, pet. denied) (mem. op.) (holding that although vicarious liability claims were sufficiently addressed in an expert report, direct liability claims were not, and should have been dismissed); *Azle Manor, Inc. v. Vaden*, No. 2-08-115-CV, 2008 WL 4831408, at *10 (Tex. App.—Fort Worth Nov. 6, 2008, no pet.) (mem. op.) (holding that although vicarious liability claims against two doctors were sufficiently addressed in two expert reports, the direct liability claims were not, and thus the trial court abused its discretion when it denied the defendant doctors' motion to dismiss the direct liability claims).

[6] *See, e.g.*, *Hendrick Med. Ctr.*, 2012 WL 314062, at *3.

provision of particular policies and procedures." *Fung v. Fischer*, 365 S.W.3d 507, 522 (Tex. App.—Austin 2012, no pet.); *see also MSHC the Waterton at Cowhorn Creek, LLC v. Miller*, No. 06-12-00056-CV, 2012 WL 6218001, at *7 (Tex. App.—Texarkana Dec. 14, 2012, no pet.) ("The facts required to establish direct liability here are qualitatively different from the facts necessary to establish . . . vicarious liability . . . . ").

Still other courts have addressed questions that vary slightly from the one before us today. These courts have engaged in analyses that demonstrate the need to definitively resolve the question of how expert reports treat multiple theories of liability.[7]

These conflicts give us jurisdiction over this interlocutory appeal. TEX. GOV'T CODE § 22.225(c).[8]

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[7] *See Marino v. Wilkins*, No. 01-11-00835-CV, 2012 WL 749997, at *8–10 (Tex. App.—Houston [1st Dist.] Mar. 8, 2012, pet. denied) (holding, under the *Potts* reasoning, that a health care liability suit may proceed under one liability theory if the defendant does not move to dismiss all theories of liability in his challenge to the expert reports); *Petty v. Churner*, 310 S.W.3d 131, 138 (Tex. App.—Dallas 2010, no pet.) (concluding that the trial court properly dismissed direct liability claims because the vicarious and direct liability theories were based on two different standards of care, and an expert report that only addressed the vicarious theory did not meet the statutory requirements); *Obstetrical and Gynecological Assocs., P.A. v. McCoy*, 283 S.W.3d 96, 105–06 (Tex. App.—Houston [14th Dist.] 2009, pet. denied) (deciding that a claimant need not provide an expert report addressing an employer's conduct if the claimant only seeks to hold the employer liable under a vicarious liability theory, noting that there is a distinction between allegations of liability made against the employer based on the conduct of employees versus allegations of direct liability based on the conduct of the employer entity itself); *Methodist Charlton Med. Ctr. v. Steele*, 274 S.W.3d 47, 50–51 (Tex. App.—Dallas 2008, pet. denied) (holding that because the claimant failed to timely serve expert reports related to the direct liability claims against defendants that were added in an amended petition, those particular claims should have been dismissed; but, the vicarious liability claims, based on the conduct of a nurse employee, were addressed in a timely report and could move forward).

[8] *See also* TEX. GOV'T CODE § 22.225(e) (noting that "one court holds differently from another when there is inconsistency in their respective decisions that should be clarified to remove unnecessary uncertainty in the law and unfairness to litigants").

III. Addressing Theories of Liability

Certified EMS contends that if a claimant's report does not adequately address each asserted theory, the trial court must dismiss those theories that are unsupported by a report. Thus, if a plaintiff's allegations include both direct and vicarious liability claims, the report is deficient if it does not cover both. We are not persuaded.

Several courts of appeals rely on the statute's use of the term "cause of action" to decide this issue. When we discussed the phrase in *In re Jorden*, we noted that it "generally applies to facts, not filings." *Jorden*, 249 S.W.3d at 421. We also looked to Black's Law Dictionary, which "defines 'cause of action' as [a] group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person." *Id.* (quoting BLACK'S LAW DICTIONARY 235 (8th ed. 2004)). From this, several appellate courts have relied on "operative facts" to reach opposing results—either that an expert report must address every pleaded liability theory,[9] or that it need not.[10] The competing conclusions demonstrate the pitfalls of this approach.

The focus on operative facts raises more questions than it answers. Are the "operative facts" underlying alleged liability for failure to train different from the underlying allegations of vicarious liability for medical malpractice? The court of appeals here said no,[11] but others would say yes.[12]

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[9] *See, e.g.*, *MSHC the Waterton*, 2012 WL 6218001, at *6–7.

[10] *See, e.g.*, *Qi*, 370 S.W.3d at 415–16.

[11] 355 S.W.3d at 690–92.

[12] *See, e.g.*, *MSHC the Waterton*, 2012 WL 6218001, at *7; *Fung*, 365 S.W.3d at 522.

Would each of Potts's direct liability theories against Certified EMS—for failing to train its employees, failing to enforce accepted standards of care, and failing to employ protocols to ensure quality care for patients—require its own expert report, because the facts underlying each allegation may differ? Will, as the cases suggest, the relevant operative facts be disputed in every case, leading to additional time, expense, and interlocutory appeals?

We appreciate the courts of appeals' reasoning, but decline to follow that approach. No provision of the Act requires an expert report to address each alleged liability theory. The Act requires a claimant to file an expert report "[i]n a health care liability claim." TEX. CIV. PRAC. & REM. CODE § 74.351(a). Once an expert report is timely served and 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.

Id. § 74.351(l); *see also Loaisiga v. Cerda*, 379 S.W.3d 248, 260 (Tex. 2012) (same). A valid expert report has three elements: it must fairly summarize the applicable standard of care; it must explain how a physician or health care provider failed to meet that standard; and it must establish the causal relationship between the failure and the harm alleged. TEX. CIV. PRAC. & REM. CODE § 74.351(r)(6); *see Scoresby v. Santillan,* 346 S.W.3d 546, 556 (Tex. 2011). A report that satisfies these requirements, even if as to one theory only, entitles the claimant to proceed with a suit against the physician or health care provider.

The report serves two functions. "First, the report must inform the defendant of the specific conduct the plaintiff has called into question. Second, and equally important, the report must

provide a basis for the trial court to conclude that the claims have merit." *Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 879 (Tex. 2001).

A report need not cover every alleged liability theory to make the defendant aware of the conduct that is at issue. *Palacios* recognized that an expert report does not require litigation-ready evidence. Rather, "to avoid dismissal . . . [t]he report can be informal in that the information in the report does not have to meet the same requirements as the evidence offered in a summary-judgment proceeding or at trial." *Id.* For the particular liability theory addressed, the report must sufficiently describe the defendant's alleged conduct. Such a report both informs a defendant of the behavior in question and allows the trial court to determine if the allegations have merit. If the trial court decides that a liability theory is supported, then the claim is not frivolous, and the suit may proceed.

IV. Legislative Intent

This approach is consistent with the Legislature's intent. *See Molinet v. Kimbrell*, 356 S.W.3d 407, 411 (Tex. 2011) ("Our primary objective in construing statutes is to give effect to the Legislature's intent."). In amending the Act, the Legislature sought to reduce "the excessive frequency and severity of . . . claims," but to "do so in a manner that will not unduly restrict a claimant's rights any more than necessary to deal with the crisis." Act of June 11, 2003, 78th Leg., R.S., ch. 204, § 10.11(b)(1), (3), 2003 Tex. Gen. Laws 847, 884. In accordance with this goal, we have opined that one purpose of the report requirement is "to expeditiously weed out claims that have no merit." *Loaisiga,* 379 S.W.3d at 263. We have also stated that the purpose of evaluating expert reports is "to deter frivolous claims, not to dispose of claims regardless of their merits." *Scoresby,* 346 S.W.3d at 554; *see also Loaisiga*, 379 S.W.3d at 258 (recognizing that the expert

report "requirements are meant to identify frivolous claims and reduce the expense and time to dispose of any that are filed"); *In re Jorden*, 249 S.W.3d at 421.

Our holding today satisfies these purposes. If a health care liability claim contains at least one viable liability theory, as evidenced by an expert report meeting the statutory requirements, the claim cannot be frivolous. The Legislature's goal was to deter baseless claims, not to block earnest ones. Potts demonstrated to the trial court that at least one of her alleged theories—vicarious liability—had expert support. She cleared the first hurdle, and the appeals court correctly recognized her right to have the entire case move forward. 355 S.W.3d at 693.

V. Efficient and Practical Litigation

Certified EMS argues that this holding will prolong litigation by forcing defendants to defend meritless claims. For two reasons, we disagree. First, if there is at least one valid theory, the defendant will be engaged in further litigation regardless of the merits of the remaining theories. Defending those theories would not be unduly burdensome. The converse is not true. To require an expert report for each and every theory would entangle the courts and the parties in collateral fights about intricacies of pleadings rather than the merits of a cause of action, creating additional expense and delay as trial and appellate courts parse theories that could be disposed of more simply through other means as the case progresses. *Cf. Scoresby*, 346 S.W.3d at 549 (applying a "lenient standard" to a plaintiff's right to cure a deficient report, noting that approach "avoids the expense and delay of multiple interlocutory appeals and assures a claimant a fair opportunity to demonstrate that his claim is not frivolous").

This leads to our second point. The expert report requirement is a threshold mechanism to dispose of claims lacking merit, but reports are not the only means to address weak subsets of those claims. The original and amended petitions inform a defendant of the claims against it and limit what a plaintiff may argue at trial. Discovery allows a claimant to refine her pleadings to abandon untenable theories and pursue supported ones. Summary judgment motions permit trial courts to dispose of claims that lack evidentiary support. But while a full development of all liability theories may be required for pretrial motions or to convince a judge or jury during trial, there is no such requirement at the expert report stage. *See Palacios*, 46 S.W.3d at 879.

It may be difficult or impossible for a claimant to know every viable liability theory within 120 days of filing suit, and the Act reflects this reality. It strictly limits discovery until expert reports have been provided, and we have held that the statute's plain language prohibits presuit depositions authorized under Rule 202 of the Texas Rules of Civil Procedure. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(s); TEX. R. CIV. P. 202; *In re Jorden*, 249 S.W.3d at 418. The Act requires the expert report to summarize the expert's opinions "as of the date of the report," recognizing that those opinions are subject to further refinement. *Id.* § 74.351(r)(6). Discovery can reveal facts supporting additional liability theories, and the Act does not prohibit a claimant from amending her petition accordingly. Under Certified EMS's reasoning, a claimant would have to serve an expert report each time a new theory is discovered. Not only would that be impractical, it would prohibit altogether those theories asserted more than 120 days after the original petition was filed—effectively eliminating a claimant's ability to add newly discovered theories. *See id.* § 74.351(a) (requiring that

expert report be filed "not later than the 120th day after the date the original petition was filed"). We see no indication that the Legislature intended such a result.

In sum, an expert report that adequately addresses at least one pleaded liability theory satisfies the statutory requirements, and the trial court must not dismiss in such a case. To the extent other cases hold differently, we disapprove of them.

VI. *Gardner v. U.S. Imaging, Inc.*, 274 S.W.3d 669 (Tex. 2008) (per curiam)

Finally, we address Certified EMS's argument that *Gardner* precludes the result we reach today. In *Gardner*, we stated that "[w]hen a party's alleged health care liability is purely vicarious, a report that adequately implicates the actions of that party's agents or employees is sufficient." *Gardner v. U.S. Imaging, Inc.*, 274 S.W.3d 669, 671–72 (Tex. 2008) (per curiam). Certified EMS argues that because Potts's theories are not *purely* vicarious, *Gardner* implies that each must be addressed in an expert report.

We disagree that *Gardner* compels such a conclusion. Our statement distinguished between expert reports required for vicarious liability claims, in which merely implicating the agent's conduct is sufficient, and those required for direct ones, in which the employer's conduct must be implicated. But we did not address the effect of such a report in a claim involving both vicarious and direct liability. To clarify, when a health care liability claim involves a vicarious liability theory, either alone or in combination with other theories, an expert report that meets the statutory standards as to the employee is sufficient to implicate the employer's conduct under the vicarious theory. And if any liability theory has been adequately covered, the entire case may proceed.

VII. Conclusion

Because Potts's reports sufficiently addressed one liability theory, the trial court correctly denied the motion to dismiss. We affirm the court of appeals' judgment. TEX. R. APP. P. 60.2(a).

Wallace B. Jefferson
Chief Justice

OPINION DELIVERED: February 15, 2013

IN THE SUPREME COURT OF TEXAS

NO. 11-0541

DYNEGY, INC., PETITIONER,

v.

TERRY W. YATES, INDIVIDUALLY, AND TERRY W. YATES, P.C., RESPONDENTS

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

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

JUSTICE DEVINE filed a dissenting opinion.

JUSTICE GUZMAN did not participate in the decision.

The statute of frauds' suretyship provision provides that an oral promise "by one person to answer for the debt, default, or miscarriage of another person" is generally unenforceable. *See* TEX. BUS. & COM. CODE § 26.01(a), (b)(2). Dynegy, Inc. contends that this provision bars the current suit because both the fraudulent inducement and breach of contract claims against it are based on an oral promise to an attorney to pay the attorney's fees incurred by one of Dynegy's former officers. We agree. Accordingly, we reverse the court of appeals' judgment and render a take-nothing judgment in favor of Dynegy.

I. Background

A grand jury indicted James Olis, a former officer of Dynegy, on multiple counts of securities fraud, mail and wire fraud, and conspiracy arising out of work he performed while at Dynegy. Dynegy's board of directors passed a resolution authorizing the advancement of attorney's fees for Olis's defense provided that Olis acted in good faith, in Dynegy's best interests, and in compliance with applicable law. The resolution provided that it "may be modified or revoked by this Board at any time as a result of changes in circumstances or further analysis."

Olis hired Terry Yates, a criminal defense attorney, to defend him in the federal criminal investigation and an ongoing civil investigation conducted by the Securities and Exchange Commission. Olis told Yates and Mark Clark, Yates's associate, that Dynegy would be paying his legal fees. Clark called Cristin Cracraft, an attorney in Dynegy's legal department, who orally confirmed that Dynegy would pay Olis's legal fees. Clark testified that Cracraft stated, "The Board has passed a resolution, so, yes, we are paying Jamie Olis's fees," and instructed Clark that the bills should be submitted to her. Cracraft's trial testimony was similar to Clark's version of the conversation. Olis signed a written fee agreement with Yates under which Olis agreed that he was responsible for payment of his legal fees. The contract stated that "all fees are due when billed unless other specific arrangements have been made." Yates testified that, despite the written fee agreement, he had an oral agreement with Olis under which Yates would never look to Olis for payment of fees, but instead would look to Dynegy for payment. Yates testified that he spoke to Cracraft after faxing his fee agreement and hourly rate to Dynegy and that Cracraft told him Dynegy

would pay Olis's legal fees through trial. Cracraft contradicted Yates's testimony about the phone call, however, stating that she had spoken only to Clark and never to Yates as of the date of the trial.

Dynegy then hand-delivered a letter notifying Yates that it would pay him directly for Olis's legal fees through August 17, 2003, but the remaining fees incurred were to be paid into escrow pursuant to a board resolution. Dynegy paid Yates's initial invoice for $15,000. Yates submitted his $105,176 July bill in August, but Dynegy did not pay it until after trial in November. Olis was ultimately convicted of securities fraud, mail and wire fraud, and conspiracy. *United States v. Olis*, 429 F.3d 540, 549 (5th Cir. 2005) (affirming the conviction but remanding to the trial court to reconsider the proper sentencing guidelines). Yates submitted a third and final invoice for $448,556, representing all work performed from August 2003 through April 2004, including the November 2003 trial. Dynegy initially escrowed that amount pursuant to the board resolution, but later refused to release the escrowed funds after concluding that Olis did not meet the "good faith" standard for indemnification as required by the board's resolution.

Yates filed suit against Dynegy to recover the unpaid attorney's fees, alleging that Dynegy orally promised that it would pay Yates's fees *through* Olis's trial. Yates asserted claims for breach of contract and fraudulent inducement and sought benefit-of-the-bargain damages for both claims. After a three-week trial, the jury found for Yates on both claims. Yates ultimately elected to recover under his fraudulent inducement claim, and the trial court rendered judgment on that claim in favor of Yates. Dynegy filed a motion for judgment notwithstanding the verdict on its affirmative defense of statute of frauds, which the trial court denied. Dynegy appealed.

The court of appeals initially reversed and rendered judgment for Dynegy based on its affirmative defense of statute of frauds. No. 04-10-00041-CV, 2010 Tex. App. LEXIS 3556, at *1 (Tex. App.—San Antonio May 12, 2010). Thereafter, the court of appeals denied Yates's motion for rehearing while also issuing a revised opinion. No. 04-10-00041-CV, 2010 Tex. App. LEXIS 6915, at *1 (Tex. App.—San Antonio Aug. 25, 2010). Then the same panel, on its own motion, reconsidered and granted Yates's motion for rehearing. 345 S.W.3d 516, 519 (Tex. App.—San Antonio 2011). In its third opinion, the court of appeals reversed itself based on the main purpose doctrine, holding that Dynegy intended to bind itself to a primary obligation rather than a promise to pay the debt of another, and the statute of frauds was therefore inapplicable. *Id.* at 520, 523–25. The court of appeals also reversed the trial court's judgment based on the jury's fraud finding, holding that the evidence was legally insufficient. *Id.* at 534. The court of appeals then rendered judgment for Yates on his breach of contract claim. *Id.* at 536. Dynegy petitions this Court for review, arguing that the court of appeals erred by considering an element of the main purpose doctrine, which is an exception to the statute of frauds, as a part of Dynegy's initial burden on its statute of frauds affirmative defense. We agree.

II. Analysis

The statute of frauds generally renders a contract that falls within its purview unenforceable. TEX. BUS. & COM. CODE § 26.01(a). The party pleading the statute of frauds bears the initial burden of establishing its applicability. TEX. R. CIV. P. 94; *cf. Woods v. William M. Mercer, Inc.*, 769 S.W.2d 515, 517 (Tex. 1988) (holding that the party pleading statute of limitations has the initial burden of proof). Once that party meets its initial burden, the burden shifts to the opposing party to

establish an exception that would take the verbal contract out of the statute of frauds. *See Cobb v. Johnson*, 108 S.W. 811, 812 (Tex. 1908). One recognized exception to the statute of frauds' suretyship provision is the main purpose doctrine. *See Cruz v. Andrews Restoration, Inc.*, 364 S.W.3d 817, 827–28 (Tex. 2012). The party seeking to avoid the statute of frauds must plead, prove, and secure findings as to an exception or risk waiver under Rule 279 of the Texas Rules of Civil Procedure. *See, e.g.*, *Crown Ranch Dev., Ltd. v. Cromwell*, No. 09-10-00458-CV, 2012 Tex. App. LEXIS 1345, at *14–15 (Tex. App.—Beaumont Feb. 23, 2012, pet. denied) (mem. op.) ("A party who contends that an agreement falls within an exception to the statute of frauds must request and obtain a jury finding on the exception."); *W.H. McCrory & Co. v. Contractors Equip. & Supply Co.*, 691 S.W.2d 717, 720–21 (Tex. App.—Austin 1985, writ ref'd n.r.e.) (placing the burden on the plaintiff to plead and prove an exception to the statute of frauds); *cf. Woods*, 769 S.W.2d at 517–18 (holding that the discovery rule, as a defense to the statute of limitations, is a plea in confession and avoidance that is waived if not pled).

A. Dynegy Met its Initial Burden to Establish Applicability of the Statute of Frauds

Here, Dynegy pled the statute of frauds as an affirmative defense and thus had the initial burden to establish that the alleged promise fell within the statute of frauds. *See* TEX. BUS. & COM. CODE § 26.01(a), (b)(2); TEX. R. CIV. P. 94. Whether a contract comes within the statute of frauds is a question of law, which we review de novo. *See Bratcher v. Dozier*, 346 S.W.2d 795, 796 (Tex. 1961). The statute of frauds' suretyship provision applies to "a promise by one person to answer for the debt, default, or miscarriage of another person." TEX. BUS. & COM. CODE § 26.01(b)(2). Yates argues that the suretyship provision does not apply to the oral agreement in this case because there

is not a preexisting debt. On the contrary, the suretyship provision applies regardless of "whether [the debt was] already incurred or to be incurred in the future." *See* RESTATEMENT (SECOND) OF CONTRACTS § 112 cmt. b (1981).

The record indicates that Olis hired Yates to represent him in the criminal proceedings. Olis signed a fee agreement with Yates, in which Dynegy was not mentioned. Yates agreed to defend Olis, and Olis agreed in exchange that fees were due when billed unless other arrangements were made. Both Clark and Yates testified that Cracraft orally promised that Dynegy would be paying Olis's fees through trial, and it is undisputed that this agreement was never reduced to writing. These facts establish one conclusion: Dynegy orally promised to pay attorney's fees associated with Olis's defense that, under the fee agreement, were Olis's obligation (i.e., Olis's debt). The dissent, like the court of appeals, believes that Dynegy's promise to pay Olis's legal fees was a primary obligation and not a promise to pay another's debts, and therefore the statute of frauds does not bar Yates's recovery on his breach of contract claim. But, as we have explained, a plaintiff relying on a primary obligor theory under the main purpose doctrine must plead and establish facts to take a verbal contract out of the statute of frauds. *See Cruz*, 364 S.W.3d at 828; *Gulf Liquid Fertilizer Co. v. Titus*, 354 S.W.2d 378, 382–83 (Tex. 1962); *Cobb*, 108 S.W. at 812. We hold that Dynegy established as a matter of law that the statute of frauds' suretyship provision initially applied to bar the claims against it. *See* TEX. BUS. & COM. CODE § 26.01(b)(2) (providing that "a promise by one person to answer for the debt . . . of another person" falls within the statute of frauds). The court of appeals erred when it held otherwise.

B. The Burden Shifted to Yates

At this point, the burden shifted to Yates to establish an exception that would take the verbal contract out of the statute of frauds—namely, the main purpose doctrine. *See Cobb*, 108 S.W. at 812. The main purpose doctrine required Yates to prove: (1) Dynegy 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 Dynegy's own use and benefit—that is, the benefit it received was Dynegy's main purpose for making the promise. *See Cruz*, 364 S.W.3d at 828. We have noted that the question of intent to be primarily responsible for the debt is a question for the finder of fact, taking into account all the facts and circumstances of the case. *See Haas Drilling Co. v. First Nat'l Bank*, 456 S.W.2d 886, 889 (Tex. 1970) (citing *Gulf Liquid Fertilizer Co.*, 354 S.W.2d at 384). Thus, the burden was on Yates to secure favorable findings on the main purpose doctrine.[1] Yates's failure to do so constituted a waiver of the issue under Rule 279 of the Texas Rules of Civil Procedure. *See* TEX. R. CIV. P. 279; *W.H. McCrory & Co.*, 691 S.W.2d at 720–21; *cf. Woods*, 769 S.W.2d at 518 (holding the discovery rule waived when a party neither pled nor obtained findings on the issue in response to the opposing party's limitations defense). Therefore, the court of appeals erred by considering the intent element of the main purpose doctrine

[1] Dynegy even pointed out to the trial court and Yates the omission of any jury questions related to an exception to the statute of frauds in its written charge objections.

in conjunction with determining whether Dynegy met its initial burden to show applicability of the statute of frauds.[2]

III. Conclusion

Based on the preceding analysis, we hold that the statute of frauds renders the oral agreement between Dynegy and Yates unenforceable. Consequently, Yates cannot recover under his breach of contract claim. In addition, Yates's claim for benefit-of-the-bargain damages pursuant to his alternative fraudulent inducement action is barred. *See Haase v. Glazner*, 62 S.W.3d 795, 799 (Tex. 2001) ("[T]he Statute of Frauds bars a fraud claim to the extent the plaintiff seeks to recover as damages the benefit of a bargain that cannot otherwise be enforced because it fails to comply with the Statute of Frauds."). Accordingly, we grant Dynegy'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 Yates take nothing on his claims.

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Paul W. Green
Justice

OPINION DELIVERED: August 30, 2013

[2] The dissent also argues that the main purpose doctrine takes Dynegy's promise out of the statute of frauds based on Dynegy's self-serving reasons for promising to pay Olis's legal fees. But, as with the intent element, Yates failed to plead and prove the consideration elements of the main purpose exception.

IN THE SUPREME COURT OF TEXAS

NO. 11-0541

DYNEGY, INC., PETITIONER,

v.

TERRY W. YATES, INDIVIDUALLY AND TERRY W. YATES, P.C., RESPONDENTS

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

JUSTICE DEVINE, dissenting.

The Statute of Frauds "is a two-edged sword. It . . . may be used to perpetrate frauds as well as to prevent them. Under it a person may obtain an oral promise to pay the debt of a third person and then resist payment on the ground that this promise is oral and therefore unenforceable under the Statute of Frauds. Because of this and other dangers, the courts of England and this country have sought to keep the Statute within its intended purpose."[1]

In this case, the Court applies the Statute of Frauds' suretyship provision to, what the jury found to be, an unconditional promise by a company to pay an attorney to defend one of its employees from a work-related prosecution. Because I do not believe the Statute was intended to apply to such promises, I respectfully dissent.

[1] *Gulf Liquid Fertilizer Co. v. Titus*, 354 S.W.2d 378, 382 (Tex. 1962).

The Statute of Frauds' suretyship provision applies when a creditor seeks to recover from a guarantor because of a third person's failure to perform.[2] The provision discourages false allegations that a person promised to pay if the primary debtor could not.[3] The provision also protects those closely associated with the principal debtor from making rash or emotionally-driven oral promises before having "any real opportunity for awareness of the nature and magnitude of the risks undertaken."[4] The suretyship provision, however, is not intended to provide more certainty to the terms of an oral contract for the benefit of a third person.[5] Nor is it intended to discourage oral promises to assume the debt of a third person.[6]

The Court states that the facts here "establish one conclusion: Dynegy orally promised to pay attorney's fees associated with Olis' defense [that would have otherwise been Olis' obligation.]" ___ S.W.3d at ___. I agree, but the inference I draw from that conclusion is that Dynegy assumed the role of primary obligor, not surety. As we explained in *Bank of Garvin v. Freeman*, the Statute of Frauds' suretyship provision does not bar an oral promise to assume primary responsibility for the debt of another:

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[2] The essential elements of a surety relationship are (1) the third person and the surety are each bound to the same performance; and, (2) the third person, rather than the surety, should be the one to perform. RESTATEMENT (SECOND) OF CONTRACTS § 112 cmt. c.; *see also* 4 CAROLINE N. BROWN, CORBIN ON CONTRACTS § 15.14, at 290 (Joseph M. Perillo ed., rev. ed. 1997) ("To be within the suretyship clause of the statute, *the defendant's (S's) duty to pay must be conditional on nonpayment* by the third person (P) . . . .") (emphasis added).

[3] *Cooper Petroleum Co. v. LaGloria Oil & Gas Co.*, 436 S.W.2d 889, 895 (Tex. 1969).

[4] 4 BROWN, *supra*, § 16.1, at 317.

[5] *See id.* § 15.7, at 268 ("[I]t is enough to take the defendant's promise out of the statute that the third person was not bound at all to the promisee.").

[6] *See Bank of Garvin v. Freeman*, 181 S.W. 187, 190-91 (Tex. 1915).

> The meaning of that statute is to require a promise as surety for another's debt, or guarantor of another's debt, to be in writing. *It never was intended to prohibit one person from assuming the payment of another's debt, as his own debt, where there is a valid consideration moving between the parties to such contract*. In other words, one person for a valuable consideration may assume as his own debt the debt of another, and it need not be in writing, but he cannot contract with one person to become surety or guarantor for the debt of another person except it be in writing.[7]

Here, Dynegy does not claim that a surety relationship existed between Olis and itself. Dynegy argues instead that the suretyship provision applies merely because Olis and Yates entered into a written fee agreement, creating a debt. But if the creation of a debt was all that was necessary to invoke the Statute of Frauds, it would not be possible to assume another's debt by oral agreement, and the Court was wrong to say otherwise in *Bank of Garvin*.[8]

For its part, Dynegy does not claim to be the guarantor of Olis' debt. Dynegy instead concedes that it agreed to pay Yates for Olis' defense, but argues that a condition in the board resolution allowed it to stop paying Yates if Dynegy's board determined that Olis did not act in good faith. At that point, according to Dynegy, Olis became responsible for Yates' fee. But the board resolution did not make Dynegy the guarantor of Olis' debt, nor did it give the company the right to stop or suspend payment to the attorney for services already rendered. The board resolution merely stated that the employee was to repay the company if his actions were determined not to have been in good faith.

The dispute in this case is therefore not about whether Dynegy agreed to pay Yates; it clearly did. The dispute instead is about the extent of Dynegy's promise. Dynegy contends that its promise

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[7] *Titus*, 354 S.W.2d at 383-84 (quoting *Bank of Garvin,* 181 S.W. at 191 (emphasis added)).

[8] *Bank of Garvin*, 181 S.W. at 191.

to Yates was conditioned by the terms of the board resolution. Yates contends that Dynegy's promise to pay for Olis' defense through trial was unconditional and, as to Yates, primarily the company's responsibility.

The dispute was submitted to a jury, which was asked to determine the extent of Dynegy's agreement with Yates. The charge instructed the jury that an essential term of the asserted agreement was whether Dynegy agreed to pay Yates for his legal services to Olis through trial.[9] In closing argument, Dynegy argued that the jury should not find it in breach of the agreement unless it believed Dynegy made an unconditional promise to pay Yates through trial. The jury found Dynegy in breach of its agreement to pay Yates and awarded damages, apparently reasoning that the conditional payment terms of the board resolution did not apply to the oral contract between Dynegy and Yates.

The Court concludes, however, that the written fee agreement between Yates and Olis conclusively establishes Olis as the primary obligor, making Dynegy merely the surety of that obligation. Because Dynegy never intended to act as a guarantor of Olis' debt, however, the Statute of Frauds' suretyship provision should not apply as a matter of law. I therefore disagree with the Court's conclusion, but even if I agreed with it, I would nevertheless hold that the main purpose exception takes Dynegy's promise to Yates out of the Statute.

[9] The charge instructions also stated that the terms of an agreement may be oral or written, or both, and that the parties must have the same understanding of the subject matter at the time of the agreement.

The main purpose doctrine, or leading object rule, takes a promise out of the Statute where "the consideration given for the promise is primarily for the promisor's own use and benefit."[10] The test focuses on the purpose of the promise, rather than on who receives the benefit of the promise.[11] This test was devised by the courts to determine whether "the promise was manifestly induced by other than gratuitous or sentimental purposes."[12]

The circumstances surrounding the promise in this case began with an SEC investigation into Project Alpha. Dynegy originally billed Project Alpha as a complex transaction that would provide the company a significant long-term supply of physical natural gas, cash funding, and a permanent tax benefit. The SEC investigation resulted in a civil fine related to the company's tax classification of the assets involved. However, the Department of Justice's investigation was just beginning.

As media publicity and threats of indictment by the Department of Justice increased, Dynegy's board passed a resolution promising to advance attorney's fees to officers and employees of the company who were involved with Project Alpha. Dynegy's bylaws required the company to indemnify its directors and officers for any civil or criminal proceedings arising out of their role as a Dynegy director or officer. Dynegy paid Olis' first attorney directly and, when Olis desired to hire Yates, the company told Yates to send the bills to the company and that it would pay him directly. The urgency in securing the services of Yates, a more experienced trial attorney, was heightened by

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[10] *Titus*, 354 S.W.2d at 383.

[11] *Cruz v. Andrews Restoration, Inc.*, 364 S.W.3d 817, 828 (Tex. 2012).

[12] 4 BROWN, *supra*, § 16.1, at 317; *see also Cooper*, 436 S.W.2d at 895 ("[T]he basic reason for requiring that a promise to answer for the default of another be in writing is that the promisor has received no direct benefit from the transaction.").

Olis' recent indictment. Therefore, Dynegy had at least two self-serving reasons to promise to pay Yates to represent Olis: (1) to protect the company's interests; and (2) to comply with its bylaws. Yates should therefore be able to enforce Dynegy's oral contract to pay him through trial because Dynegy was acting for its own purposes and not merely as a guarantor of its employee's obligation.[13]

In conclusion, Dynegy has not asserted or argued that it intended to act as a guarantor of Olis' debt. Moreover, the jury agreed that Dynegy's promise to pay Yates through trial was not conditional, and thus its promise does not fall within the Statute of Frauds' suretyship provision. However, even were I to agree that the suretyship provision otherwise applies to this transaction, I would conclude that the main purpose exception takes Dynegy's promise out of the Statute. Because the Court holds the Statute of Frauds applies to bar Dynegy's oral contract with Yates, I respectfully dissent.

_____
John P. Devine
Justice

Opinion Delivered: August 30, 2013

[13] *See Haas Drilling Co. v. First Nat'l Bank*, 456 S.W.2d 886, 890-91 (Tex. 1970) (holding that main purpose doctrine was satisfied "as a matter of law" where prospect of maintaining value of oil-producing property was sufficient benefit to enforce bank's promise to pay jetting gas company the past-due debt of the former owner).

IN THE SUPREME COURT OF TEXAS

NO. 11-0548

JIMMY GLEN RIEMER, ET AL.,
PETITIONERS,

v.

THE STATE OF TEXAS AND JERRY PATTERSON, AS COMMISSIONER OF THE GENERAL LAND OFFICE OF THE STATE OF TEXAS,
RESPONDENTS

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

Argued November 6, 2012

JUSTICE GREEN delivered the opinion of the Court.

CHIEF JUSTICE JEFFERSON did not participate in the decision.

Prior to proceeding as a class action, Rule 42 of the Texas Rules of Civil Procedure requires certain prerequisites to be met. In this case, a small group of landowners sought to certify a class composed of all owners of any real property interests in a twelve-mile stretch of land located adjacent to the Canadian River in the Panhandle to litigate alleged takings claims against the State of Texas. The trial court denied certification, finding that the landowners failed to satisfy two of Rule 42(a)'s prerequisites and any one of the three Rule 42(b) requirements. The court of appeals

affirmed, holding that certain conflicts identified by the trial court prevented the landowners from satisfying Rule 42(a)(4)'s adequacy-of-representation prerequisite. We conclude that neither of the conflicts identified by the trial court prevented the landowners from satisfying Rule 42(a)(4); therefore, the trial court abused its discretion when it found otherwise. Accordingly, we reverse the court of appeals' judgment and remand the case back to that court for further proceedings consistent with this opinion.

I. Background

This is the second case to reach this Court involving an ongoing dispute between landowners and the State concerning the boundaries of the Canadian River in Hutchinson County. *See generally Brainard v. State*, 12 S.W.3d 6, 11–12 (Tex. 1999) (discussing the history and impetus surrounding the dispute, namely the completion of the Sanford Dam in 1965 and resulting surveys). The origins of this particular suit trace back to 1993 when the State sued Hugo A. Riemer, Jr. for an alleged trespass to land. On Riemer's motion, the trial court abated the case until this Court's consideration of *Brainard*. *See Brainard*, 12 S.W.3d at 10 (holding that changes brought about or influenced by an artificial structure that was not created by the riparian owner must be considered in marking the gradient boundary of a river). Because the State owns the riverbeds and the minerals underneath the riverbeds in Texas, the boundary of the riverbed is critical in determining the rights of the State, riparian mineral interest owners, and riparian surface owners. *See* TEX. PARKS & WILD. CODE § 1.011(c); *see also* TEX. NAT. RES. CODE §§ 11.041(a)(1), 51.011 (providing that the Permanent School Fund includes the mineral estate in riverbeds).

After this Court's decision in *Brainard*, Glen Riemer, individually and as independent executor of his father's estate, filed a counterclaim against the State for trespass and conversion. The State nonsuited its claims against Riemer. Riemer, joined by Richard Coon, Jr., the June Meetze Coon Trust, and the Johnson Borger Ranch Partnership (collectively "class representatives"), filed this putative class action against the State of Texas and its oil and gas lessee, J.M. Huber Corporation. The class representatives alleged, *inter alia*, an unconstitutional taking of their property arising from the State's approval of a 1981 survey that established the boundaries of a portion of the Canadian River at issue in this case.[1] Pursuant to Rule 42, the class representatives moved to certify a class composed of all owners of any real property interests in a twelve-mile stretch of land adjacent to the Canadian River in Hutchinson County. Prior to the certification hearing, the State, Huber, and various non-party mineral interest owners settled their disputes by entering into the "Canadian River Mineral Boundary Agreement" (MBA), which used the 1981 survey to establish the boundary lines amongst the parties to the settlement. The named plaintiffs in this case also settled with Huber.

The trial court ultimately denied class certification, finding that certain named plaintiffs lacked standing to bring the alleged takings claims. The trial court also found that the proposed class action failed to satisfy the typicality and adequacy-of-representation prerequisites of Rule 42(a), and any one of the requirements outlined in Rule 42(b). The class representatives filed an interlocutory appeal challenging the trial court's order denying class certification. The court of appeals rejected

[1] The State filed a plea to the jurisdiction on sovereign immunity grounds, which the trial court denied. The court of appeals reversed, dismissing all claims against the State except the class action takings claim and Riemer's individual claim for trespass to try title. *State v. Riemer*, 94 S.W.3d 103, 112–13 (Tex. App.—Amarillo 2002). Neither party sought review of that decision in this Court. Thus, the only live class action claim at this time is the takings claim.

the trial court's findings on standing but affirmed its order denying class certification, holding that the trial court did not abuse its discretion in finding that the class representatives would not fairly and adequately protect the interests of the class. 342 S.W.3d 809, 813. Central to the court of appeals' holding that the trial court did not abuse its discretion in refusing to certify the proposed class was that conflicts of interest existed among the class representatives and the other proposed class members. *Id.* at 815–16. Due to these conflicts, the court of appeals held that the class representatives failed to satisfy the adequacy-of-representation requirement. *Id.* at 818. In particular, the court of appeals focused on the following two conflicts initially identified by the trial court: "(1) the claims of the [class] representatives conflict with the claims of other proposed class members who ha[d] signed [the MBA,] . . . and (2) the claims of the [class] representatives conflict with claims of other proposed class members who own land on opposite sides of the Canadian River." *Id*. at 815.

The class representatives petitioned this Court for review, complaining that the court of appeals erred in affirming the trial court's order denying class certification. We granted the class representatives' petition. This Court has jurisdiction to review an interlocutory order refusing to certify a class in a suit brought under Rule 42. TEX. GOV'T CODE § 22.225(d); TEX. CIV. PRAC. & REM. CODE § 51.014(a)(3). We review a class certification order for abuse of discretion, which occurs when the trial court acts arbitrarily, unreasonably, or without reference to any guiding principles. *Bowden v. Phillips Petroleum Co.*, 247 S.W.3d 690, 696 (Tex. 2008).

II. Class Action Certification Under Rule 42

A class action is an extraordinary procedural device designed to promote judicial economy by allowing claims that lend themselves to collective treatment to be tried together in a single proceeding. *See generally Ford Motor Co. v. Sheldon*, 22 S.W.3d 444, 452–53 (Tex. 2000) (discussing the origination and purpose of the class action device). Because Rule 42 is patterned after Federal Rule of Civil Procedure 23, federal decisions and authorities interpreting current federal class action requirements are instructive. *Sw. Ref. Co. v. Bernal*, 22 S.W.3d 425, 433 (Tex. 2000). There is no right to litigate a claim as a class action under Rule 42. *Id.*

Rule 42 establishes four initial prerequisites to class certification: numerosity, commonality, typicality, and adequacy of representation. *See* TEX. R. CIV. P. 42(a). In addition to Rule 42(a)'s prerequisites, a proposed class action must satisfy at least one of the three subdivisions of Rule 42(b). TEX. R. CIV. P. 42(b). A trial court must apply a rigorous analysis to determine whether Rule 42's certification requirements have been satisfied. *Bowden*, 247 S.W.3d at 696. The class representatives argue that the court of appeals erred in holding that the conflicts identified by the trial court prevent the class representatives from establishing Rule 42(a)(4)'s adequacy-of-representation prerequisite. We agree.

Rule 42(a)(4)'s adequacy-of-representation prerequisite requires the proponent of class certification to establish that the class representative will fairly and adequately protect the interests of the class. TEX. R. CIV. P. 42(a)(4); *Bowden*, 247 S.W.3d at 707 ("The class representative has the burden of proving adequacy."). "[A] class representative whose interests conflict with the interests of other class members may not adequately represent a class." *State Farm Mut. Auto. Ins. Co. v.*

Lopez, 156 S.W.3d 550, 556 (Tex. 2004). The existence of minor conflicts standing alone, however, will not prevent a class representative from adequately representing a class. *See Valley Drug Co. v. Geneva Pharms., Inc.*, 350 F.3d 1181, 1189 (11th Cir. 2003). For a conflict of interest to prevent class certification under Rule 42(a)(4), the conflict must be fundamental and go to the heart of the litigation. *See Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 430–31 (4th Cir. 2003); *see also In re K-Dur Antitrust Litig.*, 686 F.3d 197, 223 (3d Cir. 2012) ("Only a fundamental conflict will defeat adequacy of representation."). A conflict that is merely speculative or hypothetical will not defeat the adequacy-of-representation requirement. *See Gunnells*, 348 F.3d at 430. We address each of the conflicts identified by the trial court in turn.

A. Conflict Regarding the MBA

Prior to the hearing on the class representatives' motion to certify, the settling parties to the MBA agreed upon a location for the banks of the Canadian River so that the boundary between the settling landowners and the State could be established. The settling landowners were necessarily included within the definition of the class that the class representatives initially sought to be certified. The court of appeals held that the testimony of one landowner who opposed his inclusion in the class coupled with the class representatives' questioning of the validity of the MBA lent sufficient support to a potential conflict that would prevent class certification. 342 S.W.3d at 817–18. The class representatives argue that the MBA fails to create a real conflict between the class representatives and the settling landowners because the conflict does not go to the heart of the litigation. The State responds that antagonism between the settling landowners and class representatives is sufficiently established by the settling landowner's testimony and the class

representatives' counsel's statements at the certification hearing regarding their intent to challenge the MBA.

We disagree with the State and the court of appeals' holding that a potential conflict among the settling landowners and the class representatives regarding the MBA is sufficient to deny class certification in this case. First, Rule 42 does not require that all members agree on the propriety of the action in order to certify the class. *Cf.* 5 JEROLD S. SOLOVY ET AL., MOORE'S FEDERAL PRACTICE § 23.25[2][b][iii] (3d ed. 2012) (providing that disagreements regarding the appropriateness of the litigation generally will not defeat certification under Rule 23(a)(4) of the Federal Rules of Civil Procedure). The landowners' motion for class certification alleges that certification is proper under Rule 42(b)(2) and 42(b)(3). If the settling landowners wished to honor the MBA and thus dispute the appropriateness of this lawsuit, then they may utilize Rule 42's procedures for opting out of the class. *See* TEX. R. CIV. P. 42(c)(2)(B)(v) (allowing plaintiffs in a certified class under Rule 42(b)(3) to be excluded from the class); *Compaq Computer Corp. v. Lapray*, 135 S.W.3d 657, 667–68 (Tex. 2004) (providing that trial courts must consider opt-out rights for class members under any theory, including Rule 42(b)(2)). Second, the class representatives clarify their position in this Court that it is not their intention to invalidate the MBA. Again, we see no reason why the settling landowners could not continue to honor the MBA, to the extent it is valid, regardless of the relief, if any, that may be ultimately awarded in this case. Finally, the State argues that *Swain v. Brinegar*, 517 F.2d 766, 769, 779–80 (7th Cir. 1975), supports its argument that a conflict fatal to class certification exists when other potential class members have already settled with the defendant. We find *Brinegar* distinguishable and thus unpersuasive.

In *Brinegar*, a group of landowners sought to certify a class composed of owners and tenants of farmland who were subject to having their land condemned for the purposes of the construction of a highway. *Brinegar*, 517 F.2d at 779–80. The class definition specifically included "those who have already conveyed or agreed to convey their property under threat of condemnation." *Id.* at 780. The court in *Brinegar* held that the named plaintiffs could not meet Federal Rule of Civil Procedure 23(a)(4)'s adequacy-of-representation requirement because those who had "'already conveyed or agreed to convey their property' will have an interest in the integrity of their bargain," and will also oppose any change in the proposed highway's route. *Id.* In other words, the named plaintiffs in *Brinegar* were directly challenging the location of the proposed highway, and as noted by the trial court, if the class action succeeded, then the state would likely choose a different route thus negating the state's need for the land already conveyed or land that landowners had agreed to convey. *See Swain v. Brinegar*, 378 F. Supp. 753, 756 (S.D. Ill. 1974). In this case, however, any relief granted would not prevent the settling landowners from continuing to honor the MBA, and the class representatives do not intend to attack that settlement like the named plaintiffs intended to attack the conveyances in *Brinegar*. While the conflict identified in *Brinegar* went directly to the heart of the class action litigation, the conflict regarding the MBA in this case does not. Therefore, the potential conflict among the settling landowners and the class representatives does not prevent the class representatives from serving as adequate representatives of the proposed class. The court of appeals erred in holding otherwise.

B. North-South Conflict

The trial court found—and the court of appeals held without analysis—that the class representatives failed to satisfy Rule 42(a)(4)'s adequacy-of-representation requirement due to the potential conflict between landowners on the north and south of the Canadian River in locating the boundaries of the riverbed. The class representatives argue that no evidence supports antagonism between proposed class members on opposite sides of the river, and even if there was a conflict, the class representatives direct the Court to authority that holds that a conflict must be more than speculative or hypothetical. *See Emp'rs Cas. Co. v. Tex. Ass'n of School Bds. Workers' Comp. Self-Ins. Fund*, 886 S.W.2d 470, 476 (Tex. App.—Austin 1994, writ dism'd w.o.j.). The State responds that locating the riverbed creates a "risk" that landowners on the north side will attempt to locate their lands as far south as possible while landowners on the south side want the exact opposite.

While we do not disagree with the State that there is a risk for a conflict between the proposed class members on opposite sides of the river, we hold that this risk is too speculative and theoretical to prevent class certification under Rule 42(a)(4). *See Gunnells*, 348 F.3d at 431. Our holding is supported by the fact that the purported conflict rests on the questionable proposition that locating the northern boundary of the riverbed is dependent on locating the southern boundary. It is entirely probable—and we are presented with no evidence to the contrary—that locating the northern boundary of the Canadian River will have no effect on where its southern boundary is located. Therefore, the court of appeals erred in holding that the purported conflict between class members on opposite sides of the river prevented the class representatives from establishing adequacy under Rule 42(a)(4).

C. Family Dispute Conflict

The trial court also found that Montford Johnson III, who is the assistant managing partner of class representative Johnson Borger Ranch Partnership, was not an adequate representative for his relatives that were are also members of the proposed class. The court of appeals did not address this conflict. The State argues that this conflict also prevents the class representatives from establishing adequacy under Rule 42(a)(4) because Johnson's relatives have sued him in the past and have no reason to trust him. In addition, the State argues that all of Mr. Johnson's relatives that would be members of the proposed class signed the MBA. For similar reasons articulated in section II.A of this opinion, *supra*, we disagree that this potential conflict prevents certification of the proposed class in this case. Again, to the extent Mr. Johnson's relatives disagree with the propriety of the litigation, the class representative, or the class representative's counsel, they may utilize Rule 42's procedures for opting out of the class. *See* TEX. R. CIV. P. 42(c)(2)(B)(v).

III. Conclusion

For these reasons, we conclude that the trial court abused its discretion by relying on the conflicts identified in its order denying class certification to establish that the class representatives' failed to satisfy Rule 42(a)(4)'s adequacy-of-representation prerequisite. And, the court of appeals erred when it affirmed the trial court's order on the same grounds. Accordingly, we reverse the court of appeals' judgment affirming the trial court's order denying class certification and remand the case back to the court of appeals to address the remaining contested requirements of class certification under Rule 42.

Paul W. Green
Justice

OPINION DELIVERED: February 22, 2013

IN THE SUPREME COURT OF TEXAS

NO. 11-0549

GEOFFREY DUGGER, PETITIONER,

v.

MARY ANN ARREDONDO, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF JOEL MARTINEZ, DECEASED, RESPONDENTS

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

Argued November 6, 2012

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

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

In this wrongful death suit, we consider the viability of the common law "unlawful acts doctrine" as an affirmative defense in light of Texas's proportionate responsibility scheme and the statutory affirmative defense provided in section 93.001 of the Texas Civil Practice and Remedies Code. Under the unlawful acts doctrine, a plaintiff cannot recover damages if it can be shown that, at the time of injury, the plaintiff was engaged in an illegal act that contributed to the injury. *See Gulf, C. & S. F. Ry. Co. v. Johnson*, 9 S.W. 602, 603 (Tex. 1888). The trial court rendered summary

judgment for the defendant on his affirmative defense based on the unlawful acts doctrine. The court of appeals reversed, holding that section 93.001 superseded the unlawful acts doctrine. 347 S.W.3d 757, 768–69 (Tex. App.—Dallas 2011, pet. granted). We affirm the judgment of the court of appeals, but on different grounds. We hold that the Legislature's adoption of the proportionate responsibility scheme in Chapter 33 of the Civil Practice and Remedies Code evidenced its clear intention that a plaintiff's illegal conduct not falling within a statutorily-recognized affirmative defense be apportioned rather than barring recovery completely. The common law unlawful acts doctrine cannot coexist with this scheme. Accordingly, we affirm the court of appeals' judgment that reversed the summary judgment and remanded the case to the trial court for further proceedings.

I. Factual and Procedural Background

On February 2, 2007, Geoffrey Dugger went to his friend Joel Martinez's house. While getting ready to leave the house, Dugger saw Martinez put in his pocket "cheese"—a mixture of black-tar heroin and Tylenol PM. After purchasing tequila and a cigar, which they later filled with marijuana to make a "blunt," the two men returned to the house where Dugger lived with his parents. While in Dugger's bedroom and backyard, both men consumed several tequila drinks, snorted lines of cheese, and smoked marijuana. Later in the evening, Martinez fell asleep while watching television. About thirty minutes later, Dugger noticed that Martinez was making a choking sound and subsequently began vomiting. Dugger yelled for his parents, and they came down the hall to his bedroom. Instead of calling 911, Dugger called Martinez's mother, Mary Ann Arredondo, and told her that Martinez had been drinking and was throwing up. Arredondo told Dugger to let Martinez sleep it off. After another fifteen minutes had passed, Dugger's father called 911. The police arrived

about five minutes later, shortly after midnight. The paramedics arrived about ten minutes after the police. Dugger did not tell the police or paramedics that Martinez had ingested heroin, only that he drank tequila and smoked marijuana. The paramedics treated Martinez for alcohol poisoning, but their efforts proved unavailing. Martinez died less than two hours after the call to 911.

Arredondo sued Dugger under the wrongful death and survival statutes, alleging that Dugger was negligent both in failing to call 911 immediately and in failing to disclose Martinez's heroin use to the paramedics. *See* TEX. CIV. PRAC. & REM. CODE §§ 71.002(a)–(b), .021. In his answer, Dugger asserted an affirmative defense based on the common law unlawful acts doctrine, which bars a plaintiff from recovery if, at the time of injury, he was engaged in an unlawful act that was "inextricably intertwined with the claim and the alleged damages would not have occurred but for the illegal act." *Sharpe v. Turley*, 191 S.W.3d 362, 366 (Tex. App.—Dallas 2006, pet. denied); *accord Johnson*, 9 S.W. at 603; *Russell v. Ingersoll-Rand Co.*, 841 S.W.2d 343, 347 (Tex. 1992) (providing that any defenses that would be available against the decedent if he or she were alive may be asserted against his or her estate). Dugger then moved for summary judgment on his affirmative defense based on the unlawful acts doctrine, which the trial court granted.[1] The trial court denied

[1] Arredondo argues that Dugger owed Martinez a duty because he created a dangerous situation by allowing drugs to be consumed at his house and therefore had a duty to prevent injury to others. *See Buchanan v. Rose*, 159 S.W.2d 109, 110 (Tex. 1942) ("[I]f a party negligently creates a dangerous situation it then becomes his duty to do something about it to prevent injury to others if it reasonably appears or should appear to him that others in the exercise of their lawful rights may be injured thereby."). Arredondo also asserts that because Dugger chose to partially disclose the nature of Martinez's medical distress to the paramedics, he was "deemed to have assumed a duty to tell the whole truth." *Union Pac. Res. Grp., Inc. v. Rhône-Poulenc, Inc.*, 247 F.3d 574, 584 (5th Cir. 2001) (discussing the duty to disclose in the fraud context (citing RESTATEMENT (SECOND) OF TORTS § 552(2)(b) (1976))). Finally, Arredondo argues that Dugger owed Martinez a duty under section 38.15(a)(2) of the Texas Penal Code, which states that "[a] person commits an offense if the person with criminal negligence interrupts, disrupts, impedes, or otherwise interferes with: . . . (2) a person who is employed to provide emergency medical services including the transportation of ill or injured persons while the person is performing that duty." TEX. PENAL CODE § 38.15(a)(2). We need not address this issue because the

Arredondo's motion for rehearing and motion for new trial. Arredondo appealed, arguing that section 93.001 of the Civil Practice and Remedies Code replaced the common law unlawful acts doctrine, and that the statutory affirmative defense did not apply in this case.[2] The court of appeals reversed, holding that section 93.001 supersedes the common law unlawful acts doctrine.[3] 347 S.W.3d at 769. We granted Dugger's petition. 55 Sup. Ct. J. 757 (Tex. June 8, 2012).

II. Analysis of Unlawful Acts Doctrine Jurisprudence

The issue before us is whether the common law unlawful acts doctrine remains available as an affirmative defense to completely bar a plaintiff's recovery in tort cases in light of Texas's proportionate responsibility scheme and the Legislature's more recent enactment providing for an affirmative defense based on a plaintiff's felonious conduct. Dugger argues that an affirmative defense based on the unlawful acts doctrine is available in personal injury and wrongful death cases even when the elements of section 93.001's statutory affirmative defense are not satisfied. Arredondo argues that the unlawful acts doctrine conflicts not only with section 93.001, but also with the proportionate responsibility scheme in Chapter 33 of the Civil Practice and Remedies Code,

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trial court rendered judgment solely on Dugger's traditional motion for summary judgment based on the unlawful acts doctrine, and that is the only issue before us.

[2] In her response to Dugger's motion for summary judgment, Arredondo argued that Texas's proportionate responsibility scheme superseded the unlawful acts doctrine. Arredondo did not raise the argument directly when challenging the summary judgment on appeal, but does include it in her argument at this Court. *See* TEX. R. APP. P. 38.1(f) ("The brief 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.").

[3] Arredondo brings her claims under sections 71.002(b) and 71.006 of the Wrongful Death Act. TEX. CIV. PRAC. & REM. CODE §§ 71.002(b), .006. At the court of appeals, Arredondo argued that the Wrongful Death Act abrogated the common law unlawful acts doctrine, but she does not make that argument to this Court. Accordingly, that issue is not before us and we do not address it.

which replaced former common law defenses that provided a complete bar to recovery in tort cases. *See* TEX. CIV. PRAC. & REM. CODE §§ 33.001–.004. We agree with Arredondo that the Legislature's enactment of Chapter 33's proportionate responsibility scheme and section 93.001 are dispositive in this case.

"[S]tatutes 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). In construing statutes, our goal is to give effect to the intent expressed by the language in the statute. *City of Rockwall v. Hughes*, 246 S.W.3d 621, 625 (Tex. 2008) (citing *State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006)). We begin our analysis by reviewing the common law unlawful acts doctrine.

A. The Unlawful Acts Doctrine

More than 120 years ago, this Court recognized the common law unlawful acts doctrine as barring a plaintiff from recovering damages if it could be shown that, at the time of injury, the plaintiff was engaged in an illegal act that contributed to the injury.[4] *See Johnson*, 9 S.W. at 603. The doctrine originated with the principle of *in pari delicto* or "unclean hands" in the contract context, but was extended to tort causes of action. *See Rico v. Flores*, 405 F. Supp. 2d 746, 759–61 (S.D. Tex. 2005) (describing the use of the unlawful acts and *in pari delicto* doctrines in Texas jurisprudence), *rev'd on other grounds*, 481 F.3d 234 (5th Cir. 2007). The doctrine is based on the public policy that wrongdoers should not be compensated for their immoral acts. *See, e.g.*, *Ward v.*

[4] The unlawful acts doctrine is also referred to as the "outlaw doctrine," the "*ex turpi* rule," the "wrongful-conduct rule," and the "serious misconduct doctrine." *See* Joseph H. King, Jr., *Outlaws and Outlier Doctrines: The Serious Misconduct Bar in Tort Law*, 43 WM. & MARY L. REV. 1011, 1019 & n.35 (2002).

Emmett, 37 S.W.3d 500, 502 (Tex. App.—San Antonio 2001, no pet.); *Saks v. Sawtelle, Goode, Davidson & Troilo*, 880 S.W.2d 466, 470–71 (Tex. App.—San Antonio 1994, writ denied).

As early as 1888, we recognized that "no action will lie to recover a claim for damages, if to establish it the plaintiff requires aid from an illegal transaction, or is under the necessity of showing or in any manner depending upon an illegal act to which he is a party." *Johnson*, 9 S.W. at 603 (holding that the unlawful acts doctrine did not apply because there was no allegation or proof showing that, at the time of the injury, the plaintiff did any illegal act contributing to his injury). Since then, "[c]ourts throughout Texas . . . have used this rule, along with public policy principles, to prevent a plaintiff from recovering damages that arose out of his or her own illegal conduct." *Ward*, 37 S.W.3d at 502 (internal citations omitted). Courts applying the unlawful acts doctrine have required that the plaintiff's illegal act be "inextricably intertwined" with the claim for the illegal act to bar recovery. *See, e.g.*, *id.* at 503. An illegal act is "inextricably intertwined with the claim" if a plaintiff cannot prove a claim without having to prove his or her own illegal act. *See, e.g.*, *Norman v. B.V. Christie & Co.*, 363 S.W.2d 175, 177–78 (Tex. Civ. App.—Houston 1962, writ ref'd n.r.e.) (quoting *Stone v. Robinson*, 234 S.W. 1094, 1095 (Tex. 1921)). In Texas tort cases, the doctrine has most recently arisen in medical and legal malpractice cases. *See, e.g.*, *Ward*, 37 S.W.3d at 501; *Saks*, 880 S.W.2d at 470.

Recently, scholars and courts have disagreed over the viability of the unlawful acts doctrine in modern jurisprudence. The Restatement (Second) of Torts and respected legal scholars reject the principle that tortious or criminal conduct can completely bar recovery. *See* RESTATEMENT (SECOND) OF TORTS § 889 (1979); W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS 232

(5th ed. 1984); *see generally* Joseph H. King, Jr., *Outlaws and Outlier Doctrines: The Serious Misconduct Bar in Tort Law*, 43 WM. & MARY L. REV. 1011 (2002) (suggesting that the unlawful acts doctrine, or "serious misconduct bar," should be abandoned by American courts). Several courts and legislatures, on the other hand, have approved of the unlawful acts doctrine in statutes and case law. *See, e.g.*, ALASKA STAT. § 09.65.210 (2012) (setting out a detailed statutory affirmative defense based on the unlawful acts doctrine); *Barker v. Kallash*, 468 N.E.2d 39, 43–44 (N.Y. 1984) (holding that a teenager who was injured while constructing a "pipe bomb" could not recover from the young boy who supplied the gun powder); *see also* Vincent R. Johnson, *The Unlawful Conduct Defense in Legal Malpractice*, 77 UMKC L. REV. 43, 45 (2008) ("Today, in an important range of cases, statutes and court decisions, in many states, now provide that injuries arising from the plaintiff's serious unlawful conduct are not compensable under tort law.").

Since Texas's shift to the proportionate responsibility scheme, discussed below, most Texas courts have used a plaintiff's unlawful act to measure proportionate responsibility and reduce recovery, rather than completely bar the plaintiff from recovering damages. *See, e.g.*, *Fifth Club, Inc. v. Ramirez*, 196 S.W.3d 788, 790, 797–98 (Tex. 2006) (allowing a publicly intoxicated plaintiff to recover for injures sustained by a security guard); *Thomas v. Uzoka*, 290 S.W.3d 437, 445–46 (Tex. App.—Houston [14th Dist.] 2009, pet. denied) (permitting a decedent's wife to recover despite the decedent's failure to wear a seatbelt). We turn next to Chapter 33's proportionate responsibility scheme and consider whether the Legislature intended it to abrogate the common law unlawful acts doctrine as a complete bar to a plaintiff's recovery.

B. Chapter 33—Proportionate Responsibility

Before the Legislature enacted the proportionate responsibility scheme, Texas followed the all-or-nothing system of contributory negligence. *Parker v. Highland Park, Inc.*, 565 S.W.2d 512, 518 (Tex. 1978). Under contributory negligence, if a plaintiff was even one percent at fault, he or she could not recover. *See id.* In 1973, the Legislature adopted article 2212a, the first comparative negligence statute, "evidenc[ing] a clear policy purpose to apportion negligence according to the fault of the actors." *Id.*; *see also* Act of April 9, 1973, 63d Leg., R.S., ch. 28, §§ 1–2, 4–5, art. 2212a, 1973 Tex. Gen. Laws 41, 41–43, *repealed by* Act of June 16, 1985, 69th Leg., R.S., ch. 959, § 1, sec. 33.001, 1985 Tex. Gen. Laws 3242, 3270–71. Later, article 2212a was replaced with the comparative responsibility framework in Chapter 33 of the Civil Practice and Remedies Code. *See* TEX. CIV. PRAC. & REM. CODE §§ 33.001–.004; *see also* Act of June 16, 1985, 69th Leg., R.S., ch. 959, § 1, secs. 33.001–.004, 1985 Tex. Gen. Laws 3242, 3270–71, *amended by* Act of June 16, 1987, 70th Leg., 1st C.S., ch. 2, §§ 2.03–.12, secs. 33.001–.004, 1987 Tex. Gen. Laws 37, 41–44; *JCW Elecs., Inc. v. Garza*, 257 S.W.3d 701, 703 (Tex. 2008) (setting out the evolution of the comparative fault rules in Texas). In 1995, the Legislature modified Chapter 33 by replacing comparative responsibility with proportionate responsibility. Act of May 18, 1995, 74th Leg., R.S., ch. 136, § 1, 1995 Tex. Gen. Laws 971, 971–75 (amended 2003) (current version at TEX. CIV. PRAC. & REM. CODE §§ 33.001–.004); *see JCW Elecs.*, 257 S.W.3d at 703. Section 33.003 currently provides:

> (a) The trier of fact, as to each cause of action asserted, shall determine the percentage of responsibility, stated in whole numbers, for the following persons with respect to each person's causing or contributing to cause in any way the harm for which recovery of damages is sought, whether by negligent act or omission, by any

> defective or unreasonably dangerous product, by other conduct or activity that violates an applicable legal standard, or by any combination of these:
>
> (1) each claimant;
>
> (2) each defendant;
>
> (3) each settling person; and
>
> (4) each responsible third party who has been designated under Section 33.004.

TEX. CIV. PRAC. & REM. CODE § 33.003(a). The proportionate responsibility scheme applies to "any cause of action based on tort in which a defendant, settling person, or responsible third party is found responsible for a percentage of the harm for which relief is sought." *Id.* § 33.002.

C. Unlawful Conduct in Wrongful Death Cases

The wrongful death statute provides that "[a] person is liable for damages arising from an injury that causes an individual's death if the injury was caused by the person's or his agent's or servant's wrongful act, neglect, carelessness, unskillfulness, or default." *Id.* § 71.002(b). Parents may bring a wrongful death action on behalf of their deceased children. *See id.* § 71.004.

It is clear from the statute and our precedent that Chapter 33 applies to wrongful death claims. *See, e.g.*, *Russell*, 841 S.W.2d at 347. By its terms, Chapter 33 expressly applies to "any cause of action based on tort." TEX. CIV. PRAC. & REM. CODE § 33.002. In addition, we have held that, under the wrongful death statute, a defendant may assert any defense against the claimant that he might have asserted against the decedent, if the decedent were alive. *Russell*, 841 S.W.2d at 347. This formerly included the defense of contributory negligence. *See id.* (citing *Vassallo v. Nederl-Amerik Stoomv Maats Holland*, 344 S.W.2d 421, 424 (Tex. 1961)). Further, we have

recognized federal case law that holds that Texas comparative negligence precluded recovery in a wrongful death case because the decedent's negligence was greater than the tortfeasor's. *See id.* at 347 n.7 (citing *Mayo v. Tri-Bell Indus., Inc.*, 787 F.2d 1007, 1009 (5th Cir. 1986)). Finally, courts throughout the state generally accept that proportionate responsibility applies to wrongful death cases. *See, e.g.*, *Pastor v. Champs Rest., Inc.*, 750 S.W.2d 335, 358 (Tex. App.—Houston [14th Dist.] 1988, no writ) (remanding the case to the trial court to compare the decedent's negligence and bar's negligence in wrongful death case); *Velasquez v. Levingston*, 598 S.W.2d 346, 349 (Tex. Civ. App.—Corpus Christi 1980, no writ) (holding that recovery was precluded by then operative Texas comparative negligence statute because the decedent's negligence was greater than the tortfeasor's).

Because Chapter 33's proportionate responsibility scheme applies to wrongful death cases, and therefore applies to Arredondo's case, we must determine whether the common law unlawful acts doctrine is available as an affirmative defense under the proportionate responsibility framework. We conclude that it is not. The plain language of section 33.003 clearly indicates that the common law unlawful acts doctrine is no longer a viable defense. Section 33.003 provides, in pertinent part:

> The trier of fact . . . shall determine the percentage of responsibility . . . with respect to *each person's* causing or contributing to cause in *any* way the harm for which recovery of damages is sought, whether by negligent act or omission, by any defective or unreasonably dangerous product, *by other conduct or activity that violates an applicable legal standard* . . . .

See TEX. CIV. PRAC. & REM. CODE § 33.003(a) (emphasis added). The language of the statute indicates the Legislature's desire to compare responsibility for injuries rather than bar recovery, even if the claimant was partly at fault or violated some legal standard. *See Parker*, 565 S.W.2d at 518

(discussing article 2212a, which is now Chapter 33). Therefore, we hold that Chapter 33 controls over the unlawful acts doctrine in the wrongful death context.

The dissent contends that the unlawful acts doctrine and Chapter 33 may coexist as separate legal concepts. *See* ___ S.W.3d at ___. Nothing in Chapter 33 or in our case law suggests that the unlawful acts doctrine acts as an exception to the proportionate responsibility scheme, however. *See Parker*, 565 S.W.2d at 518 (holding that Chapter 33 replaces common law doctrines that lead to a "system of absolute victory or total defeat"). Proportionate responsibility abrogated former common law doctrines that barred a plaintiff's recovery because of the plaintiff's conduct—like assumption of the risk, imminent peril, and last clear chance—in favor of submission of a question on proportionate responsibility. *See Del Lago Partners, Inc. v. Smith*, 307 S.W. 3d 762, 772 (Tex. 2010). When the Legislature intends an exception to Chapter 33's broad scheme, it creates specific exceptions for matters that are outside the scope of proportionate responsibility. *See F.F.P. Operating Partners, L.P. v. Duenez*, 237 S.W.3d 680, 690–91 (Tex. 2007). In the context of criminal actions, for example, the Legislature did just that, removing certain criminal acts performed in concert with another person from the proportionate responsibility scheme and instead imposing joint and several liability. *See* Act of May 18, 1995, 74th Leg., R.S., ch. 136, § 1, sec. 33.002, 1995 Tex. Gen. Laws 971, 972, *repealed by* Act of June 11, 2003, 78th Leg., R.S., ch. 204, § 4.10, sec. 33.002, 2003 Tex. Gen. Laws 859, 859. We find no such indication that the Legislature intended a plaintiff's unlawful conduct to be treated differently from the other common law defenses under the former contributory negligence scheme, or that the Legislature intended it to be an exception to proportionate responsibility. We hold that the unlawful acts doctrine fits within the categories of

former common law defenses that are now exclusively controlled by Chapter 33's proportionate responsibility scheme.

Further, we have accepted the concept that those who voluntarily put themselves in dangerous situations are not necessarily barred from recovering from other negligent individuals. For example, we have held that an individual who voluntarily became intoxicated and was injured while driving his car may recover against the establishment that served him the alcohol. *See Smith v. Sewell*, 858 S.W.2d 350, 355 (Tex. 1993). While "[h]istorically, an individual who voluntarily became intoxicated was precluded from suing a tavern owner for his own injuries," *id.* at 352 (citing 1 JAMES H. MOSHER, LIQUOR LIABILITY LAW § 2.02[6][a](1990)), the Legislature in 1987 established a cause of action against providers of alcohol under certain circumstances by enacting Chapter 2 of the Alcoholic Beverage Code. *See* TEX. ALCO. BEV. CODE § 2.03; *see also* Act of June 11, 1987, 70th Leg., R.S., ch. 303, § 3, sec. 202, 1987 Tex. Gen. Laws 1673, 1674. Therefore, in *Smith v. Sewell*, we held that, under Chapter 2, an individual who was voluntarily intoxicated was not barred from recovery, and that Chapter 33 was applicable to a cause of action under Chapter 2 against an alcoholic beverage provider. *See* 858 S.W.2d at 355–56. We noted that "when it is the intoxicated individual who is injured due to his own intoxication, it is particularly appropriate that his conduct in contributing to his injury should be considered in assessing the amount of recovery, if any, to which he is entitled." *Id.* at 356. It follows that, like the rule prohibiting voluntarily intoxicated individuals from recovering from a tavern owner, the adoption of the proportionate responsibility framework abrogated use of the common law unlawful acts doctrine to bar recovery in the tort context.

Dugger cites several cases in which a plaintiff was precluded from recovering damages in the legal malpractice context due to the plaintiff's underlying criminal conduct. *See, e.g.*, *Sharpe v. Turley*, 191 S.W.3d 362, 365–69 (Tex. App—Dallas 2006, pet. denied); *Saks v. Sawtelle, Goode, Davdison & Trolio*, 880 S.W.2d 466, 467 (Tex. App—San Antonio 1994, writ denied); *Dover v. Baker, Brown, Sharman & Parker*, 859 S.W.2d 441, 450–51 (Tex. App.—Houston [1st Dist.] 1993, no writ). While the public policy underlying the unlawful acts doctrine may be similar to the policy behind those cases, the context makes those cases unique. In *Peeler v. Hughes & Luce*, 909 S.W.2d 494 (Tex. 1995), we held that a client's criminal conduct, as a matter of law, was the sole proximate or producing cause of the client's conviction, and that the client could not bring a legal malpractice claim unless she had been exonerated from the criminal conviction. *Id.* at 496–98. Because the client's conduct, and not the attorney's, is the sole cause of any injury resulting from conviction, the plaintiff cannot satisfy the causation element of a legal malpractice claim absent exoneration. *See id.* While some courts of appeals have extended that reasoning to civil defendants bringing legal malpractice actions, we have not directly addressed that issue. *See, e.g.*, *Sharpe*, 191 S.W.3d at 369 (precluding a plaintiff from recovering from an attorney after a finding that summary judgment evidence established that the plaintiff's conduct forming the basis of the underlying civil fraud claim was unlawful). As it is not before us, we do not do so now, and we limit the holding in this case to personal injury and wrongful death cases.

We next consider section 93.001 of the Civil Practice and Remedies Code and how it interacts with Chapter 33.

III. Section 93.001 of the Civil Practice and Remedies Code

In 1987, the Legislature enacted section 93.001 of the Civil Practice and Remedies Code, providing an affirmative defense to civil actions brought by convicted criminals seeking to recover damages for injuries arising out of their felonious acts.[5] *See* TEX. CIV. PRAC. & REM. CODE § 93.001; *see also* Act of June 19, 1987, 70th Leg., R.S., ch. 824, § 1, sec. 93.001, 1987 Tex. Gen. Laws 2856, 2856. The statute provides:

> (a) It is an affirmative defense to a civil action for damages for personal injury or death that the plaintiff, at the time the cause of action arose, was:
>
> > (1) committing a felony, for which the plaintiff has been finally convicted, that was the sole cause of the damages sustained by the plaintiff; or
> >
> > (2) committing or attempting to commit suicide, and the plaintiff's conduct in committing or attempting to commit suicide was the sole cause of the damages sustained; provided, however, if the suicide or attempted suicide was caused in whole or in part by a failure of the party or any defendant to comply with an applicable legal standard, then which suicide or attempted suicide shall not be a defense.
>
> (b) This section does not apply in any action brought by an employee, or the surviving beneficiaries of an employee, under the Workers' Compensation Law of Texas, or in any action against an insurer based on a contract of insurance, a statute, or common law.
>
> (c) In an action to which this section applies, this section shall prevail over any other law.

[5] Section 86.002 of the Civil Practice and Remedies Code is a similar expression of the legislative policy that convicted criminals may not recover for injuries sustained while committing a crime. *See* TEX. CIV. PRAC. & REM. CODE § 86.002. Arredondo does not rely on section 86.002 to support her argument that the unlawful acts doctrine has been superseded. Thus, we do not address it.

TEX. CIV. PRAC. & REM. CODE § 93.001. It is undisputed that section 93.001 may not be used as an affirmative defense in this case. Martinez was never finally convicted, nor is there any indication that Martinez committed suicide as required by subsection 93.001(a)(2). *See id.*

We must still consider the language of section 93.001, however, to determine whether it evinces legislative intent that the common law unlawful acts doctrine remain available as an affirmative defense when the statutory affirmative defense is not, as Dugger argues. Subsection 93.001(a) initially indicates broad applicability to personal injury and wrongful death cases, but then limits the availability of the affirmative defense to two circumstances. *See id.* § 93.001(a). First, subsection 93.001(a)(1) limits the affirmative defense to cases in which both (1) the plaintiff was finally convicted, and (2) the felony was the sole cause of the damages. *See id.* The phrase "for which the plaintiff has been finally convicted" is an expression of a narrow policy of the state that convicted wrongdoers who committed the most serious crimes should not be permitted to recover. *Id.* § 93.001(a)(1). The narrow focus of subsection 93.001(a)(1) might, in effect, preclude its utility, as the dissent notes, where the plaintiff dies before conviction. *See* ___S.W.3d at ___. Yet this anomaly is less evidence of absurdity than recognition of the Legislature's policy choice that only criminals actually convicted of the most serious crimes will be barred from recovery. Although there is some overlap with the policy underlying the common law unlawful acts doctrine, the statute embodies this policy in a limited and narrow way. Second, subsection 93.001(a)(2) limits the affirmative defense to instances in which the plaintiff was committing or attempting suicide. This is entirely beyond the scope of the unlawful acts doctrine, although the policy underlying the common law doctrine certainly lends support for the suicide affirmative defense. But, again,

although Dugger argues that the broad unlawful acts doctrine survived Chapter 33 and section 93.001, nothing in the statute suggests such legislative intent. *See generally* TEX. CIV. PRAC. & REM. CODE § 93.001. In fact, subsections 93.001(b) and (c) clearly contemplate that the affirmative defense is not available in all cases, and subsection 93.001(a) specifies the narrow circumstances in which a plaintiff's recovery is barred by the plaintiff's conduct.

Arredondo argues that the language in subsection 93.001(c), stating "this section shall prevail over any other law," expresses the Legislature's intention for this statute to supersede the unlawful acts doctrine. Dugger contends that the phrase "an action in which this section applies," limits the statutory affirmative defense to cases in which (1) there has been a final conviction, or (2) there has been a suicide or attempted suicide, but the common law unlawful acts doctrine is available in all other personal injury or wrongful death actions. In considering these competing interpretations, we presume the Legislature enacts a statute with knowledge of existing law. *Acker v. Tex. Water Comm'n*, 790 S.W.2d 299, 301 (Tex. 1990) (citing *McBride v. Clayton*, 166 S.W.2d 125, 128 (Tex. 1942)). When section 93.001 was enacted in 1987, article 2212a's comparative negligence already existed. *Compare* Act of June 19, 1987, 70th Leg., R.S., ch. 824, § 1, sec. 93.001, 1987 Tex. Gen. Laws 2856, 2856 (enactment of § 93.001 in 1987), *with* Act of April 9, 1973, 63d Leg., R.S., ch. 28, §§ 1–2, 4–5, art. 2212a, 1973 Tex. Gen. Laws 41, 41–43 (repealed 1985) (art. 2212a in effect in 1987). Chapter 33, as amended in 1987—the same legislative session as the enactment of section 93.001—provided that "[i]n an action to recover damages for negligence resulting in personal injury, property damage, or death . . . a claimant may recover damages only if his percentage of responsibility is less than or equal to 50 percent." Act of June 16, 1987, 70th Leg., 1st C.S., ch. 2,

§ 2.04, sec. 33.001(a), 1987 Tex. Gen. Laws 37, 41 (amended 1993); *compare id.* (amendment of Chapter 33 in 1987 by 70th Legislature), *with* Act of June 19, 1987, 70th Leg., R.S., ch. 824, § 1, sec. 93.001, 1987 Tex. Gen. Laws 2856, 2856 (enactment of § 93.001 in 1987 by 70th Legislature). Although section 93.001 does not expressly state what "other law" it prevails over, the Legislature likely intended it to prevail over Chapter 33's proportionate responsibility scheme, which had already abrogated the common law unlawful acts doctrine defense. *See* TEX. CIV. PRAC. & REM. CODE § 93.001. The dissent suggests that section 93.001 is a mere reaffirmation by the Legislature of the continued vitality of the unlawful acts doctrine in the context in which a plaintiff was engaged in criminal conduct and subsequently convicted. ___ S.W.3d at ___. In light of Chapter 33's abrogation of common law defenses that provide a complete bar to plaintiff's recovery—including the unlawful acts doctrine—we interpret subsection 93.001(c) as an indication that the Legislature intended the statutory affirmative defense to resurrect only a small portion of the unlawful acts doctrine, providing a complete bar to recovery only in the certain limited circumstances articulated by subsections 93.001(a)(1) and (2). *See* TEX. CIV. PRAC. & REM. CODE § 93.001(c).

IV. Public Policy

Dugger and the dissent argue that if we do not uphold the unlawful acts doctrine, it will be easier for criminals to bring suits and recover. *See* ___ S.W.3d at ___. On the other hand, Arredondo argues that recognizing the unlawful acts doctrine could lead to a slippery slope where it would be impossible for many people to access the judicial system and try their claims because they were engaged in an unlawful act while sustaining injuries. Additionally, the Texas Civil Rights Project, as amicus curiae, contends that a broad unlawful acts doctrine could allow people who

commit serious tortious conduct against others to have civil immunity merely because the claimant was not in compliance with every law at the time of the tortious conduct. *Cf. City of Lancaster v. Chambers*, 883 S.W.2d 650, 653–55 (Tex. 1994) (holding that an injured passenger in a fleeing vehicle could maintain a suit for unreasonable chase because officers owed a duty of reasonable care).

The Legislature has resolved this conflict, however, with the enactment of proportionate responsibility. A plaintiff's actions are taken into account in calculating recovery, but do not completely bar recovery unless his or her actions account for more than fifty percent of the responsibility or satisfy the elements of the statutory affirmative defense in section 93.001. TEX. CIV. PRAC. & REM. CODE. §§ 33.001, .003; *id.* § 93.001. Further, sections 93.001 and 86.002 of the Civil Practice and Remedies Code speak to the policy of the state that in only a very limited set of circumstances will a plaintiff be barred from recovery. *See Fairfield Ins. Co. v. Stephens Martin Paving*, *LP*, 246 S.W.3d 653, 665 (Tex. 2008) ("The Legislature determines public policy through the statutes it passes." (citing *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 628 (Tex. 2004))). To hold that the unlawful acts doctrine applies broadly in the tort context despite the plain language of Chapter 33 and the legislative policy expressed in section 93.001 would render section 93.001 meaningless. *See Hunter v. Fort Worth Capital Corp.*, 620 S.W.2d 547, 551 (Tex. 1981) ("To hold otherwise would violate the rule of statutory construction that the [L]egislature is never presumed to do a useless act."). Nor does this interpretation compel the conclusion that the Legislature intended to make it easier for criminals to bring suit. Following a broad trend, the Legislature has embraced proportionate responsibility. *See* RESTATEMENT (THIRD)

OF TORTS: APPORTIONMENT OF LIABILITY, § 1 cmt. a (2000) (highlighting the almost universal shift from contributory negligence to comparative responsibility). The limited nature of the statutory affirmative defense in section 93.001, requiring a conviction in order to bar suit, reflects that trend as well as the Legislature's prerogative to recognize an exception that applies only under very narrow circumstances.

V. Conclusion

We hold that the common law unlawful acts doctrine is not available as an affirmative defense in personal injury and wrongful death cases. Like other common law assumption-of-the-risk defenses, it was abrogated by Chapter 33's proportionate responsibility scheme. Unless the requirements of the affirmative defense in section 93.001 are satisfied, a plaintiff's share of responsibility for his or her injuries should be compared against the defendant's. We therefore affirm the judgment of the court of appeals, which reversed the summary judgment and remanded the case to the trial court.

_____

Paul W. Green
Justice

OPINION DELIVERED: August 30, 2013

IN THE SUPREME COURT OF TEXAS

NO. 11-0549

GEOFFREY DUGGER, PETITIONER,

v.

MARY ANN ARREDONDO, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF JOEL MARTINEZ, DECEASED, RESPONDENTS

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

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

Given that we have repeatedly refused to hold a social host liable for providing alcohol to a guest,[1] one will wonder why we are engaging in the unlikely assumption that a social host may be liable for not preventing a guest from overdosing on his own heroin. The answer is that the parties have agreed to argue only the applicability of the common-law unlawful acts doctrine as a defense to liability, assuming some duty of care exists.[2] The viability of the common-law doctrine is so

[1] *Reeder v. Daniel*, 61 S.W.3d 359, 364-365 (Tex. 2001) (social host has no duty not to make alcohol available to minors); *Smith v. Merritt*, 940 S.W.2d 602, 605 (Tex. 1997) (social host has no duty to passenger to prevent nineteen-year-old guest from drinking and driving); *Graff v. Beard*, 858 S.W.2d 918, 921-922 (Tex. 1993) (social host has no duty to third party to prevent adult guest from drinking and driving).

[2] 347 S.W.3d 757, 760 n.2 ("Dugger's motion [for summary judgment] also . . . attack[ed] the elements of Arredondo's claims. By a rule 11 agreement at the trial court, the parties submitted to the trial court only the unlawful acts doctrine defense . . . .").

conjectural in this case, we ought to leave the issue for another day.[3] But the Court holds that the doctrine has been abrogated by statute — specifically, by the comparative responsibility scheme in Chapter 33 of the Texas Civil Practice and Remedies Code, and by a statute on the affirmative defense of assumption of the risk, Section 93.001 of the Code.[4]

Correctly understood, the unlawful acts doctrine has nothing to do with comparative fault. A plaintiff who kills himself by ingesting too much of a substance he knows or should know is toxic is at fault irrespective of whether his actions are illegal. The doctrine holds that in some instances a plaintiff whose injuries are directly caused by conduct in which he was forbidden by law to engage is not entitled to assert a claim for damages against someone whose fault may also have caused the injury. Confusing felonies with tortious conduct, as the Court does, ends up treating heroin like aspirin.[5]

Section 93.001, the other basis for today's ruling, is nothing more than the Legislature's reaffirmation that the unlawful acts doctrine applies specifically when the plaintiff or her decedent was not only engaged in criminal conduct but was also convicted of the crime.[6] Nothing in the

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[3] *See, e.g.*, *Valenzuela v. Aquino*, 853 S.W.2d 512, 514 (Tex. 1993) (refusing to consider the possibility of a defense to liability not yet established).

[4] All statutory references are to the Texas Civil Practice & Remedies Code unless otherwise noted.

[5] The Court's conclusion that Chapter 33 supplants the common-law unlawful acts doctrine may surprise the parties, since they mentioned Chapter 33 only in a few sentences in the trial court, not at all in the court of appeals, and in a total of three pages of briefing in this Court.

[6] *See Lord v. Fogcutter Bar*, 813 P.2d 660, 662 n.9 (Alaska 1991) (citing, as support for applying the unlawful acts doctrine, a statute providing that a "person who suffers personal injury or death may not recover damages . . . if the injuries or death occurred while the person was engaged in the commission of a felony, the person has been convicted of the felony, including conviction based on a guilty plea or plea of nolo contendere, and the felony substantially contributed to the injury or death").

statutory text suggests that it was intended to abrogate the broader common-law defense. The Court interprets the statute as limiting the defense to certain situations — when nothing suggests that it does — thereby rendering the statute largely ineffectual, even in the situations it purports to cover. It defies reason to think that the Texas Legislature in 1987 intended to make it easier for criminals to recover damages for injuries they caused themselves while committing illegal acts.[7]

Accordingly, I respectfully dissent.

Before turning to the legal issues, we should have the facts in mind. Geoffrey Dugger, 25 at the time, and Joel Martinez, 21, friends for several years, decided to spend Friday evening together doing what they often did: drinking alcohol, smoking marijuana, and snorting "cheese" — black tar heroin mixed with Tylenol PM®. Martinez lived with his mother, Mary Ann Arredondo, and stepfather in their home. When Dugger drove over to pick him up, Martinez was drinking a beer and said he had been snorting cheese. Dugger saw Martinez put three or four baggies of black tar heroin in his pocket, and as they left, Martinez asked Arredondo for Tylenol for a headache. On the way to Dugger's parents' home, where Dugger lived, he and Martinez stopped to buy a fifth of tequila and cigars to fill with the marijuana they had. On arrival, they visited with Dugger's parents a few minutes, then went to his bedroom where they spent the evening watching television, listening to music, eating pizza, drinking tequila, and snorting cheese. At one point, they went out in the backyard and smoked marijuana.

As midnight approached, Martinez complained that he did not feel well. He drank a little

[7] Act of May 31, 1987, 70th Leg., R.S., ch. 824, 1987 Tex. Gen. Laws 2856.

water and fell asleep. Not long after, he began to make a gurgling sound as if he were trying to vomit, and Dugger could not wake him. Alarmed, Dugger called down the hall to his parents. Dugger called Martinez's mother, Arredondo, but Dugger told her only that Martinez was throwing up, and that he and Martinez had been drinking, not that they had been using drugs. But eight minutes later, Dugger's mother called Arredondo to tell her to come immediately, and that Martinez looked like he was dying. Arredondo arrived only five or six minutes later. Dugger's father called 9-1-1. Police and paramedics arrived within a few minutes, but Dugger did not tell them, either, that Martinez had been using drugs. Martinez never revived and died about an hour later at the hospital.

Arredondo sued Dugger almost two years later, alleging that Dugger was negligent in allowing Martinez into his parents' home "to consume dangerous quantities of illegal substances that [Dugger] knew or should have known could foreseeably result in serious bodily injury and/or death to [Martinez]", in failing to timely call 9-1-1, and in failing to disclose Martinez's drug consumption to Arredondo and the police and paramedics.

The common law regarding a criminal's entitlement to the benefits and protections of the law has evolved over centuries. Pollock and Maitland explain that before the Norman Conquest, it was decreed of outlaws, *caput gerat lupinum*:

> He who breaks the law has gone to war with the community; the community goes to war with him. It is the right and duty of every man to pursue him, to ravage his land, to burn his house, to hunt him down like a wild beast and slay him; for a wild beast he is; not merely is he a 'friendless man,' he is a wolf.[8]

[8] 2 FREDERICK POLLOCK & FREDERIC MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 449 (2d ed. Cambridge University Press 1899).

Outlawry was banned by the Magna Charta[9] and by the thirteenth century "had lost its exterminating character",[10] but the law remained draconian: "[o]f every proprietary, possessory, contractual right [the outlaw] is deprived".[11] In time, outlawry rightly came to be regarded as barbaric.[12] Outlawry is prohibited by the Texas Constitution.[13]

But while the law has come to take a measured view of what rights should be forfeited as a consequence of illegal conduct, it has retained a resistance to asserting rights based on illegal conduct in certain instances. In Justice Cardozo's words, there remains, "deeply fastened in universal sentiments of justice, the principle that no man should profit from his own inequity or take advantage of his own wrong."[14] The Latin maxim, *ex turpi causa non oritur actio*, expresses a similar idea. Thus, the law restricts recovery on illegal contracts,[15] and while the principle's

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[9] MAGNA CHARTA ch. 39, *translated in* 3 VERNON'S ANNOTATED CONSTITUTION OF THE STATE OF TEXAS 624, 628 (1993) ("No freeman shall be taken or imprisoned, or deseised, or outlawed, or banished, or any ways destroyed, nor will we pass upon him, nor will we send upon him, unless by the lawful judgment of his peers, or by the law of the land.").

[10] 2 POLLOCK & MAITLAND, *supra* note 8, at 449.

[11] 1 *id.* at 477.

[12] 2 *id.* at 450.

[13] TEX. CONST. art. I, § 20 ("No citizen shall be outlawed."). *See In re J.W.T.*, 872 S.W.2d 189, 206-207 (Tex. 1994) (Cornyn, J., dissenting) (tracing the prohibition of outlawry from Magna Charta to article I, section 20 of the Texas Constitution).

[14] BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 41 (Yale University Press 1921).

[15] *Lewis v. Davis*, 199 S.W.2d 146, 151 (Tex. 1947); *see also* RESTATEMENT (SECOND) OF CONTRACTS ch. 8, intro. note (1981) (addressing courts' willingness to refuse to enforce contracts on grounds of public policy, including discouraging undesirable conduct such as illegality).

application to tort law has become controversial,[16] at the beginning of the twentieth century, it was "conceded by all, that if an unlawful act was the cause, or concurring cause, of the damage, the action is barred."[17] That was certainly this Court's view in 1888, when it wrote in *Gulf, C. & S.F. Ry. v. Johnson*:

> It may be assumed, as undisputed doctrine, that no action will lie to recover a claim for damages, if to establish it the plaintiff requires aid from an illegal transaction, or is under the necessity of showing or in any manner depending upon an illegal act to which he is a party. . . . In all the cases where a recovery of damages for some injury has been denied upon the ground of vice or illegality in the plaintiff's cause of action, it is upon the principle that the wrong of the plaintiff must have been some act or conduct having the relation to that injury of a cause to the effect produced by it. In those cases where it is shown that, at the time of the injury, the plaintiff was engaged in the denounced or illegal act, the rule is, if the illegal act contributed to the injury, he cannot recover; but, if plaintiff's act did not contribute to the injury, the fact alone that at the time he was engaged in an act in violation of law will not of itself preclude a recovery.[18]

This is what we have called the unlawful acts doctrine.

The doctrine absolutely bars a claim of liability. A court's refusal to enforce an illegal contract is not to benefit or punish either party but to protect public policy in not allowing the law to further an illegal purpose.[19] The application in tort cases serves the same end. When contributory negligence was also an absolute bar to liability, there was little need to invoke the unlawful acts

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[16] *See, e.g.*, Joseph H. King, *Outlaws and Outlier Doctrines: The Serious Misconduct Bar in Tort Law*, 43 WM. & MARY L. REV. 1011, 1019-1021 (2002); Bruce MacDougall, *Ex Turpi Causa: Should a Defence Arise from a Base Cause?*, 55 SASK. L. REV. 1, 2 (1991); Robert A. Prentice, *Of Tort Reform and Millionaire Muggers: Should an Obscure Equitable Doctrine be Revived to Dent the Litigation Crisis?*, 32 SAN DIEGO L. REV. 53, 57-62 (1995).

[17] Harold S. Davis, *The Plaintiff's Illegal Act as a Defense in Actions of Tort*, 18 HARV. L. REV. 505, 506 (1905).

[18] 9 S.W. 602, 603 (Tex. 1888) (internal citations omitted).

[19] *Lewis*, 199 S.W.2d at 151; *see also* RESTATEMENT (SECOND) OF CONTRACTS, *supra* note15.

doctrine as a defense.[20] But with the advent of comparative responsibility, the basis for the contributory negligence defense has narrowed: a plaintiff is precluded only from recovering those damages he himself caused. There has been no corresponding change in the basis for the unlawful acts doctrine: it remains an absolute bar to liability.

For this reason, Chapter 33 expressly does not apply to an action in which the unlawful acts doctrine is invoked. Section 33.002(a)(1) states in pertinent part: "This chapter applies to . . . any cause of action based on tort in which a defendant, settling person, or responsible third party is found responsible for a percentage of the harm for which relief is sought". When the unlawful acts doctrine applies, no such party can be found responsible for a percentage of the plaintiff's harm because the plaintiff's action is barred.

The Court seems to think that because Chapter 33 abrogated other common law doctrines that barred recovery based on the plaintiff's conduct, like assumption of the risk, imminent peril, and last clear chance, it also abrogated the unlawful acts doctrine. But comparative responsibility determines the amount of recovery based on an allocation of fault contributing to injury. The unlawful acts doctrine holds that the allocation should not be made because any recovery rewards criminal conduct. This case is a good example. Assuming, as we must, that Dugger should have called 9-1-1 a few minutes earlier and should have disclosed Martinez's ingestion of heroin, what is his

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[20] *See* 1 DAN B. DOBBS ET AL., THE LAW OF TORTS § 228, at 816 (2011) ("Before the adoption of comparative negligence systems it would not have mattered whether the court invoked the immoral plaintiff principle or the contributory negligence bar, since both would have barred the plaintiff. After the adoption of comparative negligence, however, a rule that bars the claim of the immoral plaintiff potentially conflicts with the comparative negligence system of apportionment, which would only reduce damages."); King, *supra* note 16, at 1020 ("The serious misconduct doctrine had essentially the same effect as contributory negligence, and was thus largely subsumed into the broader contributory negligence defense.").

percentage of responsibility? How much should Dugger pay Arredondo for not acting promptly and not being forthcoming when Martinez was prohibited by law from ingesting the drug that killed him? The point is not simply that the question is hard, though it is, and assigning it to a jury makes it no easier. The point is that to award any damages lessens the law's prohibition against the use of heroin.

Now, if a robber slips in a puddle on the bank floor and breaks his leg, he can sue the bank. A rapist who falls in a hole in the victim's backyard can sue for damages.[21] Lest these examples be thought extreme or unlikely, consider this: can a teenager sue a boy who sold him fireworks from which he extracted gunpowder to make a pipe bomb that exploded in his hands? No, in New York, said the New York Court of Appeals in *Barker v. Kallash*.[22] In Texas, after today, the answer is yes.[23]

One criticism of the unlawful acts doctrine, a criticism with substance, is that it does not have

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[21] *Contrast Lord v. Fogcutter Bar*, 813 P.2d 660, 662 (Alaska 1991) (plaintiff, who was allegedly over-served by defendant before he left with a woman — and was later convicted of kidnapping and raping her — was barred as a matter of public policy from recovering damages resulting from his imprisonment).

[22] 63 N.Y.2d 19, 22-24, 28-29, 468 N.E.2d 39, 40-44 (1984). *Contrast Flanagan v. Baker*, 35 Mass. App. Ct. 444, 449, 621 N.E.2d 1190, 1193 (1993) (a boy injured while constructing a pipe bomb out of fireworks in defendants' basement was not barred from recovery).

[23] *But cf. Peeler v. Hughes & Luce*, 909 S.W.2d 494, 498 (Tex. 1995) ("Because of public policy, we . . . hold that plaintiffs who have been convicted of a criminal offense may negate the sole proximate cause bar to their claim for legal malpractice in connection with that conviction only if they have been exonerated on direct appeal, through post-conviction relief, or otherwise."); *Sharpe v. Turley*, 191 S.W.3d 362, 366 (Tex. App.–Dallas 2006, pet. denied) (plaintiff illegally took documents from dumpster, and so could not sue for fraud, conversion, or recovery of those documents); *Ward v. Emmett*, 37 S.W.3d 500, 502 (Tex. App.–San Antonio 2001, no pet.) (plaintiff, who had long-standing mental and behavioral problems and was eventually convicted of killing her mother, could not pursue claims against her health care providers; her injuries were deemed caused by her illegal conduct); *Dover v. Baker, Brown, Sharman & Parker*, 859 S.W.2d 441, 451 (Tex. App.–Houston [1st Dist.] 1993, no writ) (public policy barred recovery when plaintiff was a knowing and willful party to tax fraud which contributed to his injury).

sufficient limiting principles. The doctrine has proven especially difficult to apply against undocumented aliens.[24] But that criticism is hardly fair when negligence is the failure to use ordinary care as would a reasonable person. The law has proven that it can infuse real meaning into general concepts like ordinary care and reasonableness. No one argues that a motorist broadsided by a drunk driver should be prohibited from recovering because he was driving five miles an hour over the speed limit. Nor should the doctrine be used to resurrect outlawry for undocumented aliens. It is true that in the nineteenth century, the doctrine was used to deny recovery to persons injured while violating Blue Laws.[25] But if we were to discard every claim and defense that has been misused, there would be nothing left of the law. Properly applied, the doctrine serves the valuable purpose of promoting compliance with the law and should be retained.

When the purpose of a criminal law is to protect a plaintiff and his violation of that law is the direct cause of injury that would not have occurred otherwise, he should not be permitted to sue another. As Justice Brandeis observed in another context:

> The governing principle . . . is that a court will not redress a wrong when he who invokes its aid has unclean hands. . . . The court's aid is denied . . . when [the

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[24] Brief of Amicus Curiae Texas Civil Rights Project in Support of Respondents. *Compare Carcamo-Lopez v. Doe*, 865 F. Supp. 2d 736, 766-767 (W.D. Tex. 2011) (citing the court of appeals' opinion in the present case to conclude that Texas' unlawful acts doctrine does not bar suit by an undocumented alien accidentally struck by a border patrol vehicle while crouching in the dark in vegetation near the bank of the Rio Grande River), *with Rico v. Flores*, 481 F.3d 234, 243-244 (5th Cir. 2007) (concluding that it was uncertain whether the Texas unlawful acts doctrine would bar suit for the wrongful death of undocumented aliens who died in a railcar while entering the country illegally against the person hired to help them or the railway), *and Fuentes v. Alecio*, Civil Action No. C-06-425, 2006 U.S. Dist. LEXIS 93013, 2006 WL 3813780 (S.D. Tex. Dec. 26, 2006) (dismissing action for the wrongful death of an undocumented alien who expired from heat exhaustion while entering the country illegally as barred by the unlawful acts doctrine).

[25] *See, e.g.*, *Bosworth v. Inhabitants of Swansey*, 51 Mass. 363 (1845) (barring an action by an injured plaintiff illegally traveling on a Sunday); *Hinckley v. Inhabitants of Pensobscot*, 42 Me. 89 (1856) (barring an action for injuries to a plaintiff's horse caused by a defective highway because plaintiff was illegally traveling during daylight hours on a Sunday).

> plaintiff] has violated the law in connection with the very transaction as to which he seeks legal redress. Then aid is denied despite the defendant's wrong. It is denied in order to maintain respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination.[26]

The unlawful acts doctrine was not abrogated by Chapter 33 and should remain part of the common law of Texas.

Finally, the doctrine has not been abrogated by Section 93.001. Section 93.001(a) states in pertinent part:

> It is an affirmative defense to a civil action for damages for personal injury or death that the plaintiff, at the time the cause of action arose, was:
>
> (1) committing a felony, for which the plaintiff has been finally convicted, that was the sole cause of the damages sustained by the plaintiff; or
>
> (2) committing or attempting to commit suicide, and the plaintiff's conduct in committing or attempting to commit suicide was the sole cause of the damages sustained; provided, however, if the suicide or attempted suicide was caused in whole or in part by a failure on the part of any defendant to comply with an applicable legal standard, then such suicide or attempted suicide shall not be a defense.

One obvious problem, that a suicide victim can never be a plaintiff, can be cured by reading "plaintiff" to include a decedent's heirs and beneficiaries. The Court reads the statute not only to provide an affirmative defense, which it plainly does, but to confine the defense to the circumstances described. That interpretation renders the statute critically ineffectual and absurd because the defense cannot be used in wrongful death cases unless the decedent is convicted posthumously or the decedent lingers between injury and death long enough to be convicted. Since neither of those

[26] *Olmstead v. United States*, 277 U.S. 438, 483-484 (1928) (Brandeis, J., dissenting) (footnotes omitted).

things is likely to ever happen, the statute provides an affirmative defense in wrongful death cases . . . never.

Subsection (c) states: "In an action to which this section applies, this section shall prevail over any other law." This plainly preempts any law that *denies* an affirmative defense in the circumstances described but leaves undisturbed a law that provides the defense in other situations, as the unlawful acts doctrine does. For the statute to have the effect the Court ascribes to it, it should state: "It is an affirmative defense to a civil action for damages for personal injury or death that . . ." — strike "that" and instead read — "*only if* . . . ."

Even if the Court's interpretation of the statutory text were reasonable, apart from the statute's ostensible purpose and the interpretation's effect on the law in severely limiting the common-law unlawful acts doctrine, it is simply inconceivable that the Legislature intended in enacting Section 93.001 to make it easier for criminals to sue for damages caused by their own illegal acts. For this, the Court has no answer.

The Court's misinterpretation of Chapter 33 and Section 93.001 is patent in its effect on Texas law. Now a plaintiff cannot sue for breach of an illegal contract even if he himself was not at fault in the transaction, but a plaintiff directly injured by his own illegal conduct can sue in tort for damages.

The unlawful acts doctrine is not merely contributory negligence that can be compared with other fault in allocating responsibility for a plaintiff's injuries. Although it must not be misused, in appropriate cases the unlawful acts doctrine protects the integrity of the legal system. The doctrine has not been abrogated by either the comparative responsibility scheme in Chapter 33 or Section 93.001's affirmative defense. Because the Court does not agree, I respectfully dissent.

Nathan L. Hecht
Justice

Opinion delivered: August 30, 2013

IN THE SUPREME COURT OF TEXAS

NO. 11-0554

CITY OF LORENA, TEXAS, PETITIONER,

v.

BMTP HOLDINGS, L.P., RESPONDENT

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

Argued November 6, 2012

JUSTICE GUZMAN delivered the opinion of the Court, in which JUSTICE GREEN, JUSTICE JOHNSON, JUSTICE WILLETT, JUSTICE LEHRMANN, JUSTICE BOYD, and JUSTICE DEVINE joined.

JUSTICE LEHRMANN filed a concurring opinion.

JUSTICE HECHT filed a dissenting opinion, in which CHIEF JUSTICE JEFFERSON joined.

Municipalities must ensure that essential public facilities are available to their residents. To assist in accomplishing this goal, the Legislature has allowed municipalities under Chapter 212 of the Local Government Code to enact temporary moratoria on "property development" if they can demonstrate the moratoria are needed to prevent a shortage of essential public facilities. That right, however, is subject to certain limitations. One limitation is that a municipality may not enact such a moratorium unless it contains a summary of evidence showing that it is limited to property that has

not been approved for development,[1] which the statute defines to include subdivision or construction.

Here, the municipality approved a subdivision plat and subsequently enforced a moratorium against the property, citing the municipality's additional sewage system capacity requirements. The landowner sued for a declaratory judgment that the moratorium did not apply against its approved development and for damages arising from a regulatory taking under an inverse condemnation claim. The trial court granted summary judgment in favor of the municipality on the declaratory judgment and inverse condemnation claims and awarded attorney's fees to the municipality. The court of appeals reversed, holding that the moratorium could not apply to the property in question because it had been approved for development before the moratorium took effect. The court remanded the inverse condemnation and attorney's fees claims. We hold that the moratorium cannot apply to the property because the municipality approved the property for subdivision before it enacted the moratorium, and the owner is therefore entitled to prevail on its declaratory judgment claim. We further conclude that, with respect to the inverse condemnation claim, the trial court must resolve factual disputes pertaining to the extent of the government's interference with the owner's use and enjoyment of its property before the merits of the takings claim are judicially addressed. Accordingly, we affirm the judgment of the court of appeals and remand this cause to the trial court for further proceedings.

[1] TEX. LOC. GOV'T CODE § 212.135(b)(2)(B).

I. Background

This appeal concerns a series of moratoria on sewer connections the City of Lorena (City) applied to seven residential lots due to capacity issues with the municipal sewer system. Various statutes and regulations require municipalities to be proactive with regard to the capacity of their utilities. For example, Chapter 212 of the Local Government Code requires a municipality to confirm that when it approves a development plat, the plat conforms with the municipality's plans and ordinances concerning current and future utilities. TEX. LOC. GOV'T CODE § 212.047(1). Additionally, the Texas Commission on Environmental Quality (TCEQ) requires municipalities whose sewers reach 75% capacity to make plans to increase capacity and obtain TCEQ authorization to commence construction of that additional capacity when the system reaches 90% capacity. 30 TEX. ADMIN. CODE § 305.126.

The TCEQ initiated enforcement proceedings against the City regarding its sewer system in late 2004. At that point in time, the City had preliminary studies and plans for a replacement sewage treatment plant but had not begun construction.

BMTP Holdings, L.P. (BMTP) is a residential real estate developer operating in the City. As a developer, BMTP does not construct residences. Rather, it obtains municipal approval of plats to divide property into residential lots and build community infrastructure such as roads, storm drains, curbs, and taps into the municipality's sewer system. BMTP then sells the subdivided property to builders who obtain municipal permits and construct houses on the lots. Prior to 2003, BMTP began subdividing the property at issue for a residential subdivision named South Meadows

Estates. The project was divided into five phases, and this appeal concerns seven lots in the fourth and fifth phases.

In January 2006, the City Council approved the final plat for phase five of South Meadows Estates, having already granted final approval of phase four. The City Manager then executed the plat, indicating the City's acceptance of it and its eligibility for filing with the county clerk's office. In the spring of 2006, BMTP began building the infrastructure for the fifth phase of the development, which it completed in May 2006.

Also during the spring of 2006, engineers the City retained to evaluate its sewage system informed the City that the system was over capacity and could pose problems if the volume of sewage continued to increase. The engineers recommended a temporary moratorium on sewer tap permits to allow the City time to remedy the problem.

The City enacted a moratorium on June 5, 2006, which stated:

> [N]o city employee . . . shall accept for filing any applications for the issuance of one or more sewer taps. Applications, together with any documents or fees accompanying the applications, which are submitted during the duration of this ordinance, shall be returned to the applicant as unfiled.

The moratorium was to last 120 days and specifically exempted pending sewer tap applications and completed but inactive sewer tap construction. The moratorium also allowed aggrieved applicants to appeal to the City Manager or his designee, showing why the moratorium would deprive the applicant of vested property rights. Importantly, though the moratorium contained some of the written findings and a portion of the summary of the evidence required by Chapter 212 of the Local Government Code, it contained no findings or a summary showing that the moratorium was limited

to property that had not been approved for development. *See* TEX. LOC. GOV'T CODE § 212.135(b)(2)(B).

Shortly after the moratorium's adoption, the City Manager delivered the final approved plat to a manager of BMTP. The City Manager informed BMTP's manager that the City had adopted a moratorium on the issuance of sewer tap permits and intended to enforce that moratorium against South Meadows Estates.

The City Council voted to extend the moratorium seven times, each time for a 120-day period. The first extension contained substantially the same language as the original moratorium with two additions. First, at the request of BMTP, the extension exempted fifteen lots in South Meadows Estates that BMTP had contracted to sell prior to the moratorium. The City refused to exempt BMTP's remaining seven unsold lots. Second, the extension contained a new finding that the City was taking steps to become a member of the Waco Metropolitan Area Regional Sewerage System (WMARSS).

The second extension largely contained the terms of the first extension but changed the phrase "sewer taps" to "sewer connections."[2] The third and fourth extensions contained the same language and findings as the second extension.

After the City enacted the fourth extension, BMTP sent a letter to the City Attorney asking the City to reconsider its application of the moratorium and extensions to BMTP's seven remaining lots. Specifically, BMTP asserted that the City had already approved the plats for the seven lots, thus

[2] There is some dispute in the record regarding the nature of this change from "sewer taps" to "sewer connections." For the reasons explained in Part II.B, *infra*, we need not reach this issue.

exempting them by law from any moratorium. The City Attorney responded that the seven lots would not be exempted because the City had only approved the lots for subdivision—not construction. The City's fifth extension contained the same language as the previous extensions.

In its sixth extension, the City added a new finding that the exemptions set forth in the original moratorium and its extensions demonstrated that the moratorium was reasonably limited to property that had not been approved for the construction of residential or commercial buildings. The sixth extension also stated that the City had paid the equity cost to become a member of WMARSS and the cost of new treatment capacity to WMARSS but that such additional capacity would not be available until after the expiration of the extension.

Meanwhile, BMTP fielded inquiries about its seven non-exempt lots, but no potential buyer maintained interest in the lots once BMTP disclosed the moratorium. BMTP asserts that the value of these seven lots fell 83% while the moratorium and extensions were in effect. With the sixth extension still in effect, BMTP sought a declaratory judgment that the moratorium and its extensions could not be enforced against its remaining seven lots.

Subsequently, the City extended its 2006 moratorium for the seventh and final time, mirroring the language of the sixth extension. The City later re-initiated the moratorium process and adopted a new moratorium in November 2008, which was substantively similar to the sixth and seventh extensions.

In February 2009, BMTP amended its petition to include the new moratorium and added a claim for inverse condemnation, asserting that the wrongful application of the moratorium amounted to a regulatory taking. Both parties moved for summary judgment on the declaratory judgment

claim, and the City also moved for summary judgment on the inverse condemnation claim. The trial court granted summary judgment to the City, first on the declaratory judgment claim and subsequently on the inverse condemnation claim, and awarded attorney's fees and costs to the City.

The court of appeals reversed, holding that section 212.135 of the Local Government Code prohibits municipalities from enforcing moratoria against approved development. 359 S.W.3d 239, 245. The court of appeals also remanded the inverse condemnation claim, finding that the trial court's summary judgment could have been based on its ruling on the declaratory judgment claim. *Id.* at 246. Finally, the court of appeals remanded the issue of attorney's fees for a determination of whether the grant remained equitable and just. *Id.* at 247; *see* TEX. CIV. PRAC. & REM. CODE § 37.009.

II. Discussion

The City argues that BMTP's claims are not ripe because BMTP failed to comply with the procedures set forth in the moratorium. Additionally, the City asserts the moratorium validly applies to BMTP's seven lots and, therefore, BMTP's inverse condemnation claim is meritless. We address each argument in turn.

A. Ripeness

Initially, the City contends that BMTP's claims are not ripe because BMTP has not complied with the moratorium's application, appeal, or waiver procedures. The City's argument concerning the application process is unavailing because the process does not give rise to a mandatory requirement and, as structured, would nonetheless be futile. The moratorium provided that "no city employee . . . shall accept for filing any applications for the issuance of one or more sewer

connections," and that the "[a]pplications, together with any documents or fees accompanying the applications . . . shall be returned to the applicant as unfiled." We first note that this procedure does not impose a requirement that an aggrieved landowner file an application; rather, it is a process by which the City will return any applications to the owner as unfiled. Moreover, this process would effectively render futile any attempt by BMTP to file an application as it would have been summarily returned. *See Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 933 (Tex. 1998) (holding that "futile variance requests or re-applications are not required" to make regulatory takings claims ripe). Thus, the moratorium's application process is not a bar to BMTP's claims.

Regarding the appeal procedure, the moratorium stated that an "applicant for a sewer connection application aggrieved by the City's decision not to accept for filing or to further process such application may appeal for relief to the City Manager, or his designee." We have recognized that "administrative bodies only have the powers conferred on them by clear and express statutory language or implied powers that are reasonably necessary to carry out the Legislature's intent." *Thomas v. Long*, 207 S.W.3d 334, 340 (Tex. 2006). If the Legislature grants an administrative body sole authority to make a determination in a dispute, the municipality has exclusive jurisdiction over the dispute and "a party must exhaust all administrative remedies before seeking judicial review of the decision." *Id*. Here, the parties have not cited to, nor are we aware of, any such Legislative grant of sole authority. Accordingly, we cannot say that failure to exhaust administrative remedies bars BMTP's claims.

Lastly, we cannot agree with the City's argument that BMTP's claims must fail because it did not obtain a waiver as provided by the moratorium. The moratorium sets forth a waiver

procedure for aggrieved applicants who "claim[] a right obtained under a development agreement" or "provid[e], at the applicant's expense, the additional capacity to the City's wastewater treatment plant . . . ." This waiver procedure tracks the statutory requirement for a waiver procedure for rights obtained under a development agreement or for a landowner that will fund public facilities at its own cost. TEX. LOC. GOV'T CODE § 212.137(a). But BMTP claims no right under a development agreement and has not volunteered to fund additional sewage system capacity; hence, the moratorium's waiver procedure does not apply to BMTP. In sum, we conclude the City's ripeness assertions regarding the application, appeal, and waiver procedures in the moratorium do not bar BMTP's claims.

B. Declaratory Judgment

Having resolved the City's ripeness arguments, we now turn to whether the moratorium validly applies to BMTP's seven lots. The crux of this case involves statutory construction. Our goal in interpreting any statute is to "ascertain and give effect to the Legislature's intent as expressed by the language of the statute." *City of Rockwall v. Hughes*, 246 S.W.3d 621, 625 (Tex. 2008). To determine that intent, we look first to the "plain and common meaning of the statute's words." *State v. Gonzalez*, 82 S.W.3d 322, 327 (Tex. 2002). We examine statutes as a whole to contextually give meaning to every provision. *Id.* "Municipal ordinances must conform to the limitations imposed by the superior statutes, and only where the ordinance is consistent with them, and each of them, will it be enforced." *Bolton v. Sparks*, 362 S.W.2d 946, 950 (Tex. 1962); *see also Quick v. City of Austin*, 7 S.W.3d 109, 116 (Tex. 1998) ("[I]n reviewing an ordinance, the court is to consider all the

circumstances and determine as a matter of law whether the legislation is invalidated by a relevant statute or constitutional provision.").

As an initial matter, we determine that the moratorium relevant to BMTP's declaratory judgment claim is the November 2008 moratorium. BMTP filed its live pleading in March 2009, which sought "[a] declaration that under Chapter 212 of the Local Government Code, any and all *existing* moratoriums . . . do not apply to any of the lots contained in South Meadows Estates . . . ." (emphasis added). At the time of this amended pleading, only the November 2008 moratorium was in effect. Accordingly, any declaration must be in regard to the November 2008 moratorium.[3]

We now turn to whether the November 2008 moratorium complied with Chapter 212 of the Local Government Code. Section 212.133 states that "[a] municipality may not adopt a moratorium on property development unless the municipality: . . . makes written findings as provided by Section 212.135 . . . ." TEX. LOC. GOV'T CODE § 212.133(2). Section 212.135 provides that "[a] moratorium is justified by demonstrating a need to prevent the shortage of essential public facilities. The municipality must issue written findings based on reasonably reliable information." *Id.* § 212.135(a). One such required finding is "a summary of: . . . evidence demonstrating that the moratorium is reasonably limited to . . . property that has not been approved for development because of the insufficiency of existing essential public facilities." *Id.* § 212.135(b)(2)(B). Thus, in context, the plain language of these statutes provides that a moratorium regarding a shortage of

[3] As explained in Part II.C, *infra*, the prior ordinances, while irrelevant to the declaratory judgment claim, are relevant to the inverse condemnation claim because they involve the character of the government's action during the time it was applying the moratoria against BMTP.

essential public facilities must not affect approved development. *Id.* §§ 212.133(2), 212.135. It therefore follows that a moratorium enacted to prevent a shortage of essential public facilities that affects approved development conflicts with the controlling statute and is invalid. *Id.* § 212.135; *see Bolton*, 362 S.W.2d at 950.

At this juncture, the parties dispute what constitutes approved development under Chapter 212, which defines development as "the construction, reconstruction, or other alteration or improvement of residential or commercial buildings or the subdivision or replatting of a subdivision of residential or commercial property." TEX. LOC. GOV'T CODE § 212.131(3). The City contends that because development is subdivision "or" construction, it may place a moratorium on construction for property it has approved for subdivision. BMTP responds, and the court of appeals agreed, that because Chapter 212 defines development as subdivision or construction, the City may not enforce a moratorium on property it previously approved for subdivision or construction. We agree with BMTP and the court of appeals.

Chapter 212 defines development as "the construction, . . . of residential or commercial buildings or the subdivision . . . of residential or commercial property." *Id.* Under the plain language of the statute, subdivision constitutes development; thus, a moratorium may not affect property previously approved for subdivision (or construction). *Id.* The two types of development (subdivision and construction) have separate approval processes and often involve, as here, separate entities pursuing subdivision and construction for the same property. *See id.* § 212.001 *et seq.* (regulating municipal platting process for subdivisions); *id.* § 245.001 *et seq*. (regulating issuance of permits for construction). We have previously held that the Legislature's use of the disjunctive

word "or" is significant when interpreting statutes. *See Spradlin v. Jim Walter Homes, Inc.*, 34 S.W.3d 578, 581 (Tex. 2000) ("This reading is supported by the use of the disjunctive conjunction 'or' between the two phrases, which signifies a separation between two distinct ideas."). By using the word "or" in defining "development," the Legislature indicated that these distinct aspects are brought within the singular scope of the term development. *Id*. (noting that the use of the word "or" signifies separation of distinct ideas).[4] Giving effect to the statute's plain language, a property need not be approved for both the subdivision and construction aspects of development to be insulated from moratoria regarding shortages of essential public facilities; it is insulated from such subsequent moratoria when the municipality approves either subdivision or construction. *See* TEX. LOC. GOV'T CODE §§ 212.131(3), 212.135(b)(2)(B).

Construing the definition of development to encompass both subdivision and construction also comports with the broader statute. *See Gonzalez*, 82 S.W.3d at 327. When a municipality approves a plat, Chapter 212 requires it to confirm that the plat conforms with its plans and ordinances concerning current and future utilities. TEX. LOC. GOV'T CODE § 212.047(1). This requires the municipality to assess at the start of the development process the impact on utilities the development will have when completed. The Legislature's requirement that the municipality engage in this assessment at the outset buttresses the conclusion that the Legislature intended Chapter 212

[4] *See also Cherokee Water Co. v. Freeman*, 33 S.W.3d 349, 354 (Tex. App.—Texarkana 2000, no pet.) (holding that the word "or" in the phrase "living or visiting with them" was intended to allow either "living" or "visiting" to modify the pronoun "them," thereby making either a viable way of fulfilling the requirements of the clause).

to prevent moratoria regarding shortages of essential public facilities from applying to either approved subdivision or approved construction.

The City responds that the difference between Chapters 212 and 245 of the Local Government Code compel the conclusion that Chapter 212 grants it the right to place a moratorium on construction that applies to approved subdivision.[5] Chapter 245 of the Local Government Code grants vested rights to entities in most circumstances to develop property under the ordinances in effect when they first filed their plat applications. *Id.* § 245.002. The City notes that Chapter 245 collectively defines the various approvals needed for a project as a single series of permits. *Id.* § 245.002(b). The City reasons that the Legislature could have collectively identified property development as a project in Chapter 212 as it did in Chapter 245 and prohibit moratoria from affecting development that was approved at any stage. But the City's argument ignores that the Legislature can accomplish the same goal with different language, as it did here. Just as Chapter 245 addresses a project in terms of a series of permits from the original plat application to completion, Chapter 212 addresses approved development as approved subdivision or approved construction. The chapters use different phraseology but both cover the spectrum from the beginning to the end of the development process. *See Hartsell v. Town of Talty*, 130 S.W.3d 325, 328 (Tex. App.—Dallas 2004, pet. denied) (holding Chapter 245 does not distinguish between subdivision and

[5] We note that municipalities are not encumbered by the strictures of Chapter 212 in every situation affecting essential public utilities. For example, municipalities may use police powers when necessary to safeguard the public safety and welfare. *Barshop v. Medina Cnty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 635 (Tex. 1996). The City does not claim that its circumstances were exigent enough to justify use of the police power.

construction). The comparison of Chapters 212 and 245 only bolsters the weight we give to the Legislature's plain language.

Moreover, the City's reading would yield a labyrinthine statutory framework. The definition of development uses the word "or" six times. *See* TEX. LOC. GOV'T CODE § 212.131(3) ("'Property development' means the construction, reconstruction, *or* other alteration *or* improvement of residential *or* commercial buildings *or* the subdivision *or* replatting of a subdivision of residential *or* commercial property." (emphases added)). We construe statutes to provide consistent meaning to the same word used throughout a statute. *Tex. Dep't of Transp. v. Needham*, 82 S.W.3d 314, 318 (Tex. 2002). Accepting the City's interpretation yields a series of twelve subcategories of development subject to a municipality's moratoria regarding a shortage of essential public facilities. *See id*.[6] Rather than establishing twelve subcategories of development, the Legislature broadly defined development to include all of its discrete aspects, which prevents a moratorium regarding a shortage of essential public facilities from applying to development approved at any point in that process.

Amicus Texas Municipal League claims our interpretation will allow developers to delay developing their approved plats until municipalities pass moratoria (thereby insulating themselves

[6] Treating "or" in the discrete manner the City suggests results in the following twelve subcategories of development: (1) construction of residential buildings; (2) construction of commercial buildings; (3) reconstruction of residential buildings; (4) reconstruction of commercial buildings; (5) other alteration of residential buildings; (6) other alteration of commercial buildings; (7) improvement of residential buildings; (8) improvement of commercial buildings; (9) subdivision of residential property; (10) subdivision of commercial property; (11) replatting of a subdivision of residential property; and (12) replatting of a subdivision of commercial property. *See* TEX. LOC. GOV'T CODE § 212.131(3).

from competition and potentially obtaining higher profits). But the Legislature has already contemplated such a scenario and enacted section 245.005 to allow local governments to establish ordinances related to dormant projects. TEX. LOC. GOV'T CODE § 245.005. Moreover, this problem may also be avoided if municipalities assess the impact of development on utilities when approving that development, as section 212.047 requires. The a*micus*'s concerns are therefore unwarranted, and we decline the invitation to rewrite the Legislature's definition of development based on a concern the Legislature addressed elsewhere in the Local Government Code.

Applying the plain language of Chapter 212 to the moratorium at issue, the City approved BMTP's final plat in January 2006—almost two years before it passed the moratorium at issue and four months before it passed any moratorium. Because the City approved the residential subdivision for the seven lots at issue, the property constitutes approved development under Chapter 212. *Id.* §§ 212.131(3), 212.135(b)(2)(B). Accordingly, the moratorium cannot validly apply against BMTP's seven lots, and we therefore affirm the judgment of the court of appeals with respect to BMTP's declaratory judgment claim. *Id.*; *see Bolton*, 362 S.W.2d at 950.[7]

C. Inverse Condemnation

BMTP also seeks damages for the City's application of the moratorium against its seven lots under an inverse condemnation claim for a regulatory taking. We have held that a regulatory taking occurs when the government has unreasonably interfered with a claimant's use and enjoyment of its

[7] In light of our holding, we need not reach the issues of whether the moratorium met the technical requirements of Chapter 212 or whether the moratorium violated vested rights under Chapter 245.

property. *See Hearts Bluff Game Ranch, Inc. v. State*, 381 S.W.3d 468, 489 (Tex. 2012). To determine whether such an interference has occurred, we follow the *Penn Central* inquiry, which requires us to consider all of the circumstances surrounding the alleged taking. *Id.* (citing *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)); *Sheffield Dev. Co., Inc. v. City of Glenn Heights*, 140 S.W.3d 660, 672–73 (Tex. 2004). The United States Supreme Court has identified three key factors to guide our analysis: (1) the economic impact on the claimant; (2) the extent of interference with the claimant's investment-backed expectations; and (3) the character of the government's action. *Penn Cent.*, 438 U.S. at 124.

Here, the trial court granted the City's motion for summary judgment on BMTP's inverse condemnation claim, and we must determine whether that ruling was error in light of our holding that BMTP was entitled to prevail on its declaratory judgment claim. In its summary judgment motion on the inverse condemnation claim the City asserted that none of the three grounds for a regulatory taking existed here because: (1) the moratorium existed for a valid purpose; (2) some economic value remained in the property; and (3) the moratorium was a reasonable interference with BMTP's use and enjoyment of its property. *See Sheffield*, 140 S.W.3d at 671–72.[8] The trial court granted summary judgment in favor of the City on the inverse condemnation claim without specifying the grounds, which the court of appeals reversed and remanded. 359 S.W.3d at 246–47. Because any one of the these three regulatory takings theories could potentially support BMTP's

[8] We have also held that in certain circumstances a municipality "commits no taking when it abates what is, in fact, a public nuisance." *City of Dallas v. Stewart*, 361 S.W.3d 562, 569 (Tex. 2012). The City did not assert this theory in its motion, so that ground is not at issue here.

inverse condemnation claim, the City must have conclusively disproven all three theories for the trial court's grant of summary judgment to be proper.

We review the trial court's grant of summary judgment *de novo*. *Exxon Corp. v. Emerald Oil & Gas Co., L.C.*, 331 S.W.3d 419, 422 (Tex. 2010). The ultimate determination of whether an ordinance constitutes a compensable taking is a question of law, but "we depend on the district court to resolve disputed facts regarding the extent of the governmental intrusion on the property." *Sheffield*, 140 S.W.3d at 673 (quoting *Mayhew*, 964 S.W.2d at 933). Thus, we must determine whether any disputed issues of fact exist concerning the extent of the City's intrusion on BMTP's property—in which case we must remand to the trial court to resolve the dispute and determine the extent of the government's intrusion. *Id*.

In the summary judgment context, we 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). BMTP may defeat summary judgment by showing the existence of factual disputes regarding the extent of the moratorium's intrusion on BMTP's property, which the trial court must resolve. *Sheffield*, 140 S.W.3d at 673. In *Sheffield*, we found there was no taking under the *Penn Central* test when: (1) the record was devoid of evidence of the economic impact on the owner; (2) the record was devoid of evidence of frustration of the owner's investment-backed expectations; and (3) the moratorium was validly enacted. *Id.* at 680.

By contrast, here BMTP has presented evidence that raises factual disputes with regard to the extent of the moratorium's intrusion on BMTP's property. Regarding the economic impact on the owner, the City asserts the seven lots have lost no value because BMTP never lowered the sales

price of those lots when the moratorium was in effect and because BMTP's manager testified that he hoped to sell the lots for approximately $25,000 each when the moratorium is lifted (compared to sale prices of approximately $20,000 for lots sold before the moratorium took effect). BMTP argues the value of the lots has diminished by as much as 83% due to the moratorium based on a comparison of the value of lots sold before the moratorium took effect to the tax appraisal value while the moratorium was in place.[9] *See Natural Gas Pipeline Co. of Am. v. Justiss*, 397 S.W.3d 150, 159 (Tex. 2012) (noting that when a property owner testifies as to the value of his property, "[e]vidence of price paid, nearby sales, tax valuations, appraisals, online resources, and any other relevant factors may be offered to support the claim").

Regarding the frustration of the owner's investment-backed expectations, the City argues that BMTP's manager testified he was expecting to sell the lots for approximately $25,000 each once the moratorium is lifted and that the lots will be some of the only developed lots available in the area. BMTP counters with testimony from its manager that his expectation was that BMTP would be able to sell the lots to builders once the subdivision was completed, as it had done for the previous lots in South Meadows Estates. Despite interest in the remaining seven lots from potential buyers, BMTP has been unable to sell the lots as a result of the moratorium.

And regarding the character of the government's action, we held in Part II.B, *supra*, that the November 2008 moratorium could not be enforced against BMTP because the City had previously

[9] When BMTP protested the tax assessed value of its land due to the moratorium, the appraisal review board adjusted the assessed value to $23,124 for all seven lots (and average value of $3,303 per lot).

approved the subdivision of the seven lots in question. *See* TEX. LOC. GOV'T CODE § 212.135(b)(2)(B). Likewise, the City enforced the June 2006 moratorium and its extensions against BMTP's approved development. *Id.* We must also view the character of the government's specific actions toward the landowner with the broader purpose of the government's action, which here was to assure an adequate supply of necessary public facilities. *See Sheffield*, 140 S.W.3d at 680 (assessing poor character of governmental action with respect to delaying rezoning during moratorium with broader character of zoning for planned development).[10]

These facts, viewed in the light most favorable to the nonmovant, indicate that the extent of the moratorium's intrusion on BMTP's property is still in dispute. *City of Keller*, 168 S.W.3d at 824. Thus, we cannot determine as a matter of law whether the moratorium's intrusion on BMTP's property went so far as to constitute a taking under *Penn Central*. *See Hearts Bluff*, 381 S.W.3d at 489. For this reason, the City has failed to meet its burden of establishing that no issues of material fact exist with respect to its interference with BMTP's use and enjoyment of its property and that it is entitled to judgment as a matter of law. *Sheffield*, 140 S.W.3d at 673. We therefore conclude the trial court's grant of summary judgment was error and remand for resolution of these factual disputes and to determine the extent of governmental intrusion before assessing whether a regulatory taking has occurred.[11]

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[10] Though the City does not raise the argument, in certain circumstances a municipality commits no taking when it validly exercises its police power to protect the public safety and welfare. *City of College Station v. Turtle Rock Corp.*, 680 S.W.2d 802, 804 (Tex. 1984).

[11] In light of our disposition, we need not address the City's arguments that its moratorium was based on a valid public purpose and that some economic value remained in the property.

D. Attorney's Fees

Finally, we must consider the trial court's award of attorney's fees. The trial court awarded the City attorney's fees when it ruled in favor of the City on the declaratory judgment claim. Under the Declaratory Judgment Act, a "court may award costs and reasonable and necessary attorney's fees as are equitable and just." TEX. CIV. PRAC. & REM. CODE § 37.009. The decision of whether to award attorney's fees is within the discretion of the trial court, but the question of whether attorney's fees are equitable and just is a question of law. *Bocquet v. Herring*, 972 S.W.2d 19, 20–21 (Tex. 1998). The trial court's grant of attorney's fees here was based on its determination that BMTP was not entitled to a declaratory judgment that the moratorium could not apply to its seven lots. Because we have held the moratorium cannot apply against BMTP's seven lots, we remand the issue of attorney's fees to the trial court to determine whether its grant remains equitable and just in light of our holding.

E. Response to the Dissent

The dissent laments that: (1) there will be "sewage in the streets;" (2) municipalities will be "out of luck" and have no mechanism to solve their problems; and (3) section 212.135(b)(2)(A) validates the moratorium here. All three assertions are misguided.

Simply put, the Legislature in Chapter 212 requires municipalities to be proactive and assess the impact of development on utilities when they approve the development. TEX. LOC. GOV'T CODE § 212.047(1). If utility issues nonetheless persist, municipalities may place moratoria on new development in affected areas in accordance with the procedural requirements of Chapter 212. *Id.* §§ 212.133, .135. If issues still persist and threaten the public safety and welfare, municipalities

have police powers and powers to abate nuisances at their disposal. *See supra* notes 5, 8. Thus, the Legislature has weighed the competing interests of developers and municipalities and resolved the conflict by allowing developers to continue building approved development and equipping municipalities with mechanisms at the various stages of utility issues to adequately address such problems. By using the mechanisms at their disposal, municipalities may avoid "sewage in the streets" and are never "out of luck" when addressing a shortage of public facilities.[12]

The dissent also relies heavily on section 212.135(b)(2)(A) as a basis for validating the moratorium. Section 212.135 requires the moratorium to contain a summary of evidence demonstrating the moratorium is reasonably limited to:

> (A) areas of the municipality where a shortage of essential public facilities would otherwise occur; and
>
> (B) property that has not been approved for development because of the insufficiency of existing essential public facilities.

TEX. LOC. GOV'T CODE § 212.135(b)(2). The dissent reasons that "(B) is a complete subset of (A): the areas of town where shortages will occur include every area where development has not been approved because of existing shortages." __ S.W.3d at __ (Hecht, J., dissenting). The dissent concludes that under our interpretation, "only (B) must be met," and subsection (A) is rendered meaningless. *Id*. at __.

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[12] Relatedly, the dissent decries that municipalities will be forced to spend resources defending suits rather than building public facilities. On the contrary, complying with Chapter 212 would avoid litigation altogether because the municipality would plan for the needed sewage capacity when approving a development plat and not impose a moratorium on approved development.

Aside from the fact that no party or judge has claimed that subsection (A) is in any way relevant to this moratorium, the premise that subsection (B) is wholly subsumed by subsection (A) is flawed. There will undoubtedly be occurrences when a shortage of essential public facilities only affects part of a municipality. In such a circumstance, the municipality may impose a moratorium only on the affected area under subsection (A) and only on new development in that area under subsection (B). Subsection (A) is not rendered meaningless. It prevents municipalities from imposing moratoria on new development in unaffected areas. Because one sewer served the entire City here, no party has argued that subsection (A) has any bearing on the validity of the moratorium at issue.

III. Conclusion

Chapter 212 of the Local Government Code prevents moratoria regarding a shortage of essential public facilities from affecting previously approved development. It also defines development to include subdivision or construction. Because the City approved BMTP's subdivision for the seven lots at issue before it passed the moratorium, the seven lots constitute approved development that the moratorium cannot affect. Thus, BMTP is entitled to prevail on its declaratory judgment claim. Regarding the inverse condemnation claim, factual disputes persist that the trial court must resolve with respect to the extent of the moratorium's interference with BMTP's use and enjoyment of its property before a court may determine if a taking has occurred. Finally, the grant of attorney's fees was based on the trial court's finding that the moratorium was valid. Because we have affirmed the court of appeals' reversal of this ruling, the trial court must assess whether its award of attorney's fees remains equitable and just. Accordingly, we affirm the judgment of the

court of appeals, which rendered judgment for BMTP on its declaratory judgment claim and remanded the inverse condemnation and attorney's fee claims to the trial court for further proceedings.

_____

Eva M. Guzman
Justice

OPINION DELIVERED: August 30, 2013

IN THE SUPREME COURT OF TEXAS

NO. 11-0554

CITY OF LORENA, TEXAS, PETITIONER,

v.

BMTP HOLDINGS, L.P., RESPONDENT

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

JUSTICE LEHRMANN, concurring.

In the spring of 2006, the City of Lorena was informed by retained engineers that its sewage system was over capacity. The City was further warned that, if the sewage volume continued to increase, excess sewage could contaminate nearby water sources. Needless to say, the receipt of this information put the City on notice that it needed to take action to protect its citizens. Title 7 of the Texas Local Government Code provides municipalities with authority to regulate the development of property, including the imposition of moratoria in certain circumstances. *See* TEX. LOC. GOV'T CODE §§ 212.131–.139. Today we are presented with the question of whether the statute at issue prohibited the City from using this form of protective action—the adoption of a moratorium—to protect its residents under the circumstances of this case.

While the conclusion the Court reaches today may seem harsh, in my view, the plain language of the statute leaves no plausible alternative. Section 212.135 clearly requires municipalities to issue written findings summarizing evidence demonstrating both "the extent of the need beyond estimated capacity of existing essential public facilities" and "that the moratorium is reasonably limited to: (A) areas of the municipality where a shortage of essential public facilities would otherwise occur; and (B) property that has not been approved for development because of the insufficiency of existing essential public facilities." *Id.* § 212.135(b). The definition of "property development" in section 212.131 unambiguously includes not only building construction, but also the subdivision of residential or commercial property. *Id.* § 212.131(3). In other words, property that has been approved for subdivision has necessarily been approved for development and is therefore not properly subject to a moratorium under section 212.135.

I agree with the dissent that, if the purpose of a moratorium is to prevent a shortage of essential public facilities, restricting the moratorium to only those properties that have not been approved for development is arguably insufficient to accomplish that goal. After all, exempting property that has been approved for development will necessarily lead to an increase in the volume of sewage burdening an already-taxed system. However, for the reasons advanced by the Court, I cannot say that such a result is absurd. Cities simply must be very careful when evaluating whether to grant permits authorizing development in the first instance.

All of this is not to say that cities are powerless to protect their citizens. To the contrary, municipalities must have an effective mechanism to do so in the event of a public threat. And while I agree with the dissent that reliance on the police power may not be the preferred method of

accomplishing such a necessary goal, that is not for this Court to decide. Because this option allows municipalities to take protective action when necessary and proper, without rising to the level of a constitutional taking, I concur in the Court's opinion and judgment.

_____
Debra H. Lehrmann
Justice

OPINION DELIVERED: August 30, 2013

IN THE SUPREME COURT OF TEXAS

NO. 11-0554

CITY OF LORENA, TEXAS, PETITIONER,

v.

BMTP HOLDINGS, L.P., RESPONDENT

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

JUSTICE HECHT, joined by CHIEF JUSTICE JEFFERSON, dissenting.

The way the Court begins its opinion — "[m]unicipalities must ensure that essential public facilities are available to their residents"[1] — the ending comes as a surprise: "a moratorium regarding a shortage of essential public facilities must not affect approved development."[2] To be honest, the Court should begin instead: "Municipalities cannot ensure that essential public facilities are available to their residents if it interferes with approved development. The Legislature has forbidden it." Surely the staunchest cynic of the legislative process would pause to accuse the Legislature of preferring development over, say, sewage in the streets — development run amuck, as it were.

What can a city do to prevent continuing development from depriving residents of essential public facilities? Two things. It can waste tax revenues on buying out the developer or litigating

[1] *Ante* at ___.

[2] *Ante* at ___.

with him (probably unsuccessfully, as I will explain, but nevertheless expensively), instead of spending the funds to improve facilities so that development can continue without threatening public health and safety, thereby benefitting both the developer and the public. Or it can just let matters run their course, polluting the environment and endangering the public. The Court's solution to this predicament is for cities to be very careful — reluctant, even — in approving development — a wonderful irony in a case won by a developer. Which is all well and good, except that nothing suggests the city in this case was promiscuous in approving development, and in any event, the unexpected may occur — it may have in this case — and facilities that seemed adequate when development was approved prove insufficient before construction is begun or completed. There will be times when a city is just . . . out of luck.

It would be bad enough if all this were the Court's concoction, but what is worse, the Court blames it on the Legislature. Requiring cities to risk either public revenue or public health, or both, in approving development is all the Legislature's idea. And this, says the Court, is clear from "the plain language" of Sections 212.133 and 212.135 of the Local Government Code.[3] What is missing from the Court's analysis — which turns on the meaning of one word, "and" — is any thought that there ought to be some *rationale* for its interpretation of these statutes, or what that rationale might be. The words are crucial, to be sure, but they are the product of a legislative process, the hallmark of which is not precision but purpose. To address the reality that even the most carefully chosen words may be misunderstood, the Legislature has stated that "[i]n enacting a statute," it intends "a

[3] *Ante* at ___.

just and reasonable result".[4] Requiring cities to waste tax dollars? Polluting streets and waterways? Stalling economic growth? Those are the possible results of the Court's statutory interpretation. Which does it think are reasonable?

Fidelity to text is achieved more by discerning its purpose than by parsing its grammar. In my view, the Court misreads the statutory text in this case, but its error is not merely grammatical. The Court refuses to be guided in its interpretation by legislative purpose, and that systemic failing will affect — is affecting — other cases.

The essential facts of this case are simple. Several months after the Lorena City Council approved BMTP Holdings' plat for the latest phase of its residential development, the City's engineering firm reported that if the sewage volume continued to increase, the system could become overloaded, violate state regulations, and send excess sewage into nearby water sources. The City Manager had known all along that the sewer system was inadequate but was not aware a crisis was brewing. Following the engineer's recommendation, the City adopted a moratorium on sewer tap permits, preventing homes constructed on BMTP's lots from connecting to the sewer system. When BMTP pointed out that it had already sold fifteen of the vacant lots to homebuilders, the City exempted those lots from the moratorium, but it refused to exempt BMTP's seven unsold lots. Two years later, after trying unsuccessfully to sell residential lots without sewer connections, BMTP sued for a declaration that the moratorium was invalid under Chapter 212 of the Local Government Code, and for damages, alleging inverse condemnation.

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[4] TEX. GOV'T CODE § 311.021(3).

Sections 212.133[5] and 212.135[6] provide that a city may not adopt a moratorium on property development to prevent a shortage of essential public facilities unless it makes findings on two subjects. One is "the extent of need beyond the estimated capacity of existing essential public facilities that is expected to result from new property development".[7] The other is that

> the moratorium is reasonably limited to:
>
> (A) areas of the municipality where a shortage of essential public facilities would otherwise occur; and

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[5] "A municipality may not adopt a moratorium on property development unless the municipality: (1) complies with the notice and hearing procedures prescribed by Section 212.134; and (2) makes written findings as provided by Section 212.135, 212.1351, or 212.1352, as applicable." TEX. LOCAL GOV'T CODE § 212.133.

[6] Section 212.135 applies if a municipality faces a shortage of facilities and states:

"(a) If a municipality adopts a moratorium on property development, the moratorium is justified by demonstrating a need to prevent a shortage of essential public facilities. The municipality must issue written findings based on reasonably available information.

"(b) The written findings must include a summary of:

"(1) evidence demonstrating the extent of need beyond the estimated capacity of existing essential public facilities that is expected to result from new property development, including identifying:

"(A) any essential public facilities currently operating near, at, or beyond capacity;

"(B) the portion of that capacity committed to the development subject to the moratorium; and

"(C) the impact fee revenue allocated to address the facility need; and

"(2) evidence demonstrating that the moratorium is reasonably limited to:

"(A) areas of the municipality where a shortage of essential public facilities would otherwise occur; and

"(B) property that has not been approved for development because of the insufficiency of existing essential public facilities."

Id. § 212.135.

[7] *Id.* § 212.135(b)(1).

(B) property that has not been approved for development because of the insufficiency of existing essential public facilities.[8]

The Court treats (A) and (B) as conditions which must both be met for a moratorium to apply in an area, based on their joinder by "and". The problem with this interpretation is that (B) is a complete subset of (A): the areas of town where shortages will occur include every area where development has not been approved because of existing shortages. Because (A) includes areas not in (B), and all areas in (B) are in (A), if both (A) and (B) must be met, then only (B) must be met. That is what the Court concludes.

This interpretation is flawed in two respects. It reads (A) out of the statute. Section 212.135(b)(2) would mean exactly the same thing if (A) were omitted. This violates the principle that all words of a statute be given effect and not treated as mere surplusage.[9] But more importantly, it makes nonsense of the statute. The need for a moratorium in the (B) areas is not immediate; development there has already been halted due to existing shortages. All the (A) areas need the moratorium, not just those which are also (B) areas. In the Court's view, the Legislature prohibited cities from halting development except when it is already halted. Legislature to cities: you can protect the public from a loss of essential services, but only if protection is unnecessary.

Subsection (B) is better read as a specific instance of (A). It is not surplusage; it emphasizes one area included in (A). I suspect the Court would agree if the specific preceded the general, limiting a moratorium to "property that has not been approved for development because of the

[8] *Id.* § 212.135(b)(2).

[9] *E.g. Chevron Corp. v. Redmon*, 745 S.W.2d 314, 316 (Tex. 1987) ("We will give effect to all the words of a statute and not treat any statutory language as surplusage if possible.").

insufficiency of existing essential public facilities" *and* (*i.e.*, as well as) "areas of the municipality where a shortage of essential public facilities would otherwise occur". The specific illustrates or emphasizes an example of the general but does not limit the general; otherwise, the general would be irrelevant. Beginning with the general does not alter the meaning. For example, where a 60 mph speed limit for trucks is lower than the limit for other vehicles, a statute imposing the 60 mph limit for "vehicles and trucks" or "trucks and vehicles" accomplishes the same thing: reducing the speed limit for all vehicles to the current limit for trucks. A reasonable drafter could choose to include trucks specifically to point out that the difference in the legal limits has been removed. It would be unreasonable to suppose that the drafter intended by the phrase that the 60 mph limit would apply only to vehicles that are also trucks, thereby accomplishing nothing.

The Court's focus on the areas covered by a permissible moratorium is misdirected. Surely it goes without saying that a moratorium should be imposed on development only where essential public facilities are threatened. The Legislature's obvious purpose in enacting Sections 212.133 and 212.135 was not to limit *where* a moratorium on development can be imposed but *how* one can be imposed. By mandating a process in which a moratorium cannot be adopted without making specific findings justifying its necessity, the Legislature has deprived cities of the power to act for general policy reasons, or simply because they can. Absent the required fact-finding supported by evidence, a moratorium is prohibited. Not all the ordinances adopted by the City of Lorena may have complied with the statutes, but the final ordinance, which is the one the Court thinks matters, found that

> (1) any new sewer connections will push the Lorena Wastewater Treatment Plant further beyond its capacity;

(2) operating beyond the capacity of the Lorena Wastewater Treatment Plant may result in failure of the entire plant, thereby causing all residents of the City currently connected to the Lorena Wastewater Treatment system to lose service; and

(3) operating beyond the capacity of the Lorena Wastewater Treatment Plant may result in illegal discharges from the plant, thereby subjecting the City to fines and penalties from the State of Texas and/or the federal government.

The Court does not consider these findings to be unsupported by the evidence or inadequate to support the moratorium. In fact, they are not pretextual; the City has been attempting to increase the sewage services available to its residents since the first moratorium.

Reasonably read, and completely unsurprisingly, Sections 212.133 and 212.135 do not prohibit cities from halting development, whether previously approved or not, to ensure essential public services for its residents, as the City did in this case. The surprise is that the Court reaches the opposite conclusion.

The Court also concludes that because the City's moratorium was invalid, BMTP has a viable takings claim. But valid or not, the threat to the public remains. One element of a takings claim, as the Court acknowledges, is that BMTP has been deprived of its reasonable, investment-backed expectations in the use of its seven lots.[10] BMTP's expectations, the Court says, were that it "would be able to sell the lots to builders once the subdivision was completed, as it had done for the previous lots".[11] But sewer services available for the previous lots have come to be inadequate. No investor

[10] *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) (significant factors include "the extent to which the regulation has interfered with distinct investment-backed expectations"); *Sheffield Dev. Co., Inc. v. City of Glenn Heights*, 140 S.W.3d 660, 672-673 (Tex. 2004) (quoting and discussing *Penn Central*).

[11] *Ante* at ___.

can reasonably expect that, having begun to develop his property without risk to the public, he will be entitled to continue that development when the risk arises. For that reason, a takings claim is unlikely to succeed. I think what the Court means is that it is reasonable to expect that approval of development guarantees that essential services will be available when needed. The Court's view, for now at least, is that the consequences of post-approval exigencies should reasonably be expected to fall on the public, not a landowner. This position flows from the Court's view that the Legislature has prohibited cities from halting approved development to protect public health and safety. But no authority supports such a view, and in the unlikely event BMTP should persuade a jury to award it damages against the City for trying to protect its citizens from having to drink improperly treated wastewater, I doubt the Court will adhere to that position.

I respectfully dissent.

Nathan L. Hecht
Justice

Opinion delivered: August 30, 2013

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

We grant in part the limited motion for rehearing by respondent Daybreak Express, Inc., withdraw our opinion of August 31, 2012, and substitute the following opinion in its place.

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 remand this case to that court for further proceedings. TEX. R. APP. P. 59.1.

Opinion delivered: January 25, 2013

IN THE SUPREME COURT OF TEXAS

NO. 11-0630

TTHR LIMITED PARTNERSHIP D/B/A PRESBYTERIAN HOSPITAL OF DENTON, PETITIONER,

v.

CLAUDIA MORENO, INDIVIDUALLY AND AS NEXT FRIEND OF F.C., A MINOR, RESPONDENT

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

Argued November 6, 2012

JUSTICE JOHNSON delivered the opinion of the Court.

Plaintiffs suing on health care liability claims must serve each defendant with an expert report meeting the requirements of the Texas Medical Liability Act ("TMLA" or "the Act")[1] or face dismissal of their claims. We recently held that an expert report satisfying the requirements of the TMLA as to a defendant, even if it addresses only one theory of liability alleged against that defendant, is sufficient for the entire suit to proceed against the defendant. *Certified EMS, Inc. v. Potts*, ___ S.W.3d ___ (Tex. 2013). In this case the plaintiff's expert reports satisfy the TMLA requirements as to her claim that a hospital is vicariously liable for the allegedly negligent actions of two doctors. Accordingly, the plaintiff's case against the hospital may proceed.

[1] TEX. CIV. PRAC. & REM. CODE §§ 74.001–.507.

We affirm the judgment of the court of appeals in part, reverse in part, and remand the cause to the trial court for further proceedings.

I. Background

Claudia Moreno, pregnant with twins, was admitted to TTHR Ltd., d/b/a Presbyterian Hospital of Denton ("Presbyterian" or "the hospital") for difficulties associated with the pregnancy. The hospital's nurses began having problems monitoring Moreno and the twins, so they paged the physician on call, Dr. Lorie Gore-Green. Dr. Gore-Green and Moreno's regular doctor, Dr. Marc Wilson, attended to Moreno the next morning. Dr. Wilson induced labor and used forceps and vacuum extraction to deliver the second baby, F.C. At some point shortly before or during the birth process F.C. suffered blood loss and a hypoxic-ischemic insult. It was later determined that his nervous system and kidneys were damaged.

Moreno, individually and as next friend of F.C., sued the hospital, Dr. Wilson, and Dr. Gore-Green.[2] She alleged that the hospital was liable for the injuries to F.C. because of its own direct negligence as well as its vicarious liability for the negligence of its nurses and the two doctors.

Moreno timely served Presbyterian with a report by Dr. Samuel Tyuluman, an obstetrician and gynecologist. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(a) (requiring service of an expert report not later than the 120th day after a health care liability claim is filed). The hospital objected to Dr. Tyuluman's report on the basis that he was not qualified to express opinions about the cause of F.C.'s neurological and kidney damage, and also because his opinions about the standards of care,

[2] Neither Dr. Wilson nor Dr. Gore-Green are parties to this appeal. We will reference only the claims against the hospital.

breach of the standards, and causation were conclusory. In response to the objections, Moreno served a report by Dr. Billy Arant, a pediatric nephrologist.[3] *See id.* § 74.351(I) (authorizing fulfilling the expert report requirements by serving multiple reports). Presbyterian objected to Dr. Arant's report on various grounds.

The trial court sustained only Presbyterian's objection that the reports failed to show a causal relationship between the alleged failures of the hospital and its nurses to meet the applicable standards of care and F.C.'s neurological injury. The court granted Moreno a thirty-day extension to cure the reports. *See id.* § 74.351(c) (providing that if "elements of the report are found deficient, the court may grant one thirty-day extension to the claimant in order to cure the deficiency"). She then filed a report by Dr. John Seals, a pediatric neurologist. Presbyterian objected to Dr. Seals's report on the basis that it did not set out any acts of alleged negligence on the part of the hospital, nor did it set out a causal connection between any allegedly negligent act or omission of the hospital or its nurses and F.C.'s neurological injury. The trial court determined that when the reports of Drs. Tyuluman, Arant, and Seals were read in concert, Moreno had met the TMLA's requirements. It denied the hospital's motion to dismiss, and this interlocutory appeal followed. *See id.* § 51.014(a)(9).

The court of appeals affirmed as to the adequacy of the reports regarding Moreno's claim that Presbyterian is vicariously liable for the doctors' negligence. ___ S.W.3d ___. In doing so, it determined that Dr. Tyuluman's report specified several standards of care, how the defendant doctors

[3] Nephrology involves the study of functions and treatment of the kidneys.

breached them, and that Drs. Arant and Seals were qualified to and did opine on the causal connection between the breaches by the doctors and F.C.'s injuries. *Id.* at ___. The appeals court also determined that the reports adequately addressed a causal relationship between the events at delivery and F.C.'s neurological and kidney injuries. *Id.* at ___. But in addressing the direct liability claims, the court concluded that Dr. Tyuluman's report did not adequately address the applicable standards of care or how Presbyterian breached those standards, and neither the report of Dr. Arant nor that of Dr. Seals addressed any standard or breach by the hospital. *Id.* at ___. As to the vicarious liability claims based on the nurses' actions, the court concluded that Dr. Tyuluman's report did not state how any of the nurses violated applicable standards of nursing care and the reports of Drs. Arant and Seals did not attempt to address either nursing standards of care or breaches of those standards. *Id.* at ___. The court remanded the case to the trial court and instructed it to consider granting Moreno a thirty-day extension to cure the deficiencies found on appeal. *Id.* at ___.

Presbyterian appeals, arguing that the court of appeals erred by concluding Moreno's reports were adequate as to causation, but even if the reports were adequate in that respect, the court erred by remanding the case for the trial court to consider granting another thirty-day extension to cure the other deficiencies.

After we heard oral argument in this case we held in *Certified EMS* that the TMLA does not require an expert report for each liability theory pleaded against a defendant. *Certified EMS, Inc.*, ___ S.W.3d at ___. Our decision in that case controls the outcome here because we conclude that Moreno's expert reports addressing the hospital's alleged liability for the actions of Drs. Wilson and Gore-Green are adequate. Given that determination, we do not address whether the court of appeals

erred by remanding the case for the trial court to consider granting a second extension of time for Moreno to cure deficiencies in her reports.

II. Vicarious Liability for the Doctors' Actions

The court of appeals held that the trial court did not abuse its discretion by determining Moreno's reports were adequate as to her claim that the hospital is vicariously liable for the negligence of Drs. Wilson and Gore-Green. ___ S.W.3d at ___. Its review of the trial court's ruling was under the abuse of discretion standard. *Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 877 (Tex. 2001). So is ours, and we reach the same conclusion as did the court of appeals.

A valid expert report under the TMLA must provide: (1) a fair summary of the applicable standards of care; (2) the manner in which the physician or health care provider failed to meet those standards; and (3) the causal relationship between that failure and the harm alleged. TEX. CIV. PRAC. & REM. CODE § 74.351(r)(6). Dr. Tyuluman's report set out applicable standards of care for doctors treating a patient with conditions similar to those with which Moreno presented. He opined that (1) the standard of care for a doctor caring for a patient presenting with conditions such as Moreno's was to immediately deliver the babies by cesarean section; (2) failing to do so was a breach of that standard; and (3) the doctors' failing to perform a cesarean section resulted in the extended labor and birthing process. We agree with the court of appeals that as to the foregoing standard of care and breach, Dr. Tyuluman's report was not conclusory. Dr. Arant's report explained that asphyxia during the birth process caused F.C.'s kidney injury, and Dr. Seals's report stated his opinion that the hypoxic-ischemic event during the labor and delivery process caused F.C.'s brain injury.

Accordingly, we agree with the court of appeals that the trial court did not abuse its discretion by finding Moreno's reports adequate as to the claim that Presbyterian is vicariously liable for actions of the doctors.[4]

III. Direct Liability and Vicarious Liability for Nurses' Negligence

As we articulated in *Certified EMS*, the TMLA requires a claimant to timely file an adequate expert report as to each defendant in a health care liability claim, but it does not require an expert report as to each liability theory alleged against that defendant. *Certified EMS, Inc.*, ___ S.W.3d at ___. Here, because the trial court did not abuse its discretion in finding Moreno's reports adequate as to her theory that Presbyterian is vicariously liable for the doctors' actions, her suit against Presbyterian—including her claims that the hospital has direct liability and vicarious liability for actions of the nurses—may proceed. *See id.* at ___.

IV. Conclusion

We affirm the court of appeals' judgment as to the adequacy of the reports regarding the claim that Presbyterian is vicariously liable for the doctors' actions. We need not and do not consider whether the TMLA authorized the court of appeals to remand the case to the trial court for it to consider granting a second extension of time for Moreno to cure her reports. We reverse that part of the court of appeals' judgment by which it did so, but affirm its judgment remanding the entire suit to the trial court.

The cause is remanded to the trial court for further proceedings consistent with this opinion.

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[4] Presbyterian does not concede that it can be held vicariously liable for the doctors' actions. But it acknowledges that whether it can be is not a question to be determined in this appeal.

_____

Phil Johnson
Justice

OPINION DELIVERED: April 5, 2013

IN THE SUPREME COURT OF TEXAS

NO. 11-0642

THE STATE OF TEXAS, PETITIONER,

v.

NINETY THOUSAND TWO HUNDRED THIRTY-FIVE DOLLARS AND NO CENTS IN UNITED STATES CURRENCY ($90,235) AND 2000 BLACK LINCOLN NAVIGATOR VIN: 5LMPU28A7YLJ10865, RESPONDENTS

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

Argued November 7, 2012

JUSTICE JOHNSON delivered the opinion of the Court.

In this case the State brought an action for forfeiture of a vehicle and $90,235 found in it following a traffic stop. The driver of the vehicle, who claimed ownership of the vehicle and money, sought recovery of the property and filed a traditional motion for summary judgment. He asserted three grounds for summary judgment: (1) the trial court lacked subject-matter jurisdiction; (2) the State did not produce evidence of probable cause to seize the property; and (3) the search of the vehicle was illegal. The trial court granted the motion without stating its reasons. The court of appeals affirmed.

We conclude that the court of appeals erred by affirming on the basis that the State did not produce evidence of probable cause to seize the property. We reverse and remand to the court of appeals for further proceedings.

I. Background

On May 6, 2008, El Paso Sheriff's Deputy Armando Gomez stopped a black Lincoln Navigator driven by Hermenegildo Godoy Bueno. Deputy Gomez requested that Bueno show proof of liability insurance and a driver's license, which he did. After running a warrants check on Bueno and his passenger, Deputy Gomez arrested the passenger for outstanding traffic warrants but neither arrested Bueno nor issued a traffic ticket to him. During the stop, however, Deputy Gomez noticed a backpack and a tote bag in the rear floorboard of the vehicle. Bueno said they contained his son's clothes. After Bueno denied Deputy Gomez's request for consent to search the vehicle, Deputy Gomez called a K-9 unit to the scene. According to a sworn statement by Detective Mario Garcia that was attached to the State's pleadings, the K-9 unit's dog alerted positively for the odor of narcotics on the Navigator's exterior. Deputy Gomez and the dog's handler searched the vehicle. Inside the backpack and the tote bag they discovered six clear plastic bags containing rubber band-wrapped bundles of cash totaling $90,235. According to Detective Garcia's sworn statement, the dog alerted positively to the odor of narcotics on the money. Bueno told Detective Garcia the money was partial payment for a ranch he sold and that he was going to deliver it as the final payment for an El Paso service station he purchased.

The officers seized the money and vehicle ("the property"), and the State instituted forfeiture proceedings. Detective Garcia's sworn statement was attached to and incorporated into the State's

pleadings by reference. *See* TEX. CODE CRIM. PROC. art 59.04(b). The pleadings alleged that the property was seized by a peace officer incident to a search to which the owner or agent-in-charge of the property consented or pursuant to a lawful arrest, lawful search, or lawful search incident to arrest. They also alleged that the property was contraband based on one of two alternative statutory provisions. First, they alleged that the property was used in, intended to be used in, or gained from commission of a felony under Chapter 481 of the Texas Health and Safety Code (the Texas Controlled Substances Act). *See* TEX. HEALTH & SAFETY CODE §§ 481.001–.314. Second, they alleged that the property was contraband because it was used in, intended to be used in, or proceeds from commission of a felony under Chapter 34 of the Penal Code (Money Laundering). *See* TEX. PENAL CODE §§ 34.01–.03.

Bueno answered the suit, asserted that he owned the property, and eventually filed what he described and represented to the trial court to be a traditional motion for summary judgment. He requested dismissal of the forfeiture action and return of the property on "three distinct grounds": (1) "[t]he State of Texas does not have subject-matter jurisdiction to prosecute this forfeiture action"; (2) no evidence will support a reasonable belief that a substantial connection existed between the property and illegal drug dealing activities; and (3) the warrantless search of the vehicle was illegal because it exceeded the temporal scope of the stop necessary for Deputy Gomez to inspect Bueno's driver's license and insurance, run a warrants check, and issue a traffic citation. In his motion to the trial court, Bueno specifically referenced Deputy Garcia's sworn statement and adopted some of the facts set out in it. He also attached his own affidavit to the motion as summary judgment evidence. His affidavit, in its entirety, was as follows:

> My name is HERMENEGILDO GODOY BUENO and I am over eighteen (18) years of age and of sound mind. I am the same HERMENEGILDO GODOY BUENO who was stopped by law enforcement officers on May 6, 2008, for no valid reason. At the time that I was stopped by law enforcement officers I wasn't doing anything wrong or breaking any driving laws and I did not give the law enforcement officer consent to search my vehicle. My vehicle and the money from the sale of my ranch were seized from me. I have complied with all of the State's discovery requests and I hereby incorporate them herein by reference for all intents and purposes as if recited herein verbatim. My vehicle was acquired legally and lawfully and the money that was in my possession was acquired legally and lawfully. The money represents partial payment on the sale of my ranch. I received this money in El Paso County after it was brought to me in El Paso.

Referencing Texas Code of Criminal Procedure articles 59.01(2) and 59.05(b), and our decision in *State v. $11,014.00*, 820 S.W.2d 783, 784 (Tex. 1991) (per curiam), Bueno asserted that the State must satisfy a two-part test to prevail in a forfeiture proceeding. The first part of the test is that probable cause existed for seizure of the alleged contraband. The second part is that the seized property is in fact contraband. In his motion, Bueno sought summary judgment as to the first part but specifically disclaimed seeking summary judgment under the second part. That is, he disclaimed having conclusively proved the property was not contraband.

The State responded to Bueno's motion for summary judgment but neither attached any evidence to the response nor filed any evidence in opposition to the motion. The trial court granted Bueno's motion without giving its reasons.

The court of appeals affirmed. 346 S.W.3d at 747. As to Bueno's first ground, it agreed with the State that the trial court had jurisdiction. Bueno does not challenge that ruling here. But, because we may not address the merits of a case absent jurisdiction, *see Tex. Workers' Comp.*

Comm'n v. Garcia, 893 S.W.2d 504, 517 n.15 (Tex. 1995), we note that we agree with the analysis and conclusion of the court of appeals.

The appeals court then rejected the State's arguments as to Bueno's second ground. The court determined that: (1) Bueno presented evidence sufficient to "conclusively establish[] the State lacked a reasonable belief that a substantial connection or nexus existed between the property seized . . . and any illegal drug dealing activities, and therefore negated this element of the State's forfeiture action"; (2) the State could not rely on Detective Garcia's affidavit attached to the Notice of Seizure as summary judgment evidence because the State did not direct the trial court's attention to it; and (3) because the State did not present evidence controverting Bueno's affidavit, it did not raise a genuine issue of material fact. 346 S.W.3d at 746-47. The court did not address Bueno's third ground for summary judgment—that the search was illegal.

The appeals court also concluded that the State was required to specially except to Bueno's motion to complain on appeal that his second ground did not encompass all of the State's forfeiture claims because it did not address the State's claim that the property was connected to money laundering. *Id.* at 744. Because the State did not do so, the court concluded that it failed to preserve error on this issue. *Id.*

In this Court the State challenges the decision of the court of appeals on two grounds. It first argues that the determination of whether the officers had probable cause to seize the property, that is, a reasonable belief in a substantial connection between the property and illegal activities, must be assessed in light of the facts as the seizing officers reasonably believed them to be, and Bueno could not conclusively negate such a belief through his own affidavit. It then argues that a special

exception to Bueno's motion for summary judgment was not necessary to preserve error for its assertion that Bueno's motion did not address all the State's claims.

We reverse the court of appeals' judgment on the State's first ground and do not address its second in light of our disposition of the appeal.

II. Probable Cause to Seize Property

Although the language of Bueno's second ground for summary judgment might appear to have been a no evidence assertion, the record reflects that he specified to the trial court and court of appeals that his motion was a traditional one. *See* 346 S.W.3d at 743 n.1. The court of appeals addressed it as such and so will we.

A. Standard of Review

We review a grant of summary judgment *de novo*. *Exxon Corp. v. Emerald Oil & Gas Co., L.C.*, 331 S.W.3d 419, 422 (Tex. 2010). When the trial court does not specify the grounds for its ruling, a summary judgment will be affirmed if any of the grounds advanced by the motion are meritorious. *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 872-73 (Tex. 2000). A party moving for traditional summary judgment has the burden to prove that there is no genuine issue of material fact and it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). The non-movant has no burden to respond to or present evidence regarding the motion until the movant has carried its burden to conclusively establish the cause of action or defense on which its motion is based. *M.D. Anderson Hosp. & Tumor Inst. v. Willrich*, 28 S.W.3d 22, 23 (Tex. 2000) (per curiam).

B. Evidence of No "Reasonable Belief"

"Contraband" is property of any nature used in the commission of various enumerated crimes, including any felony under Chapter 481 of the Texas Health and Safety Code (the Texas Controlled Substances Act) or Chapter 34 of the Penal Code (Money Laundering). TEX. CODE CRIM. PROC. art. 59.01(2). Contraband is subject to seizure and forfeiture by the State. *Id.* arts. 59.02(a), 59.03(a)–(b). Civil rules of pleading apply in forfeiture proceedings. *See id.* art. 59.05(a). Forfeiture proceedings are tried in the same manner as other civil cases, and the State has the burden to prove by a preponderance of the evidence that the property in question is subject to forfeiture. *Id.* art. 59.05(b). The State also has the burden to show probable cause existed for seizure of the property. *$56,700 in U.S. Currency v. State*, 730 S.W.2d 659, 661 (Tex. 1987) (citing TEX. CONST. art. I, § 9). Probable cause, in the context of civil forfeiture, is "a reasonable belief that 'a substantial connection exists between the property to be forfeited and the criminal activity defined by the statute.'" *Id.* (quoting *United States v. $364,960.00 in U.S. Currency*, 661 F.2d 319, 323 (5th Cir. 1981)).

As noted above, Bueno's second ground for summary judgment was that the State did not have probable cause to seize the property. Specifically, he asserted that

> [l]ess than a scintilla of evidence will support a reasonable belief that a substantial connection or nexus exists between the Lincoln Navigator and U.S. currency seized from Bueno and illegal drug dealing activities.

Only if Bueno conclusively proved that none of the officers had such a belief would the burden shift to the State to respond and raise a material fact question about whether they did. *See Mann Frankfort*, 289 S.W.3d at 848; *Willrich*, 28 S.W.3d at 23. We conclude that he did not do so.

Bueno's only summary judgment evidence was his affidavit. We need not address the affidavit's weight in light of Bueno's status as an interested witness, because his affidavit was insufficient to support summary judgment regardless of his status. *See* TEX. R. CIV. P. 166a(c) (stating the specific requirements for when summary judgment may be based on the uncontroverted testimonial evidence of an interested witness). The affidavit states, as relevant to any connection between the seized property and illegal drug dealing activities, that (1) the vehicle and money were "acquired legally and lawfully"; and (2) the money represented a partial payment from the sale of his ranch. But the affidavit wholly fails to address whether the officers had a reasonable belief that the property had or would have a substantial connection with illegal activity as pleaded by the State—even assuming Bueno could address what the officers believed and whether their beliefs were reasonable. The affidavit certainly does not conclusively prove that none of them did. And until Bueno conclusively established that none of them had such a belief, the trial court could not have properly granted summary judgment on Bueno's second ground. The court of appeals erred by holding otherwise.

III. Other Issues

The court of appeals did not address the State's challenge to Bueno's ground that the property was seized pursuant to an illegal search of the vehicle. The State asserts that, if we reverse the court of appeals' judgment, we should remand the case to that court. Bueno counters that the State waived the issue because it did not complain to the court of appeals about the court's failure to address the ground, nor did the State bring the issue forward to this Court.

We disagree with Bueno. First, our rules of appellate procedure provide for courts of appeals to hand down opinions that are as brief as practicable while covering every issue raised and necessary to disposition of the appeal. *See* TEX. R. APP. P. 47.1. It was not necessary for the court of appeals to address Bueno's third ground after it affirmed the summary judgment based on his second ground. The State did not waive its issue by failing to request the court of appeals to address matters beyond those prescribed by the rules. Second, ordinarily a case will be remanded to the court of appeals for further proceedings when we reverse the judgment of the appeals court and the reversal necessitates consideration of issues raised in but not addressed by that court. *See* TEX. R. APP. P. 53.4; *Miller v. Keyser*, 90 S.W.3d 712, 720 (Tex. 2002).

Because of our disposition of the case we do not address the court of appeals' holding that the State failed to preserve error for its argument that Bueno's motion for summary judgment did not include all of the State's claims.

IV. Conclusion

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

Phil Johnson
Justice

OPINION DELIVERED: January 25, 2013

IN THE SUPREME COURT OF TEXAS

NO. 11-0647

MILESTONE OPERATING, INC. AND DSTJ, L.L.P.,
PETITIONERS,

v.

EXXONMOBIL CORPORATION,
RESPONDENT

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

PER CURIAM

JUSTICE LEHRMANN did not participate in the decision.

In this case, we consider whether the defendants satisfied the first element of the *Craddock* test for setting aside a no-answer default judgment. *See Craddock v. Sunshine Bus Lines, Inc*., 133 S.W.2d 124, 126 (Tex. 1939) (requiring a new trial if the defendant shows (1) that the default was neither intentional nor the result of conscious indifference, (2) a meritorious defense, and (3) that a new trial would cause neither delay nor undue prejudice). Because the evidence in this case established that the defendants' failure to answer was not intentional or the result of conscious indifference, the defendants' motion for new trial could not be denied on the ground that the

defendants failed to satisfy the first *Craddock* element. Accordingly, we reverse the court of appeals' judgment and remand the case to that court.

This appeal arises from a suit by ExxonMobil Corporation against DSTJ, L.L.P. and Milestone Operating, Inc. (collectively Milestone), alleging that Milestone breached the parties' Farmout Agreement by failing to notify ExxonMobil that "payout" had occurred on a well that was subject to that agreement. Under the Farmout Agreement, "payout" triggered ExxonMobil's election to either escalate its overriding royalty interest or convert to a working interest. After Milestone failed to answer, ExxonMobil filed a motion for default judgment. ExxonMobil alleged that its private process server, Thomas Barber, properly served Donald Harlan—DSTJ's partner and Milestone Operating, Inc.'s director and registered agent—with citation and a copy of ExxonMobil's petition. ExxonMobil obtained a default judgment that awarded it almost $1.8 million, which included unliquidated damages, prejudgment interest, attorney's fees, and costs.

Milestone filed a timely motion for new trial, arguing that service on Harlan was defective, and that Milestone established the necessary *Craddock* elements to set aside the default judgment. The trial court denied the motion for new trial. The court of appeals affirmed the trial court's denial of Milestone's motion for new trial, holding that Milestone failed to meet its burden to satisfy *Craddock*'s first element. 346 S.W.3d 101, 109. But the court of appeals reversed the portion of the judgment awarding unliquidated damages. *Id.* at 112.

Milestone asserts two grounds for reversal. First, Milestone contends that the evidence established that the failure to answer was not intentional or due to conscious indifference. Second, Milestone argues that service of process was defective because Harlan was not personally informed

of the nature of the process. When a default judgment is attacked by a motion for new trial, the critical question is: "Why did the defendant not appear?" *Sutherland v. Spencer*, ___ S.W.3d ___, ___ (Tex. 2012) (quoting *Fid. & Guar. Ins. Co. v. Drewery Constr. Co.*, 186 S.W.3d 571, 574 (Tex. 2006) (per curiam)) (internal quotation marks omitted). Milestone does not challenge whether the suit papers were actually received—only that service was *defective*. Therefore, our analysis focuses on whether Milestone offered sufficient evidence to meet its burden under the first element of the *Craddock* test.[1] *See id.* at ___ ("[I]f 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.").

Under *Craddock*, a trial court must 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." 133 S.W.2d at 126. We must look to the knowledge and acts of the defendant to determine whether the defendant satisfied its burden as to the first *Craddock* element. *Dir., State Emp. Workers' Comp. Div. v. Evans*, 889 S.W.2d 266, 269 (Tex. 1994). The absence of an intentional failure to answer rather than a real excuse for not answering is the controlling fact. *Craddock*, 133 S.W.2d at 125. A defendant satisfies its burden under this element when its factual assertions, if true, negate intentional or consciously indifferent conduct by the defendant and the

[1] Because the court of appeals addressed only *Craddock*'s first element, we limit our review to that determination. *See* 346 S.W.3d at 109; *Sutherland*, ___ S.W.3d at ___.

factual assertions are not controverted by the plaintiff. *Sutherland*, ___ S.W.3d at ___. Consciously indifferent conduct occurs when "the defendant knew it was sued but did not care." *Fidelity*, 186 S.W.3d at 576.

"An excuse need not be a good one to suffice." *Id.* As in *Sutherland*, Milestone offered an excuse that was not controverted and, if true, negated intentional or consciously indifferent conduct on its part. *See Sutherland*, ___ S.W.3d at ___. Specifically, Milestone alleged that Harlan did not recall being served with ExxonMobil's petition on March 19, 2009, even after reviewing his office notes and speaking to the people with whom he works about that day's events. Harlan testified that Milestone had been sued at least four times prior to ExxonMobil's suit, he was served with process in each of those suits, and it was his routine to turn over the suit papers to Milestone's legal counsel. Yet Harlan testified that he did not remember being served or turning over any suit papers to Milestone's legal counsel in this case. Although ExxonMobil offered the testimony of Lynn Tatar, Barber's fiancée, who maintained that she saw Barber hand Harlan the suit papers, ExxonMobil did not controvert Harlan's testimony that he does not recall being served.[2] Nor did ExxonMobil controvert Milestone's evidence that detailed Harlan's familiarity with being served with process and his procedure for responding to such service.

We conclude that the evidence here shows that Milestone's failure to answer was neither intentional nor the result of consciously indifferent conduct. *See Fidelity*, 186 S.W.3d at 576. Milestone therefore provided a sufficient excuse to satisfy *Craddock*'s first element. *See Sutherland*,

[2] Barber passed away prior to the hearing on Milestone's motion for new trial. Tatar testified that she accompanied Barber to Harlan's office on the date that Barber served Harlan.

___ S.W.3d at ___. The trial court's denial of Milestone's motion for new trial thus cannot be affirmed on the ground that its excuse for not answering was insufficient. The court of appeals erred when it held otherwise. This holding 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). 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. *See* TEX. R. APP. P. 59.1.

OPINION DELIVERED: October 26, 2012

IN THE SUPREME COURT OF TEXAS

NO. 11-0650

NED B. MORRIS III, ET AL., PETITIONERS,

v.

HOUSTON INDEPENDENT SCHOOL DISTRICT, ET AL., RESPONDENTS

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

PER CURIAM

In this case we must decide whether taxpayers who were sued for nonpayment of property taxes lost their entitlement to contest liability based on non-ownership when the taxing authorities non-suited after the taxpayers paid the disputed taxes under protest. We hold that they did not. Accordingly, the court of appeals erred in reversing the trial court's denial of the taxing authorities' plea to the jurisdiction. We reverse the court of appeals' judgment and remand to the trial court.

The Harris County Appraisal District's appraisal roll listed the petitioners, Ned B. Morris III, Daniel W. Shipper, Patrick A. Shipper, Anita Gibson, Mary Ann Moseley, Deborah L. Moore, Linda Shipper Bender, Caroline D. Armstrong, Pamela K. Moore, Joyce Salter, and James R. Hunt (collectively, "Taxpayers") as the owners of 10.34 acres of land in Harris County, of which the Taxpayers actually owned 9.38 acres. They never administratively challenged the inclusion of the 0.96 acres they did not own. In 2004, the Houston Independent School District**,** Harris County, City

of Houston, Harris County Education Department, Port of Houston Authority of Harris County, Harris County Flood Control District, Harris County Hospital District, and the Houston Community College System[1] sued the Taxpayers for twenty years of unpaid taxes on the 10.34 acres. The taxing authorities placed a lien on the properties to secure payment. As the Taxpayers only owned 9.38 of the 10.34 acres, they asserted their lack of ownership as an affirmative defense under section 42.09(b)(1) of the Tax Code. While the suit was pending, the Taxpayers, under protest, paid the taxes on the entire 10.34 acres because the taxing entities would not accept payment on only the 9.38 acres. The Taxpayers did so in order to stop further penalties and interest from accruing, to avoid foreclosure on the 9.38 acres they did own, and to avoid breaching a contract to sell the 9.38 acres. They then filed a counterclaim for a refund of the taxes, penalties, and interest they had paid on the 0.96 acres they did not own, totaling $180,000. Once the taxing entities received the payment, they non-suited their claims and the district court realigned the parties, designating the Taxpayers as plaintiffs.

The taxing authorities filed a plea to the jurisdiction, asserting that the district court lacked jurisdiction because the Taxpayers failed to exhaust administrative remedies as required by the Tax Code. *See* TEX. TAX CODE § 42.09(a). The district court denied the plea. The taxing entities then filed an interlocutory appeal, contending that the district court erred in denying their jurisdictional plea.[2]

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[1] Morris's petition for review also names the Harris County Education District as a respondent in this Court.

[2] While we generally do not have jurisdiction over interlocutory appeals, the court of appeals rendered a final judgment granting the taxing entities' plea to the jurisdiction and dismissing the case.

The court of appeals reversed and granted the plea to the jurisdiction. 355 S.W.3d 668, 671. The court of appeals reasoned that after the realignment, the Taxpayers became plaintiffs so the affirmative defense of non-ownership was no longer available under section 42.09(b)(1). *Id*. at 677; TEX. TAX CODE § 42.09(b)(1). Since the only other means for bringing up non-ownership was a protest before the appraisal review board under section 41.41(a)(7), and the Taxpayers brought no timely protest, the court of appeals held that the trial court lacked jurisdiction due to the Taxpayers' failure to exhaust administrative remedies. 355 S.W.3d at 677; TEX. TAX CODE § 41.41(a)(7). The Taxpayers appealed, arguing that they were not stripped of their affirmative defense of non-ownership when the taxing units non-suited and the Taxpayers were realigned as plaintiffs. We agree and hold that the court of appeals erred in reversing the trial court's order denying the taxing authorities' plea to the jurisdiction.

The Tax Code establishes a detailed set of procedures that property owners must abide by to contest the imposition of property taxes. *See* TEX. TAX CODE §§ 41.01–43.04. Under section 42.09(a) of the Code, those procedures are exclusive and a taxpayer must exhaust the remedies provided in order to raise most grounds of protest in defense of a suit to collect taxes or as a basis for a claim for relief. *Id.* § 42.09(a). Section 42.09(b)(1), however, allows a person sued for delinquent taxes to assert as an affirmative defense "that the defendant did not own the property on which the tax was imposed" if the suit is to enforce personal liability. *Id.* § 42.09(b)(1).

In reversing the trial court's ruling, the court of appeals emphasized the distinction between the Taxpayers' assertion of non-ownership as an affirmative defense and non-ownership as the basis for an affirmative claim for reimbursement of taxes paid under protest. That there is a distinction

between an affirmative defense and an affirmative claim for relief is beyond dispute. But the technical distinction between the two is insignificant in this context. In section 42.09(b)(1), the Legislature provided taxpayers a mechanism to avoid the imposition of tax liability for property they do not own. Under the court of appeals' reading of the statutory scheme, however, even persons who were never provided an opportunity to pursue the administrative remedy provided in section 41.41(a)(7) of the Code would be unable to recoup taxes paid under protest after being sued for delinquent taxes on property they did not own if the taxing authorities non-suited. Further, the court of appeals' construction of the statute discourages taxpayers' compliance with section 42.08 of the Tax Code, which requires prepayment of taxes under protest as a condition of judicial review; as the Taxpayers in this case note, they would have been in a better position had they resisted payment and pursued the litigation to the end, despite not availing themselves of administrative remedies.

While Section 42.09(b)(1) refers to non-ownership as an affirmative defense, it evidences the Legislature's intention to provide taxpayers with an opportunity to avoid tax liability for property that they do not own. *See City of Pharr v. Boarder to Boarder Trucking Serv., Inc.*, 76 S.W.3d 803, 806 (Tex. App.—Corpus Christi 2002, pet. denied)(recognizing "that 42.09 makes [it] clear that the legislature desires that the taxpayer 'have available the defense that he did not own the property.'"). Taxing statutes are construed strictly against the taxing authority and liberally for the taxpayer. *Bullock v. Statistical Tabulating Corp.*, 549 S.W.2d 166, 169 (Tex. 1977); *Wilson Commc'ns, Inc. v. Calvert*, 450 S.W.2d 842, 844 (Tex. 1970). The court of appeals' reading of the statute contravenes that precept: it allows taxing authorities to thwart the Legislature's intent by accepting taxes paid under protest and then non-suiting, just as happened in this case.

Accordingly, we hold that the Taxpayers did not lose their entitlement to contest tax liability on the basis of non-ownership when the taxing units non-suited and the Taxpayers were realigned as plaintiffs. Accordingly, we reverse the court of appeals' judgment and remand to the trial court.

OPINION DELIVERED: October 26, 2012

IN THE SUPREME COURT OF TEXAS

NO. 11-0686

TEXAS ADJUTANT GENERAL'S OFFICE, PETITIONER,

v.

MICHELE NGAKOUE, RESPONDENT

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

Argued December 4, 2012

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

JUSTICE BOYD delivered a dissenting opinion, in which JUSTICE JOHNSON, JUSTICE WILLETT, and JUSTICE GUZMAN joined.

Today we determine how various provisions of the Texas Tort Claims Act's [TTCA] election-of-remedies statute interact with one another. *See* TEX. CIV. PRAC. & REM. CODE § 101.106. The statute encourages, and in effect mandates, plaintiffs to pursue lawsuits against governmental units rather than their employees when the suit is based on the employee's conduct within the scope of employment. Section 101.106, in part, bars a suit against a governmental unit absent the unit's consent after a plaintiff sues the unit's employee regarding the same subject matter. However, it also provides that when an employee is sued for acts conducted within the general scope

of employment, and suit could have been brought under the TTCA, then the suit is considered to have been filed against the governmental unit, not the employee. Accordingly, we hold that the plaintiff who brings such a suit against an employee is not barred from asserting a claim against the governmental employer. Further, while the Legislature has set out a procedure for the dismissal of a suit against an employee who was acting within the scope of employment, this procedure is immaterial to whether suit may be maintained against the proper defendant—the government. In this case, the employee was entitled to dismissal as a matter of law because the suit against him undisputedly arose from conduct within the general scope of employment, and suit against the governmental unit should proceed because the plaintiff was entitled to, and did, amend his pleadings to assert a TTCA claim against the government. Accordingly, we affirm the judgment of the court of appeals, although for reasons different from those expressed in its opinion.

I. Background

Michele Ngakoue sued Franklin Barnum for damages arising out of an automobile accident that occurred in Austin, Texas, alleging that Barnum's negligence caused the accident. At the time of the accident, Barnum was an employee of the Texas Adjutant General's Office (TAGO). Barnum filed a motion to dismiss himself from suit pursuant to section 101.106(f) of the Texas Civil Practice and Remedies Code. That section provides in part that if suit is filed against a government employee in the employee's official capacity, then "[o]n the employee's motion, the suit against the employee shall be dismissed unless the plaintiff files amended pleadings dismissing the employee and naming the governmental unit as defendant" within thirty days. TEX. CIV. PRAC. & REM. CODE § 101.106(f). Ngakoue filed an amended petition within thirty days entitled "Plaintiff's First Amended Petition

& Motion to Dismiss as to Defendant Franklin Barnum," which added TAGO as a defendant but failed in the body of the document to specifically reference or request Barnum's dismissal from the suit. The amended petition alleged that TAGO's sovereign immunity was waived under the TTCA because the claim arose "from the negligent acts and omissions of [Barnum] while [Barnum] was acting in the course and scope of his employment by [TAGO]." The trial court eventually denied Barnum's motion to dismiss.

TAGO subsequently filed a plea to the jurisdiction and motion to dismiss, claiming that Ngakoue failed to comply with the requirements of subsection (f) by not dismissing Barnum in his amended pleading, and arguing that suit against both Barnum and TAGO should be dismissed as a result of that failure. Specifically, TAGO argued that Barnum should be dismissed pursuant to subsection (f), while TAGO itself should be dismissed pursuant to subsection (b). *See id.* § 101.106(b) ("The filing of a suit against any employee of a governmental unit constitutes an irrevocable election by the plaintiff and immediately and forever bars any suit or recovery by the plaintiff against the governmental unit regarding the same subject matter unless the governmental unit consents."). The trial court denied TAGO's plea and motion to dismiss, and both TAGO and Barnum timely appealed.

The court of appeals reversed the trial court's order denying Barnum's motion to dismiss. However, the court affirmed the denial of TAGO's plea to the jurisdiction, holding that Ngakoue's failure to comply with subsection (f) did not bar suit against TAGO. More specifically, the court of appeals held that: (1) Ngakoue failed to comply with subsection (f)'s procedural requirement by not properly dismissing Barnum within thirty days of Barnum's motion to dismiss; (2) nonetheless, that

failure had no effect on the operation of subsection (b); and (3) subsection (b) does not bar suit against a governmental unit that otherwise falls within the waiver of immunity of the TTCA itself. Thus, because Ngakoue's suit against TAGO arose from its employee's use of a motor vehicle—ostensibly invoking a waiver of immunity under the TTCA—the court concluded that it was not barred by section 101.106(b). *See* TEX. CIV. PRAC. & REM. CODE § 101.021(1). We agree with the court of appeals that Barnum's motion to dismiss should have been granted. We also agree, though for different reasons, that TAGO's plea to the jurisdiction was properly denied.

II. The Texas Tort Claims Act and Section 101.106: Election of Remedies

"[N]o state can be sued in her own courts without her consent, and then only in the manner indicated by that consent." *Hosner v. DeYoung*, 1 Tex. 764, 769 (1847). This is because lawsuits against the state "hamper governmental functions by requiring tax resources to be used for defending lawsuits and paying judgments rather than using those resources for their intended purposes." *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 655 (Tex. 2008) (citation and internal quotation marks omitted). Accordingly, the doctrine of sovereign immunity "bars suits against the state and its entities" unless the state consents by waiving immunity. *Prairie View A&M Univ. v. Chatha*, 381 S.W.3d 500, 512 (Tex. 2012). "[T]he manner in which the government conveys its consent to suit is through the Constitution and state laws." *Garcia*, 253 S.W.3d at 660. Thus, "'it is the Legislature's sole province to waive or abrogate sovereign immunity.'" *Id.* (quoting *Tex. Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 853 (Tex. 2002)). Because any legislative waiver of immunity must be undertaken "by clear and unambiguous language," statutory

waivers of immunity are to be construed narrowly. TEX. GOV'T CODE § 311.034; *see also Garcia*, 253 S.W.3d at 655.

The TTCA provides a limited waiver of immunity for certain tort claims against the government. *See* TEX. CIV. PRAC. & REM. CODE §§ 101.001–.109. As is relevant here, the TTCA imposes liability on a governmental unit for the negligent acts of employees acting in the scope of employment if the injury claimed "arises from the operation or use of a motor-driven vehicle" and the employee would have been personally liable under Texas law. *Id.* § 101.021(1). The TTCA also includes a section entitled "Election of Remedies," which contains various provisions addressing different pleading scenarios and provides:

> (a) The filing of a suit under this chapter against a governmental unit constitutes an irrevocable election by the plaintiff and immediately and forever bars any suit or recovery by the plaintiff against any individual employee of the governmental unit regarding the same subject matter.
>
> (b) The filing of a suit against any employee of a governmental unit constitutes an irrevocable election by the plaintiff and immediately and forever bars any suit or recovery by the plaintiff against the governmental unit regarding the same subject matter unless the governmental unit consents.
>
> (c) The settlement of a claim arising under this chapter shall immediately and forever bar the claimant from any suit against or recovery from any employee of the same governmental unit regarding the same subject matter.
>
> (d) A judgment against an employee of a governmental unit shall immediately and forever bar the party obtaining the judgment from any suit against or recovery from the governmental unit.
>
> (e) If a suit is filed under this chapter against both a governmental unit and any of its employees, the employees shall immediately be dismissed on the filing of a motion by the governmental unit.

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

Id. § 101.106. To resolve this case we must analyze the operation of and interaction between the provisions of section 101.106 to determine the consequences of both Ngakoue's election to file suit against Barnum and Ngakoue's actions in response to Barnum's motion to dismiss.

When interpreting a statute, our goal is to ascertain the Legislature's intent. *In re Lopez*, 372 S.W.3d 174, 176 (Tex. 2012) (orig. proceeding). The best guide to that determination is usually the plain language of the statute. *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 865 (Tex. 1999). But we must view the statute as a whole, *id.* at 866, and "[w]e must endeavor to read the statute contextually, giving effect to every word, clause, and sentence," *In re Office of Attorney Gen.*, ___ S.W.3d ___, ___ (Tex. 2013). We may consider the "object sought to be obtained" by the statute as well as the "consequences of a particular construction." TEX. GOV'T CODE § 311.023(1), (5); *see also State v. Hodges*, 92 S.W.3d 489, 494 (Tex. 2002).

In *Garcia*, we observed that section 101.106 is intended to "force a plaintiff to decide at the outset whether an employee acted independently and is thus solely liable, or acted within the general scope of his or her employment such that the governmental unit is vicariously liable." *Garcia*, 253 S.W.3d at 657. In turn, section 101.106's election scheme favors the expedient dismissal of

governmental employees when suit should have been brought against the government.[1] *Id.* An early determination of who constitutes the proper defendant "narrows the issues for trial and reduces delay and duplicative litigation costs" by removing a plaintiff's ability "to plead alternatively that the governmental unit is liable because its employee acted within the scope of his or her authority but, if not, that the employee acted independently and is individually liable." *Id.* Thus, when determining the meaning of section 101.106's various provisions, we must favor a construction that most clearly leads to the early dismissal of a suit against an employee when the suit arises from an employee's conduct that was within the scope of employment and could be brought against the government under the TTCA.

Central to the resolution of this case are subsections (b) and (f). Subsection (b) provides that filing any suit against an employee of a governmental unit is an "irrevocable election" that "immediately and forever" bars suit against the governmental unit regarding the same subject matter, "unless the governmental unit consents."[2] TEX. CIV. PRAC. & REM. CODE § 101.106(b). We held in *Garcia* that "consent" under subsection (b) includes statutory waivers of immunity, "provided the procedures outlined in the statute [waiving immunity] have been met." *Garcia*, 253 S.W.3d at 660. Specifically, we held that the plaintiffs' suit against an employee under the Texas Commission on Human Rights Act [TCHRA] did not bar suit against a governmental unit regarding the same subject

[1] We have recognized that section 101.106 was originally enacted to address the problem of plaintiffs suing governmental employees rather than the governmental unit itself in order to avoid the damage caps and other restrictions imposed by the TTCA, which apply only to suits against the government. *Garcia*, 253 S.W.3d at 656.

[2] We note that the bar in subsection (b) is not limited to suits under the TTCA, unlike other provisions in section 101.106. *Compare* TEX. CIV. PRAC. & REM. CODE § 101.106(b), *with id.* § 101.106(a), (c), (e), (f) (referring to suits filed or claims arising "under this chapter [the TTCA]").

matter because the Legislature had consented to suit via the waiver of immunity contained in that statute.[3] *Id.*; *see also* TEX. LAB. CODE §§ 21.001–.556 (waiving immunity from suit under the TCHRA). TAGO argues that, pursuant to *Garcia*, "consent" under subsection (b) may only be found in statutory waivers of immunity found outside the TTCA itself.[4] We disagree. Nothing in subsection (b)'s language suggests such a limitation, nor did we find one in *Garcia*. Rather, in that case, the plaintiff's common-law tort claims against the government were barred not because of subsection (b), but because they did not fall within the TTCA's limited waiver of immunity, 253 S.W.3d at 658–59, while the TCHRA claims survived due to the separate waiver of immunity in that statute, *id.* at 660.

Ngakoue thus argues, and the court of appeals held, that because the underlying suit alleged damages resulting from an automobile accident caused by the negligence of an employee acting within the scope of employment, and because the Legislature has waived immunity for such suits under section 101.021(1) of the TTCA, the Legislature has consented to suit and, under *Garcia*, the bar in subsection (b) no longer applies. ___ S.W.3d at ___. TAGO responds that consent under subsection (b) requires not just a waiver of immunity, but also strict compliance with the procedures set out in the pertinent statute—in this case, section 101.106(f) of the TTCA. *See, e.g.*, *Univ. of Tex. Health Sci. Ctr. v. Webber-Eells*, 327 S.W.3d 233, 242 (Tex. App.—San Antonio 2010, no pet.)

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[3] The Court noted in *Garcia* that "[w]hether Garcia ha[d] taken the necessary procedural steps to perfect her right to sue under the TCHRA is a matter the parties have not addressed." 253 S.W.3d at 660.

[4] There is a split in the courts of appeals on this issue. *Compare, e.g.*, *Amadi v. City of Houston*, 369 S.W.3d 254, 260–61 (Tex. App.—Houston [14th Dist.] 2011, pet. denied Aug. 30, 2013), *with City of Houston v. Esparza*, 369 S.W.3d 238, 242–43 (Tex. App.—Houston [1st Dist.] 2011, pet. denied Aug. 30, 2013).

(holding that plaintiff's failure to file amended pleadings substituting the governmental unit as a defendant in response to the employee's subsection (f) motion barred subsequent suit against government unit following dismissal). Specifically, TAGO argues, and the dissent would hold, that subsection (f) requires a plaintiff like Ngakoue to both add the governmental unit *and* dismiss the employee in response to a subsection (f) motion to dismiss in order to avoid the bar to suit under subsection (b). Because Ngakoue added TAGO as a defendant but failed to dismiss Barnum, TAGO contends, Ngakoue failed to comply with subsection (f) and the bar applies. As discussed below, we need not reach the issue of whether the Legislature consented to suit under subsection (b) because, independent of the question of consent, subsection (b) simply does not apply here.

As discussed above, the bar in subsection (b) is triggered by the "filing of a suit against any employee of a governmental unit." TEX. CIV. PRAC. & REM. CODE § 101.106(b). Subsection (f), however, states that "[i]f a suit is filed against an employee of a governmental unit based on conduct within the general scope of that employee's employment and if it could have been brought under this chapter [the TTCA] against the governmental unit, the suit is considered to be against the employee in the employee's official capacity only." *Id.* § 101.106(f). We have recognized that "a suit against a state official is merely 'another way of pleading an action against the entity of which [the official] is an agent.'" *Franka v. Velasquez*, 332 S.W.3d 367, 382 n.68 (Tex. 2011) (quoting *Kentucky v. Graham*, 473 U.S. 159, 165 (1985)) (alteration in original). Thus, "[a] suit against a state official in his official capacity 'is *not* a suit against the official personally, for the real party in interest is the entity.'" *Id.* (quoting *Kentucky*, 473 U.S. at 166). "Such a suit," we have noted, "actually seeks to impose liability against the governmental unit rather than on the individual specifically named and

is, *in all respects other than name*, a suit against the entity." *Id.* (emphasis added) (citations, quotation marks, and alteration omitted). Thus, pursuant to subsection (f), a suit against a government employee acting within the scope of employment that could have been brought under the TTCA—meaning the plaintiff had a tort claim to assert against the government[5]—is considered to have been brought against the governmental unit, *not* the employee.

Subsection (f)'s express classification of such a suit as one against the governmental unit is not empty language. As discussed in *Franka*, "public employees . . . have always been individually liable for their own torts, even when committed in the course of employment, and suit may be brought against a government employee in his individual capacity" to the extent the employee is not entitled to official immunity.[6] 332 S.W.3d at 383 (internal citations omitted). However, in enacting subsection (f), the Legislature "foreclose[d] suit [under the TTCA] against a government employee in his individual capacity if he was acting within the scope of employment." *Id.* at 381. This furthers one of the primary purposes of both the TTCA generally and section 101.106 in particular—to protect governmental employees acting in the scope of employment. *See Garcia*, 235 S.W.3d at 656–57; *see also Franka*, 332 S.W.3d at 384.

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[5] In *Franka*, we held that, in the context of section 101.106, a tort claim may be "brought 'under'" the TTCA regardless of whether the TTCA waives immunity for that claim. 332 S.W.3d at 379. However, claims brought against the government pursuant to statutory waivers of immunity that exist apart from the TTCA are not "brought under" the TTCA. *Garcia*, 253 S.W.3d at 659 (quotation marks omitted).

[6] While the doctrine is not implicated in this case, public employees generally may "assert official immunity 'from suit arising from the performance of their (1) discretionary duties in (2) good faith as long as they are (3) acting within the scope of their authority.'" *Franka*, 332 S.W.3d at 383 (citing *City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex. 1994)).

Further, and in conjunction with that purpose, the Legislature's choice of language in subsection (f) affects its interaction with subsection (b). Again, the bar to suit against a governmental unit in subsection (b) is triggered by the filing of a suit *against an employee* of the unit. TEX. CIV. PRAC. & REM. CODE § 101.106(b).[7] But a suit against an employee in his official capacity is *not* a suit against the employee; it is, in all but name only, a suit against the governmental unit. *Franka*, 332 S.W.3d at 382 n.68; *see also Univ. of Tex. Health. Sci. Ctr. at San Antonio v. Bailey*, 332 S.W.3d 395, 401–02 (Tex. 2011) (holding that a governmental employer may be substituted for the employee under subsection (f) after limitations has run because there is "no change in the real party in interest"). Such a suit therefore does not trigger the bar in subsection (b) to subsequent suits against the governmental unit regarding the same subject matter.

In arguing that the subsection (b) bar was triggered, TAGO relies principally on the second sentence of subsection (f), which provides: "[o]n the employee's motion, the suit against the employee shall be dismissed unless the plaintiff files amended pleadings dismissing the employee and naming the governmental unit as defendant on or before the 30th day after the date the motion is filed." TEX. CIV. PRAC. & REM. CODE § 101.106(f). TAGO contends, and the dissent would hold, that this provision sets out a specific procedure that must be followed by a plaintiff—dismissal of the employee and addition of the government as defendant within thirty days of the employee's filing

[7] Correspondingly, under subsection (a), suit against a governmental unit under the TTCA—i.e., filing a tort claim against the governmental unit—bars suit against an "individual employee" of the unit regarding the same subject matter, regardless of whether immunity has been waived. TEX. CIV. PRAC. & REM. CODE § 101.106(a); *see Harris Cnty. v. Sykes*, 136 S.W.3d 635, 640 (Tex. 2004) (applying the prior version of section 101.106 to bar the plaintiff's claim against a governmental employee even though immunity was not waived under the TTCA for suit against the governmental unit).

the motion—to avoid the bar in subsection (b). We disagree. This portion of subsection (f) simply provides a procedure by which an employee who is considered to have been sued only in his official capacity will be dismissed from the suit.[8] When such an employee files a motion to dismiss, he is entitled to dismissal, which will occur in one of two ways: (1) via the plaintiff's amended pleading substituting the governmental unit for the employee as the defendant; or (2) absent such an amended pleading, via the trial court's order granting the employee's motion and dismissing the suit against the employee.[9] *Id.* But subsection (f) does not *require* any affirmative action by the plaintiff.

Thus, while the consequence of failing to substitute the government for the employee in response to an employee's subsection (f) motion to dismiss (assuming the employee was sued in his official capacity) is that "suit against the employee shall be dismissed," *id.*, such failure does not bar subsequent suit against the government. Significantly, the procedure for dismissal of the employee in subsection (f) in no way modifies the remainder of the provision clarifying that, where a tort claim could have been asserted against the governmental unit under the TTCA, a suit against the unit's employee involving conduct within the scope of employment is "considered to be against the employee in the employee's official capacity only"—that is, the suit is "considered to be against" the governmental unit itself, not the employee. *Id.* Instead, subsection (f)'s procedure for dismissal

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[8] The dissent classifies subsection (f) as an "exception" to the bar in subsection (b) requiring strict compliance with subsection (f)'s procedures. ___ S.W.3d at ___. This construction improperly inserts language into one or both provisions and ignores the fact that, as discussed further below, subsection (f)'s procedures are focused on dismissal of the employee, which is required upon the filing of a motion to dismiss regardless of any further action by the plaintiff.

[9] We therefore do not, as the dissent suggests, construe subsection (f) as "effecting an automatic substitution of the governmental unit for the employee," such that the second sentence of the provision is rendered meaningless. *See* ___ S.W.3d at ___. If only in name, the suit has been brought against the employee, and procedurally the employee still must be dismissed, whether by the plaintiff's amended pleading or the trial court's order on the employee's motion. TEX. CIV. PRAC. & REM. CODE § 101.106(f).

independently serves section 101.106's recognized purposes of ensuring early dismissal of governmental employees when suit should have been brought against the government and reducing the expense and delay associated with alternative pleading. *Garcia*, 253 S.W.3d at 657.

The same purposes are served by subsection (e), which applies when suit is filed against both a governmental unit under the TTCA and its employee. TEX. CIV. PRAC. & REM. CODE § 101.106(e). In such cases, "the employee shall immediately be dismissed on the filing of a motion by the governmental unit." *Id.* By filing such a motion, the governmental unit effectively confirms the employee was acting within the scope of employment and that the government, not the employee, is the proper party. Further, subsection (e) does not provide for dismissal of the governmental unit, so when the employee is dismissed under that provision, the suit then proceeds solely against the government, assuming immunity is otherwise waived. *See Garcia*, 253 S.W.3d at 659 (where tort claims were asserted against an employee and a governmental employer, and TTCA did not waive immunity for the claims asserted, the employee would nevertheless have been entitled to dismissal on the government's motion, and the TTCA claims against the government would not survive). TAGO is therefore correct in recognizing that, to the extent immunity is otherwise waived under the TTCA, a governmental unit cannot use subsection (b) to foreclose suit against it after having used subsection (e) to dismiss its employee from the suit.[10] *See, e.g.*, *Esparza*, 369 S.W.3d at 248 ("We

[10] The dissent appears to agree that suit may proceed against the government when an employee is dismissed on the government's motion under subsection (e). *See* ___ S.W.3d at ___. However, under the dissent's interpretation of subsection (e) as containing procedural requirements that must be strictly followed, a plaintiff who sues both the government and an employee, but voluntarily dismisses the employee without the need for a motion by the government, is barred from proceeding against the government. Such a result is at odds with both the text and the purposes of the statute.

reject the City's contention that subsections (b) and (e) apply without reference to each other when a claimant sues both the government and its employee together, thus requiring the dismissal of both defendants.").

In sum, subsection (f) does not require dismissal of the employee by the plaintiff to overcome the bar to suit against the government in subsection (b); rather, subsection (f) provides the TTCA plaintiff a window to amend his pleadings to substitute the governmental unit before the court dismisses the suit against the employee on the employee's motion where appropriate. TEX. CIV. PRAC. & REM. CODE § 101.106(f). If the plaintiff fails to substitute the government, and the employee was sued in his official capacity only, then the case must be dismissed. *Id.* But a suit against the governmental unit for which immunity is otherwise waived may go forward, just as a suit proceeds against the government when an employee is dismissed under subsection (e). Because subsection (f) classifies a suit against the employee who was acting in the scope of employment (where the suit could have been brought under the TTCA) as effectively constituting a suit against the government, and because subsection (f)'s procedural mechanism for dismissal of the employee does not affect this classification, a plaintiff who brings such a suit is not barred by subsection (b) from subsequently pursuing a claim against the governmental unit.[11]

By contrast, TAGO's and the dissent's interpretation attributes to the Legislature a far harsher intent than is expressed in the statute. The dissent would force a plaintiff, who may not be in the position of knowing whether the defendant was acting within the scope of employment when suit

[11] Plaintiffs are still subject to any other limitations with respect to suing the government, such as the statute of limitations or other procedural requirements that must be satisfied under the TTCA.

against an employee was filed, to choose whether to proceed against the employee or the governmental unit within thirty days of the filing of a subsection (f) motion to dismiss. However, a plaintiff may not be able to obtain the information necessary to make such a decision within such a short time frame, and an erroneous decision, in the dissent's view, would mean that suit is forever barred. But a central goal of the TTCA as a whole is to allow certain types of suits against the government; as noted above, the current version of section 101.106 became necessary because plaintiffs began suing governmental employees as individuals to avoid the TTCA's limitations. *Garcia*, 253 S.W.3d at 656. Thus, while it makes sense to interpret the section as curtailing suits against employees that could be brought instead against the government, it would be illogical for the election-of-remedies provisions to prohibit the very suits the TTCA authorizes.[12] *See Franka*, 332 S.W.3d at 385 (noting that "restrictions on government employee liability have always been part of the tradeoff for the [TTCA]'s waiver of immunity, expanding the government's own liability for its employees' conduct"). The provisions of section 101.106 provide a number of avenues for dismissal of governmental employees and avoidance of duplicative litigation, but they generally favor a suit against the governmental unit when appropriate rather than wholesale dismissal of a plaintiff's otherwise-meritorious suit.

[12] We disagree with the dissent that our interpretation of the statute renders subsection (b) meaningless. Unlike subsection (b), subsection (f) applies only to suits that could have been brought under the TTCA. TEX. CIV. PRAC. & REM. CODE § 101.106(b), (f). While subsection (f) does mitigate the harsh consequences imposed by subsection (b) with respect to TTCA claims, that determination was made by the Legislature in choosing the language to include in subsection (f) in furtherance of the purposes of the statute.

III. Application

In this case, Ngakoue originally elected to sue only Barnum, a TAGO employee. Barnum moved to dismiss under subsection (f), asserting he was acting within the scope of employment and that suit could have been brought under the TTCA. Once Barnum filed his motion to dismiss, Ngakoue faced a choice: (1) dispute that Barnum acted in his official capacity and urge the court to deny Barnum's motion to dismiss, thus pursuing his claims against Barnum alone; or (2) pursue his claim against TAGO, the governmental unit, which would in turn end his suit against Barnum. Ngakoue elected the latter, alleging in his amended petition that "Barnum was acting in the course and scope of his employment by [TAGO]" and that TAGO's sovereign immunity was waived under the TTCA. By this election, Ngakoue implicitly conceded that he had sued Barnum in his official capacity only and that dismissal under subsection (f) was therefore appropriate. The trial court accordingly erred in denying Barnum's motion to dismiss.

However, because Ngakoue's suit was brought against Barnum in his official capacity only, the suit did not trigger the bar in subsection (b) to a TTCA suit against TAGO, nor did Ngakoue's failure to dismiss Barnum in Ngakoue's amended petition. Because the result contemplated by subsection (f) in this situation is dismissal of Barnum (the employee), TAGO (the governmental unit) properly remains as the sole defendant.[13] Had the trial court properly granted Barnum's motion to

[13] The dissent asserts that this holding belies our previous statement that suit against the employee must be dismissed if the plaintiff fails to amend his pleadings to dismiss the employee in response to the employee's motion. ___ S.W.3d at ___. Because Ngakoue added TAGO as a defendant before the trial court ruled on Barnum's motion, dismissal of the suit against Barnum, but not TAGO, is appropriate.

dismiss, section 101.106's primary purpose—ensuring that suit proceeds against the proper governmental defendant early in the litigation—would have been satisfied.

IV. Conclusion

We hold that Barnum was entitled to dismissal under subsection (f) as a matter of law because it is undisputed that the suit against Barnum was based on conduct within the general scope of his governmental employment and could have been brought against TAGO under the TTCA. TAGO was not entitled to dismissal, however, because subsection (b) does not apply when an employee is considered to have been sued in his official capacity only, and because immunity was otherwise waived under the TTCA. Accordingly, the trial court correctly denied TAGO's motion to dismiss, and we affirm the judgment of the court of appeals.

_____

Debra H. Lehrmann
Justice

OPINION DELIVERED: August 30, 2013

IN THE SUPREME COURT OF TEXAS

NO. 11-0686

TEXAS ADJUTANT GENERAL'S OFFICE, PETITIONER,

v.

MICHELE NGAKOUE, RESPONDENT

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

JUSTICE BOYD, joined by JUSTICE JOHNSON, JUSTICE WILLETT, and JUSTICE GUZMAN, dissenting.

The plaintiff in this case sued a government employee after they were involved in a car accident that they agree occurred within the scope of the employee's employment with a governmental unit.[1] Two subsections of the Texas Tort Claims Act's election-of-remedies provision apply to such a suit: 101.106(b) and 101.106(f). Subsection (b) provides that the filing of a suit against an employee of a governmental unit "constitutes an irrevocable election by the plaintiff and immediately and forever bars any suit or recovery by the plaintiff against the governmental unit regarding the same subject matter unless the governmental unit consents."[2] Subsection (f) says two things about such a suit: first, the suit "is considered to be against the employee in the employee's official capacity only," and second, upon the employee's motion, the suit "shall be dismissed

[1] Although the governmental unit, the petitioner in this case, has not expressly agreed that the accident occurred within the scope of the employee's employment, it has not contested it in this Court.

[2] *See* TEX. CIV. PRAC. & REM. CODE § 101.106(b).

unless," within thirty days, the plaintiff files an amended pleading dismissing the employee and naming the governmental unit as the defendant.[3]

In this case, after the employee filed a motion to dismiss, the plaintiff filed an amended pleading that *kept* the employee as a defendant *and added* the governmental unit as an additional defendant. The court of appeals held that, because the plaintiff failed to do what subsection (f) allowed, his claims against the employee must be dismissed, and the plaintiff has not appealed that holding. But the court of appeals went on to hold that the plaintiff's claims against the governmental unit need not be dismissed, and the governmental unit has appealed that holding. The Court affirms, based not on the court of appeals' reasoning or even on the plaintiff's arguments, but on a completely new construction of the statute. In my view, the Court substantially rewrites the statute to reach this result, revising the language of subsection (f) and rendering subsection (b) meaningless. Section 101.106 is admittedly difficult to construe, but reading the statute as a whole, and staying as true as possible to the language the Legislature enacted, I would hold that, because the plaintiff failed to do the only thing subsection (f) allowed him to do to avoid dismissal—that is, dismiss the employee and name the governmental unit as the defendant—his claims against the governmental unit must be dismissed. I therefore respectfully dissent.

I.
Statutory Construction

This case requires us to interpret and apply section 101.106 of the Tort Claims Act. In construing a statute, "[o]ur task is to effectuate the Legislature's expressed intent." *In re Allen*, 366

[3] *See* TEX. CIV. PRAC. & REM. CODE § 101.106(b).

S.W.3d 696, 703 (Tex. 2012). Our search for legislative intent begins with the statute's language: "Legislative intent is best revealed in legislative language." *In re Office of Att'y Gen.*, No. 11-0255, 2013 WL 854785, at *4 (Tex. Mar. 8, 2013). When the statute's language is unambiguous and does not lead to absurd results, our search also ends there: "Where text is clear, text is determinative." *Id.*; *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437 (Tex. 2009). "Enforcing the law as written is a court's safest refuge in matters of statutory construction, and we should always refrain from rewriting text that lawmakers chose . . . ." *See Entergy*, 282 S.W.3d at 443. We cannot add words into, or delete language from, a statutory provision unless doing so is "necessary to give effect to clear legislative intent," because "[o]nly truly extraordinary circumstances showing unmistakable legislative intent should divert us from enforcing the statute as written." *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 867 (Tex. 1999).

In construing the statute's text, we give the words their plain, ordinary meaning unless the statute indicates an alternative meaning. *See TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011) (observing that statutory terms are given ordinary meaning unless assigned different meaning by statute or different meaning is apparent from context). But "plain meaning" does not mean devoid of context; to the contrary, we have always considered statutes "as a whole" rather than as "isolated provisions." *See id.* at 441 ("Language cannot be interpreted apart from context. The meaning of a word that appears ambiguous when viewed in isolation may become clear when the word is analyzed in light of the terms that surround it.").

II.
Section 101.106

Section 101.106 of the Tort Claims Act, entitled "Election of Remedies," contains six separate subsections, each of which begins by describing the kind of "suit," "claim," or "judgment" to which it applies:

(a) The filing of *a suit under this chapter against a governmental unit* constitutes an irrevocable election by the plaintiff and immediately and forever bars any suit or recovery by the plaintiff against any individual employee of the governmental unit regarding the same subject matter.

(b) The filing of *a suit against any employee of a governmental unit* constitutes an irrevocable election by the plaintiff and immediately and forever bars any suit or recovery by the plaintiff against the governmental unit regarding the same subject matter unless the governmental unit consents.

(c) The settlement of *a claim arising under this chapter* shall immediately and forever bar the claimant from any suit against or recovery from any employee of the same governmental unit regarding the same subject matter.

(d) A *judgment against an employee of a governmental unit* shall immediately and forever bar the party obtaining the judgment from any suit against or recovery from the governmental unit.

(e) If a *suit is filed under this chapter against both a governmental unit and any of its employees*, the employees shall immediately be dismissed on the filing of a motion by the governmental unit.

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

TEX. CIV. PRAC. & REM. CODE § 101.106 (emphases added).[4]

I agree with the Court that the principal purpose of section 101.106 is to force plaintiffs to choose, early and irrevocably, between seeking recovery from a governmental employer or its employee individually. *See Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 657 (Tex. 2008) ("The revision's apparent purpose was to force a plaintiff to decide at the outset whether an employee acted independently and is thus solely liable, or acted within the scope of employment such that the governmental unit is vicariously liable, thereby reducing the resources that the government and its employees must use in defending redundant litigation and alternative theories of recovery. By requiring a plaintiff to make an irrevocable election at the time suit is filed between suing the governmental unit under the Tort Claims Act or proceeding against the employee alone, section 101.106 narrows the issues for trial and reduces delay and duplicative litigation costs."). Every provision of the statute operates to ensure this effect. *See* TEX. CIV. PRAC. & REM. CODE § 101.106 (prohibiting recovery against one after filing of suit or obtaining judgment or settlement against the other, and providing for dismissal of one when both are sued).

Another purpose of the statute is to encourage plaintiffs to pursue claims based on a government employee's conduct within the scope of employment against the governmental unit. *See Garcia*, 253 S.W.3d at 657 ("[T]he Tort Claims Act's election scheme is intended to protect

[4] Subsections (a), (c), (e), and (f) apply to suits and claims that are or could have been brought or filed "under this chapter," which we have interpreted to include "all tort theories alleged against a governmental unit, whether it is sued alone or together with its employees," *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 659 (Tex. 2008), and "even if the Act does not waive immunity" for the suit. *Franka v. Velasquez*, 332 S.W.3d 367, 375 (Tex. 2011). Subsections (b) and (d), which address suits and judgments against a government employee, are not limited to those brought "under this chapter."

governmental employees by favoring their early dismissal when a claim regarding the same subject matter is also made against the governmental employer."). Subsections (e) and (f) most directly operate to achieve this end, adopting procedures for swift dismissal of the employee in such suits. *See* TEX. CIV. PRAC. & REM. CODE § 101.106(e), (f). Subsections (a) and (c)) also serve this purpose by preventing subsequent suits against the employee. *See id.* § 101.106(a), (c)).

Taken together, the subsections of section 101.106 "force a plaintiff to decide at the outset whether an employee acted independently and is thus solely liable, or acted within the general scope of his or her employment such that the government is vicariously liable" for the harm the employee caused. *Garcia*, 253 S.W.3d at 657. Based on that decision, the plaintiff is required "to make an irrevocable election at the time suit is filed between suing the governmental unit under the Tort Claims Act or proceeding against the employee alone." *Id.* Depending on which choice the plaintiff makes, one or more of section 101.106's subsections will apply to achieve the statute's purposes.

A. Suit against the governmental unit

If a plaintiff elects to sue a governmental unit for harm that its employee tortiously caused, then subsection (a), which addresses "a suit under this chapter against a governmental unit," applies. TEX. CIV. PRAC. & REM. CODE § 101.106(a). Under subsection (a), the plaintiff who elects to sue the governmental unit cannot later decide to sue the employee: the decision to sue the governmental unit "constitutes an irrevocable election by the plaintiff and immediately and forever bars any suit

or recovery by the plaintiff against any individual employee of the governmental unit regarding the same subject matter."[5] *Id.*

B. Suit against both the governmental unit and its employee

If a plaintiff elects to sue both a governmental unit and its employee, then subsection (e), which addresses a suit "under this chapter against both a governmental unit and any of its employees," applies. *See* TEX. CIV. PRAC. & REM. CODE § 101.106(e). Subsection (e) does not necessarily prohibit a suit from proceeding against both defendants, but if the governmental unit files a motion to dismiss the claims against the employee, those claims "shall immediately be dismissed." *Id.* Subsection (e) thus "protect[s] governmental employees by favoring their early dismissal when a claim regarding the same subject matter is also made against the governmental employer." *Garcia*, 253 S.W.3d at 657. Upon the dismissal of the employee, the governmental unit remains as the only defendant.

C. Suit against the government employee

Finally, as in the present case, a plaintiff may elect to sue only a government employee. Unlike a suit against a governmental unit, a suit against a government employee does not necessarily reflect that the plaintiff has decided whether the employee was acting within or outside the scope of employment. The plaintiff may sue the employee in the employee's official capacity (thus implicating the governmental unit's vicariously liability) or in the employee's individual capacity (thus seeking to hold the employee personally liable) or in both capacities.

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[5] Similarly, under subsection (c), the settlement of such a claim will "immediately and forever bar the claimant from any suit against or recovery from any employee of the same governmental unit regarding the same subject matter." *Id*. § 101.106(c).

1. Subsection (b)'s bar and its exception

Regardless of the capacity allegations, when the plaintiff chooses to sue the government employee, then subsection (b), which addresses "a suit against any employee of a governmental unit," applies. *See* TEX. CIV. PRAC. & REM. CODE § 101.106(b). As a corollary to subsection (a), subsection (b) provides that a plaintiff who chooses to sue a government employee cannot later decide to sue the governmental unit: the decision to sue the employee "constitutes an irrevocable election by the plaintiff and immediately and forever bars any suit or recovery by the plaintiff against the governmental unit regarding the same subject matter." *Id.*

Unlike subsection (a), however, subsection (b) provides an exception: a plaintiff who sues a government employee cannot sue or recover from the governmental unit "*unless* the governmental unit consents." *Id*. (emphasis added). Because "the manner in which the government conveys its consent to suit is through the Constitution and state laws," we held in *Garcia* that the exception applied and subsection (b) did not bar claims against a governmental unit when the Legislature had "consented to suits" by waiving immunity under the Texas Commission on Human Rights Act. *See Garcia*, 253 S.W.3d at 660. Thus, the "consent" that provides an exception to subsection (b)'s bar includes statutory waivers of immunity, "provided the procedures outlined in the statute have been met." *Id.*

2. Subsection (f)'s dismissal provisions

When a plaintiff elects to sue a government employee, subsection (f) may also apply. Subsection (f) applies when a suit "is filed against an employee of a governmental unit based on conduct within the general scope of that employee's employment and if it could have been brought

under this chapter against the governmental unit." TEX. CIV. PRAC. & REM. CODE § 101.106(f). We have held that "any tort claim against the government is brought 'under' the Act for purposes of section 101.106, even if the Act does not waive immunity" for that claim. *Franka v. Velasquez*, 332 S.W.3d 367, 375 (Tex. 2011). Thus, while subsection (b) applies to *all* suits against a government employee, subsection (f) applies only when the government employee "acted within the general scope of his employment and suit could have been brought under the Act—that is, his claim is in tort and not under another statute that independently waives immunity." *Id*. at 381.

As the Court has previously explained, "section 101.106(f)'s two conditions are met in almost every negligence suit against a government employee," so employee-defendants are usually entitled to dismissal upon the filing of a motion. *See Franka*, 332 S.W.3d at 381. The parties agree that subsection (f) applies to the present case. Thus, this suit is "considered to be against the employee in the employee's official capacity only." TEX. CIV. PRAC. & REM. CODE § 101.106(f). If the employee moves to dismiss under subsection (f), the trial court "shall" grant the employee's motion and dismiss the plaintiff's suit against the employee "unless the plaintiff files amended pleadings dismissing the employee and naming the governmental unit as defendant on or before the 30th day after the date the motion is filed." *Id.* § 101.106(f). If the plaintiff timely files amended pleadings dismissing the employee and naming the governmental unit as defendant, the suit will proceed only against the governmental unit.

The plaintiff may, however, decline to amend the pleadings in response to a motion to dismiss under subsection (f). The employee's assertion that the suit is based on conduct within the scope of the employee's employment does not make it so. The issue of whether the complained-of

conduct occurred within the scope of employment will not have been finally adjudicated when the plaintiff decides whether to dismiss the employee and sue the governmental unit instead. As we noted in *Franka*, once an employee files a motion to dismiss under subsection (f), the plaintiff has thirty days to decide "whether to acquiesce and sue the government instead," and the statute does not mandate that the trial court rule on the motion within that time. 332 S.W.3d at 380. There may be fact issues that a jury must resolve to establish whether the conduct at issue was within the scope of employment. *See, e.g.*, *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 757 (Tex. 2007) (concluding as a matter of law that employee was not within scope of employment when there was "no conflicting evidence or conflicting set of inferences to raise a genuine issue of material fact"). And even if the trial court rules on a subsection (f) motion within thirty days, the ruling is subject to review on appeal. *Cf. Franka*, 332 S.W.3d at 380 (observing that "[e]ven if the plaintiff obtained the trial court's ruling [on waiver of immunity] before having to decide whether to dismiss the employee, there would be no assurance that the ruling would be upheld on appeal, especially after the issue was relitigated with the government.").

This means that, after an employee files a motion to dismiss under subsection (f), a plaintiff is faced with the same choice he otherwise faces under subsections (a) and (b) when he first files suit: he must choose a single avenue of recovery—against the government or the employee—at a time when there may be uncertainty as to which avenue of recovery is the right one under the facts of the case. Subsection (f), like the election-of-remedies provision as a whole, forces a Tort Claims Act plaintiff to decide early whether the government employee acted within the scope of

employment, and makes the plaintiff, rather than the governmental unit or its employee, bear the consequences if the decision is wrong.

III.
Application

In the present case, as the Court acknowledges, the plaintiff "originally elected to bring suit only against [the employee]" and "[o]nce [the employee] filed his motion to dismiss, [the plaintiff] faced a choice: (1) dispute that [the employee] acted in his official capacity and urge the court to deny [the employee's] motion to dismiss, thus pursing his claims against [the employee] alone, or (2) pursue his claim against [the employer], the governmental unit, which would in turn end his suit against [the employee]." *Ante* at __. But when the employee filed a motion to dismiss under subsection (f), the plaintiff attempted to pursue yet a third course: instead of choosing not to file an amended pleading, or choosing to file an amended pleading dismissing the employee and naming the governmental unit as defendant, the employee filed an amended pleading adding the governmental unit as a defendant, without dismissing the employee.[6]

I would hold that, by failing to do what subsection (f) allowed him to do, the plaintiff forfeited the opportunity that subsection (f) would have given him to add the governmental unit as defendant. And in the absence of subsection (f)'s authorization to add the governmental unit,

[6] The plaintiff's amended pleading was titled "Plaintiff's First Amended Petition and Motion to Dismiss as to Defendant Franklin Barnum," but in the body and prayer of the pleading, the plaintiff did not request dismissal of the employee, and instead continued to assert claims against, and seek relief from, the employee. Although the plaintiff contends in this Court that he at least "substantially complied" with subsection (f)'s requirement to dismiss the claims against the employee, I agree with the Court's conclusion that he did not.

subsection (b) (which applies any time a plaintiff sues an employee) forever bars the plaintiff's claims against the governmental unit.

A. Subsection (f) is an exception to subsection (b).

By their own terms, both subsections (b) and (f) apply when a plaintiff sues a government employee, although the latter applies only when that suit is based on conduct within the scope of employment and could have been brought against the governmental unit under the Tort Claims Act. *See* TEX. CIV. PRAC. & REM. CODE § 101.106(b), (f). Subsection (b) provides that the plaintiff's filing of a suit against the employee "immediately and forever bars any suit or recovery by the plaintiff against the governmental unit regarding the same subject matter unless the governmental unit consents." *Id.* § 101.106(b). Yet subsection (f) expressly authorizes the plaintiff to respond to the employee's motion to dismiss by filing amended pleadings naming the governmental unit as a defendant. *Id.* § 101.106(f). The governmental unit in this case contends that subsection (f) provides a limited exception to subsection (b)'s bar, arguing that this construction is the only way to give effect to both subsection (b)'s prohibition (against suing the governmental unit) and subsection (f)'s permission (to sue the governmental unit). I agree with the governmental unit and with the courts of appeals that have held that subsection (f) is an exception to the bar in subsection (b).[7]

[7] *See, e.g.*, *Tex. Tech Univ. Health Sci. Ctr. v. Williams*, 344 S.W.3d 508, 513 (Tex. App.—El Paso 2011, no pet.) ("[T]he governmental unit's immunity from 'any suit or recovery' thus retained under Subsection (b) remains subject to removal under Subsection (f) if the employee defendant moves for dismissal of the suit against him."); *Univ. of Tex. Health Sci. Ctr. at San Antonio v. Webber-Eells*, 327 S.W.3d 233, 236 (Tex. App.—San Antonio 2010, no pet.) (dismissing suit against governmental unit after plaintiff failed to comply with subsection (f)); *Huntsville Indep. Sch. Dist. v. Briggs*, 262 S.W.3d 390, 395 (Tex. App.—Waco 2008, pet. denied) (holding that plaintiff who sued government employee and amended to add governmental unit in response to employee's motion to dismiss could not pursue claims against governmental unit because plaintiff "did not comply with the procedural requirements of subsection (f). Therefore, the protections of subsection (b) were still available to [the governmental unit]."); *Tex. Dep't of Agric. v. Calderon*, 221 S.W.3d 918, 923–24 (Tex. App.—Corpus Christi 2007, no pet.) (holding that plaintiffs who initially sued employee and amended to add governmental unit in response to employee's motion to dismiss could not proceed against

B. The plaintiff failed to trigger subsection (f)'s exception to subsection (b).

Subsection (f) expressly authorizes the plaintiff to assert claims against the governmental unit (despite the bar in subsection (b)) only if the plaintiff's amended pleadings both "dismiss the employee *and* add the governmental unit as defendant." TEX. CIV. PRAC. & REM. CODE § 101.106(f) (emphasis added). By failing to dismiss the employee, the plaintiff in this case did not meet the requirements that would have permitted him to avoid the bar in subsection (b) and sue the governmental unit. I would therefore hold that subsection (b) bars the plaintiff's claims against the governmental unit, "unless the governmental unit consents."

C. The "consent" exception to subsection (b) does not apply.

Before applying subsection (b)'s "consent" exception, the court of appeals reached the same conclusion I do above—because the plaintiff failed to comply with subsection (f), his claims were barred by subsection (b). 2011 WL 1642179, at *8. But the court held that the "consent" exception applied, and subsection (b) did not bar the plaintiff's claims against the governmental unit, because the Tort Claims Act waives immunity for suits based on a governmental employee's negligent operation of a motor-driven vehicle. *See id.* at *11; TEX. CIV. PRAC. & REM. CODE § 101.021(1) (waiving governmental immunity). The court read our decision in *Garcia* to hold that the "consent" referenced in subsection (b) includes the legislative waiver of immunity through the Tort Claims Act. Although the court noted that its construction of the statute "seems problematic and inconsistent with the language of section 101.106," it concluded that it was "bound by that construction nonetheless."

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governmental unit: "because of [plaintiffs'] failure to comply with section 101.106(f), the [governmental unit] retained its immunity from suit derived from section 101.106(b), and [plaintiffs] lost the opportunity provided by section 101.106(f) to name the [governmental unit] in place of [the employee] as the defendant in the lawsuit."), *disapproved of on other grounds by Franka*, 332 S.W.3d at 382 n.67.

See 2011 WL 1642179, at *11; *see also id.* at *10 ("In addition, this construction of the term 'consents' in subsection 101.106(b) seems to eliminate any real effect to the provision because plaintiffs have always been prohibited from suing governmental employers when immunity has not been waived. Stated differently, subsection 101.106(b) only bars subsequent suits against governmental employers that were already barred through the doctrine of sovereign immunity."). I disagree that this Court's opinion in *Garcia* mandates this "problematic" construction of subsection (b), which is "inconsistent with the language" of the statute and would render subsection (b) entirely superfluous.

The Court held in *Garcia* that subsection (b)'s "consent" exception includes a statutory waiver of immunity, but we were dealing in that case with a waiver under the Texas Commission on Human Rights Act, not a waiver under the Tort Claims Act, which itself contains section 101.106. 253 S.W.3d at 660. Based on this distinction, the governmental unit in the present case argues that consent under subsection (b) can only come from a waiver under a statute other than the Tort Claims Act. The Court disagrees. *Ante* at __. I also disagree with the governmental unit that "consent" can only be found in a statute other than the Tort Claims Act—subsection (b) contains no such limitation—but I agree that the statute treats claims brought under the Tort Claims Act's waivers of immunity differently than claims brought under other statutory waivers of immunity. The statute expressly distinguishes between requirements and limitations that apply only to claims under the Tort Claims Act—i.e., claims "under this chapter." *See* TEX. CIV. PRAC. & REM. CODE § 101.106.

There are at least two reasons that this distinction is important. First, claims brought under other statutory waivers of immunity are subject to a different set of jurisdictional requirements. This

distinction is key because a plaintiff's claims under the Tort Claims Act are subject to section 101.106(e) and (f), while claims brought under different statutory waivers of immunity are not. Second, failing to distinguish between claims brought under the Tort Claims Act and claims brought under a different statute not only ignores the Tort Claims Act's specific statutory requisites to suit but also renders subsection (b) meaningless. As the court of appeals recognized, under its construction of "consent," any claim for which governmental immunity is waived falls within subsection (b)'s "consent" exception; thus, subsection (b) only bars suit that are already barred by governmental immunity. *See* 2011 WL 1642179, at *10. I would not construe the consent language in a manner that renders subsection (b) meaningless. *See* 2011 WL 1642179, at *10; *cf. Franka*, 332 S.W.3d at 393 ("Statutory language should not be read as pointless if it is reasonably susceptible to another construction.").

Instead, I would hold that the State, on behalf of its governmental units, consents to suit within the meaning of 101.106(b) only when a claimant has complied with all jurisdictional requirements for filing suit under the immunity-waiving statute. *See Garcia*, 253 S.W.3d at 660 ("[T]he Legislature, on behalf of the ISD, has consented to suits brought under the TCHRA, *provided the procedures outlined in the statute have been met*.") (emphasis added). For suits brought under the Tort Claims Act, this includes compliance with section 101.106(f), which allows a plaintiff who has sued a government employee based on the employee's conduct within the scope of employment to substitute the governmental unit as defendant only if "the plaintiff files amended pleadings dismissing the employee and naming the governmental unit as defendant" within thirty days. TEX. CIV. PRAC. & REM. CODE § 101.106(f). A plaintiff who does not comply with this

statutory requirement does not have consent to amend the pleadings to sue a governmental unit under the Act. *See id.*; *see also Franka*, 332 S.W.3d at 371 n.9 (concluding that a motion for summary judgment based on section 101.106(f) asserts claim of governmental immunity).[8] In other words, subsection (f) provides consent to sue the government only if the plaintiff complies with subsection (f) and the Act's other jurisdictional requisites.

This construction is consistent with our holding in *Garcia*. The TCHRA claims that the Court held subsection (b) did not bar in *Garcia* were not subject to subsections (e) or (f). Subsections (e) and (f) apply only to claims that are or could have been brought under the Tort Claims Act. *See* TEX. CIV. PRAC. & REM. CODE § 101.106(e), (f); *Garcia*, 253 S.W.3d at 658–59. Subsection (b), on the other hand, is not limited to claims brought under the Tort Claims Act. *See* TEX. CIV. PRAC. & REM. CODE § 101.106 (b); *Garcia*, 253 S.W.3d at 660.

Subsections (e) and (f) operate in conjunction with subsections (a) and (b) to preclude Tort Claims Act plaintiffs from pursuing claims against both the governmental unit and its employee. Other statutory immunity waivers may permit a plaintiff to sue both the government and its employee, but like the TCHRA, may contain other limitations on the claimant's cause of action. *See, e.g.*, TEX. LAB. CODE §§ 21.208, 21.252 (requiring plaintiffs to pursue administrative relief before filing suit); *id.* § 21.211 (imposing different election-of-remedies on TCHRA plaintiffs).

[8] *See also City of Houston v. Esparza*, 369 S.W.3d 238, 249–50 (Tex. App.—Houston [1st Dist.] 2011, pet. denied Aug. 30, 2013) ("[S]ubsection (b)'s 'consent' exception permits a claimant to bring suit against a governmental unit only if the claimant has complied with all of the authorizing statute's jurisdictional requirements for bringing suit. For claims brought under the Tort Claims Act, the claimant must meet all of the Act's jurisdictional constraints . . . . By its plain language and very nature, the election-of-remedies provision is such a jurisdictional constraint.") (citations omitted).

Although subsection (b) reaches more than just claims brought under the Tort Claims Act, it contains an exception if the governmental unit consents to suit. *See* TEX. CIV. PRAC. & REM. CODE § 101.106 (b). Absent this consent exception, subsection (b) would bar any plaintiff who has sued a government employee from also suing or recovering against the governmental unit (subject to subsection (f)), regardless of whether the plaintiff sued under the Tort Claims Act, the TCHRA, or another immunity-waiving statute. Subsection (b)'s consent exception permits each immunity-waiving statute to determine independently whether to permit suit against the government and its employee both or to restrict suit to one or the other, or to place some other restriction consistent with the statute's own scheme for granting a right to sue the governmental unit. Thus, we concluded in *Garcia* that subsection (b) reached the plaintiff's TCHRA claims but did not bar those claims "provided the procedures outlined in the statute have been met." 253 S.W.3d at 660.

In the present case, subsection (b) would not bar the plaintiff's Tort Claims Act claims against the governmental unit if "the procedures outlined in the statute ha[d] been met"—specifically, if he had complied with the procedure allowed in subsection (f) for substituting the governmental unit as the defendant. *See id.* Because he sued the employee and then failed to dismiss the employee in response to the employee's motion, the plaintiff has not met the jurisdictional requirements necessary to trigger the Legislature's consent to sue the governmental unit under the Act.

D. The Court rewrites the statute to hold otherwise.

The Court holds that, despite subsection (b)'s bar, subsection (f) permits the claims against the governmental unit to survive whether or not the plaintiff complies with subsection (f)'s

requirements. In my view, the majority reaches these conclusions only by substantially rewriting subsection (f) in a manner that causes the exception to swallow the rule.

The majority repeatedly says that subsection (f) "provides" that a suit to which it applies (that is, a tort action based on conduct within the general scope of employment that could have been brought against the governmental unit) "is considered to have been filed against the governmental unit, not the employee." *Ante* at __; *see also ante* at __ ("under subsection (f), [such a suit] is considered to have been brought against the governmental unit, *not* the employee") (emphasis in original); *ante* at __ (referring to "[s]ubsection (f)'s *express classification* of such a suit as one against the governmental unit") (emphasis added); *ante* at __ (characterizing subsection (f) as "clarifying that [such a suit] is 'considered to be against' the governmental unit itself, not the employee"). Subsection (f), however, does not say that a suit based on an employee's conduct within the scope of employment is, or is considered to be, "a suit against the governmental unit." To the contrary, it states that such a suit "is considered to be *against the employee* in the employee's official capacity only." TEX. CIV. PRAC. & REM. CODE § 101.106 (f) (emphasis added).[9]

It is true, as the Court notes, that we have held that "a suit against a state official is merely 'another way of pleading an action against the entity of which [the official] is an agent,'" that the entity is "the real party in interest" in such a suit, and that such a suit "is, in all respects other than name, a suit against the entity." *Franka*, 332 S.W.2d at 382 n.68 (quoting *Kentucky v. Graham*, 473 U.S. 159, 165–66 (1985)). But under the pleadings, such a suit is still a suit against the government

[9] This provision of the statute is not meaningless; even if the employee does not file a motion to dismiss, it prevents the plaintiff from recovering against a government employee personally for tortious conduct within the scope of employment. *See Franka v. Velasquez*, 332 S.W.3d 367, 383 (Tex. 2011) (observing that public employees were traditionally personally liable for their own torts, even if the torts occur within the scope of employment).

employee, and the government employee is still a named party to the suit, which is why subsection (f) says it is "considered to be against the employee in the employee's official capacity only," rather than that it is "considered to be against the governmental unit."

In essence, the Court construes the phrase "is considered to be against the employee in the employee's official capacity only" as effectuating an automatic substitution of the governmental unit for the employee, so that the suit is treated as a suit against the governmental unit (to which subsection (a) applies) rather than a suit against the employee (to which subsection (b) applies). But this is contrary to our previous construction of subsection (f). *See, e.g.*, *Univ. of Tex. Health Sci. Ctr. at San Antonio v. Bailey*, 332 S.W.3d 395, 401 (Tex. 2011). In *Bailey*, we held that, because of the "is considered to be" clause in subsection (f), "[i]n effect, when [the plaintiffs] sued [the employee], they sued [the governmental unit]," but we expressly noted that "[s]ubstitution of the [governmental unit] as the defendant was not automatic; [the employee] was required to file a motion." *Id.*

More importantly, holding that subsection (f)'s "is considered to be" language somehow automatically substitutes the governmental unit for its employee is contrary to the language of subsection (f), and renders the second sentence of subsection (f) superfluous.[10] *See* TEX. CIV. PRAC.

[10] The Court ostensibly identifies a consequence for failing to comply with the second sentence of subsection (f): "the consequence of failing to substitute the government for the employee in response to an employee's subsection (f) motion to dismiss (assuming the employee was sued in his official capacity) is that 'suit against the employee shall be dismissed." *Ante* at __; *see also ante* at __ ("[i]f the plaintiff fails to [dismiss the employee pursuant to subsection (f)], and the employee was sued in his official capacity only, then the case must be dismissed."). But the Court's holding is not consistent with these statements—the Court holds that the trial court and court of appeals properly allowed the plaintiff to proceed on his amended pleadings against the government without dismissal of this suit or re-filing of the claims against the government. Thus, the Court does not actually apply "the consequence of failing to dismiss the employee" it identifies; instead, there is no consequence. The Court elsewhere recognizes that, under its construction, it makes no difference whether the plaintiff complies with subsection (f) or not—dismissal of the employee "is required upon the filing of a motion to dismiss regardless of any further action by the plaintiff." *Ante* at __. Thus, the Court construes "the suit against the employee shall be dismissed *unless* the plaintiff files amended pleadings dismissing the employee and naming the governmental unit" to mean "the suit against the employee shall be dismissed [*regardless of whether*] the plaintiff files amended pleadings dismissing the employee and naming the governmental unit."

& REM. CODE § 101.106 (f). If, by saying the suit "is considered to be against the employee in the employee's official capacity only," the Legislature meant that the suit "is considered to be against the governmental unit only," then the Legislature would not have needed to say that the plaintiff must file amended pleadings "naming the governmental unit as defendant," nor would it be necessary for the statute to dictate dismissal of the employee.

As written, subsection (f) expressly states that the substitution of defendants occurs only if the employee files a motion to dismiss and the plaintiff timely files amended pleadings substituting the defendants. *See id.* Otherwise, it remains a suit against the employee, but because it is based on conduct within the scope of employment, it is "considered to be against the employee in the employee's official capacity only." The fact that the suit against the employee is considered to be against the employee in the employee's official capacity only is the reason the Legislature permits the substitution; it is not a reason to treat the expressly mandated procedure for substitution as superfluous and optional.

The Court also rewrites the statute by holding that, "while the Legislature has set out a procedure for the dismissal of a suit against an employee who was acting within the course of employment, this procedure is immaterial to whether suit may be maintained against the proper defendant—the government." *Ante* at __. Similarly, the Court says that the "suit against the

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The Court responds to this criticism by stating that its holding requires dismissal of the claims against the employee, even if it permits the case to proceed against the governmental unit. *Ante* at __. But under the Court's construction, this suit is (and has always been) a suit against the governmental unit, not a suit against the employee. Under that construction, dismissal of the employee is already required by subsection (a), which immediately and forever bars a suit from proceeding against a governmental employee upon filing of the same claims against the governmental employer. *See* TEX. CIV. PRAC. & REM. CODE § 101.106 (a). Additionally, the Court offers no explanation as to why the Legislature would provide a specific procedure for, and impose a thirty-day time limit on, the plaintiff's voluntary dismissal of the government employee if the Legislature intended that there would be no consequence for ignoring both the procedure and the time limit.

governmental unit should proceed because the plaintiff was entitled to, and did, amend his pleadings to assert a [Tort Claims Act] claim against the government." *Ante* at __. In my view, these statements simply ignore the language of subsection (f), effectively striking out the portion that allows a plaintiff to file "amended pleadings dismissing the employee *and* naming the governmental unit as defendant on or before the 30th day after the date the motion is filed." TEX. CIV. PRAC. & REM. CODE § 101.106 (f) (emphasis added). Subsection (f) is not an open-ended invitation for plaintiffs to bring suit against a governmental unit after suing the governmental unit's employee; it provides a single, specific procedure by which plaintiffs who have sued a government employee for conduct within the scope of employment can avoid dismissal of their entire case by adding the governmental unit as a defendant and voluntarily dismissing their claims against the employee.

It is important to note that the Court never holds or even contends that the plaintiff complied with subsection (f)'s requirement that he timely amend his pleadings to dismiss the employee and name the governmental unit as defendant. Instead, the Court just construes subsection (f) to not require that at all, despite the fact that it expressly does. The Court's construction of subsection (f) renders subsection (b) meaningless for Tort Claims Act plaintiffs. Subsection (b) expressly prohibits such plaintiffs from filing suit or recovering against a governmental unit after filing suit against one of its employees regarding the same subject matter. *Id.* § 101.106 (b). Under the Court's construction, this prohibition does not apply to a plaintiff who brings claims under the Act based on conduct within the scope of employment. But those are the only Tort Claims Act claims that subsection (b) bars—suit against a governmental unit based on conduct outside the scope of employment is already barred by governmental immunity, and employers are not generally

vicariously liable for employee conduct outside the scope of employment regardless. *See id.* § 101.021; *Minyard Food Stores, Inc. v. Goodman*, 80 S.W.3d 573,577 (Tex. 2002) (observing that employer is generally only liable for employee's acts within course and scope of employment).

The Court responds that its construction of subsection (f) does not render subsection (b) meaningless, rather it only "mitigate[s] the harsh consequences imposed by subsection (b) with respect to [Tort Claims Act] claims[.]" *Ante* at __. Although the Court uses the word "mitigates" rather than "eviscerates," it does not identify any way in which subsection (b) could bar any Tort Claims Act under its construction of the statute unless the claim was already barred by governmental immunity. The Court may intend to imply that, while its construction renders subsection (b) meaningless for Tort Claims Act plaintiffs, subsection (b) could still have some effect on suits brought under other statutory waivers of immunity because such suits are not subject to subsection (f). But this Court has already held that, under the "consent" exception, subsection (b) does not bar claims brought under other statutory waivers of immunity "provided that the procedures outlined in the statute have been met." *Garcia*, 253 S.W.3d at 660. And, of course, if the immunity-waiving statute's prerequisites to suit are not met, the claims are barred by immunity anyway. *See* TEX. GOV'T CODE § 311.034 ("Statutory prerequisites to a suit, including the provision of notice, are jurisdictional requirements in all suits against a governmental entity.").

To have any effect, subsection (b) must prohibit suit when the Act's waiver of immunity would otherwise allow it. It is unclear when, under the Court's construction, subsection (b) would ever bar an otherwise-allowed suit against a governmental unit after the filing of suit against a government employee. Yet, that is exactly what subsection (b) expressly prohibits in broad and

decisive terms. *See* TEX. CIV. PRAC. & REM. CODE § 101.106 (b). Moreover, even assuming that the Court's construction leaves subsection (b) with some effect, albeit only on non-Tort Claims Act suits, it is difficult to square subsection (b)'s language—which we have construed as applying to "*any suit* against the governmental unit," *Garcia*, 253 S.W.3d at 659—with an impact that is limited to claims that are not brought under the Act in which it appears.

III.
Conclusion

Section 101.106 of the Tort Claims Act is complex and difficult to construe, but I believe the Court has done it too much damage. Under the statute, a suit against a government employee based on conduct within the scope of employment is still a suit against a government employee. That is why, if the employee files a motion to dismiss, the statute says the plaintiff must amend to dismiss the employee and name the governmental unit as defendant. Otherwise, subsection (f) requires dismissal of the suit against the employee and does not authorize adding claims against the governmental unit, and subsection (b) bars any such claims. By holding that a suit against an employee is actually a suit against the governmental unit, the Court rewrites subsection (f) and renders subsection (b) essentially meaningless. Because the plaintiff in this case did not timely file

"amended pleadings dismissing the employee and naming the governmental unit as defendant," I would hold that subsection (f) does not authorize his amended pleadings, and his claims against the governmental unit must be dismissed.

_____
Jeffrey S. Boyd
Justice

OPINION DELIVERED: August 30, 2013

IN THE SUPREME COURT OF TEXAS

NO. 11-0708

HAL RACHAL, JR., PETITIONER,

v.

JOHN W. REITZ, RESPONDENT

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

Argued November 7, 2012

JUSTICE GUZMAN delivered the opinion of the Court.

Federal and state policies favor arbitration for its efficient method of resolving disputes, and arbitration has become a mainstay of the dispute resolution process.[1] Today we determine whether these policies render an arbitration provision contained in an *inter vivos* trust enforceable against the trust beneficiaries. The trust here contained a provision requiring all disputes regarding the trust and the trustee to proceed to arbitration. When a trust beneficiary sued the trustee, the trustee moved to compel arbitration. The trial court denied the motion. The court of appeals, sitting *en banc*, affirmed, concluding that the provision could not be enforced under the Texas Arbitration Act (TAA) because there was no agreement to arbitrate trust disputes.[2] We conclude that the arbitration

[1] *See AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1749 (U.S. 2011); *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84, 94 & n.48 (Tex. 2011); *Ellis v. Schlimmer*, 337 S.W.3d 860, 862 (Tex. 2011).

[2] 347 S.W.3d 305, 311.

provision contained in the trust at issue is enforceable against the beneficiary for two reasons. First, the settlor determines the conditions attached to her gifts, and we enforce trust restrictions on the basis of the settlor's intent. The settlor's intent here was to arbitrate any disputes over the trust. Second, the TAA requires enforcement of written agreements to arbitrate, and an agreement requires mutual assent, which we have previously concluded may be manifested through the doctrine of direct benefits estoppel. Thus, the beneficiary's acceptance of the benefits of the trust and suit to enforce its terms constituted the assent required to form an enforceable agreement to arbitrate under the TAA. We reverse the judgment of the court of appeals and remand to the trial court to enter an order consistent with this opinion.

I. Background

Andrew Francis Reitz established the A.F. Reitz Trust in 2000, naming his sons, James and John, as sole beneficiaries and himself as trustee. The trust was revocable during Andrew's lifetime and irrevocable after his death. Upon Andrew's death, Hal Rachal, Jr., the attorney who drafted the trust, became the successor trustee.

In 2009, John Reitz sued Rachal individually and as successor trustee, alleging that Rachal had misappropriated trust assets and failed to provide an accounting to the beneficiaries as required by law. Reitz sought a temporary injunction, Rachal's removal as trustee, and damages.

Rachal generally denied the allegations and later moved to compel arbitration of the dispute under the TAA, relying on the trust's arbitration provision. That provision states:

> Arbitration. Despite anything herein to the contrary, I intend that as to any dispute of any kind involving this Trust or any of the parties or persons concerned herewith (e.g., beneficiaries, Trustees), arbitration as provided herein shall be the sole and

> exclusive remedy, and no legal proceedings shall be allowed or given effect except as they may relate to enforcing or implementing such arbitration in accordance herewith. Judgment on any arbitration award pursuant hereto shall be binding and enforceable on all said parties.

The trust further provided that "[t]his agreement shall extend to and be binding upon the Grantor, Trustees, and beneficiaries hereto and on their respective heirs, executors, administrators, legal representatives, and successors."

The trial court denied Rachal's motion to compel and Rachal filed this interlocutory appeal. *See* TEX. CIV. PRAC. & REM. CODE § 171.098(a)(1) (authorizing interlocutory appeal for orders denying applications to compel arbitration). A divided court of appeals, sitting *en banc*, affirmed the trial court's order. 347 S.W.3d 305, 312. The court of appeals held that a binding arbitration provision must be the product of an enforceable contract between the parties, reasoning that such a contract does not exist in the trust context, in part because there is no consideration and in part because the trust beneficiaries have not consented to such a provision. *Id.* at 308, 310–11. The court further concluded that because there is no contractual agreement to arbitrate in this context, it is for the Legislature, rather than the courts, to decide "whether and to what extent the settlor of this type of a trust should have the power to bind the beneficiaries of the trust to arbitrate." *Id*. at 311–12.

The four dissenting Justices reasoned that further legislation is not necessarily required because a trust can be "a written agreement to arbitrate" within the meaning of the TAA even without the signatures of the beneficiaries and successor trustee. 347 S.W.3d at 312–13 (Murphy, J., dissenting) (quoting TEX. CIV. PRAC. & REM. CODE § 171.001(a)). The dissent notes that the TAA does not require a formal contract to arbitrate but only a written agreement, a broader term that

includes legal contracts but also less formal agreements. *Id*. The dissent concludes that, because the Legislature chose the broader term "agreement" in the TAA, rulings in other jurisdictions that arbitration provisions in trusts are unenforceable are inapplicable to arbitration provisions under the TAA. *Id*. at 313–14. We granted the trustee's petition to decide whether an arbitration provision under the TAA in an *inter vivos* trust is enforceable against trust beneficiaries.[3]

II. Discussion

A. Standard of Review

Rachal moved to compel arbitration under the TAA, which provides that a "written agreement to arbitrate" is enforceable if it provides for arbitration of either an existing controversy or one that arises "between the parties after the date of the agreement." TEX. CIV. PRAC. & REM. CODE § 171.001(a). As a threshold matter, a party seeking to compel arbitration must establish the existence of a valid arbitration agreement and the existence of a dispute within the scope of the agreement. *Meyer v. WMCO-GP, LLC*, 211 S.W.3d 302, 305 (Tex. 2006).

We review de novo whether an arbitration agreement is enforceable. *In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 643 (Tex. 2009). When reviewing a denial of a motion to compel arbitration, we defer to the trial court's factual determinations that are supported by evidence but review the trial court's legal determinations de novo. *Id*.

This case also requires us to construe a statute. Our primary goal in construing a statute is to give effect to the Legislature's intent. *Texas Mut. Ins. Co. v. Ruttiger*, 381 S.W.3d 430, 452 (Tex.

[3] Although a court of appeals' decision in an interlocutory appeal is ordinarily final, this Court has jurisdiction to review the appellate court's decision when, as here, there is a dissent in the court of appeals. TEX. GOV'T CODE §§ 22.001(a), 22.225(b)(3), 22.225(c).

2012); *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011). We defer to the plain meaning of a statute as the best indication of the Legislature's intent unless a different meaning is apparent from the context of the statute or the plain meaning would yield absurd results. *Molinet v. Kimbrell*, 356 S.W.3d 407, 411 (Tex. 2011). Moreover, we determine legislative intent from the entire act, not merely from isolated portions. *Ruttiger*, 381 S.W.3d at 454; *TGS-NOPEC*, 340 S.W.3d at 439.

B. Trusts and the TAA

Rachal echoes the dissenting justices' view that the TAA does not require a formal contract but rather only an agreement to arbitrate future disputes. Reitz argues that even if the TAA requires only an agreement to arbitrate—as opposed to a formal contract—the trust instrument here does not meet that less exacting standard because it lacks mutual assent and unity in thought between its parties. We agree with Rachal.

1. Settlor's Intent

Generally, Texas courts endeavor to enforce trusts according to the settlor's intent, which we divine from the four corners of unambiguous trusts. *Frost Nat'l Bank of San Antonio v. Newton*, 554 S.W.2d 149, 153 (Tex. 1977); *see also Huffman v. Huffman*, 339 S.W.2d 885, 888 (Tex. 1960) ("Assuming that there is a valid will to be construed, it is the place of the court to find the meaning of such will, and not under guise of construction or under general powers of equity to assume to correct or redraft the will in which testator has expressed his intentions." (quotation marks omitted)). We enforce the settlor's intent as expressed in an unambiguous trust over the objections of beneficiaries that disagree with a trust's terms. *Newton*, 554 S.W.2d at 153. For example, in

Newton, a trust provided for a portion of the trust to be distributed for the education of certain student beneficiary relatives, with excess income paid during the life of the trust to other relatives who would receive the ultimate distribution when the trust terminated. *Id*. at 151–52. The trust provided that the trustee could terminate the trust if the income was insufficient. *Id*. at 151. When the student beneficiaries completed their education, the ultimate beneficiaries argued the trust should be terminated because its primary purpose had been accomplished. *Id*. at 153. But we noted the additional purpose of the trust was the payment of excess income to those ultimate beneficiaries and refused to distinguish between the two purposes as primary or secondary because it would require venturing beyond the settlor's intent in the express language of the trust. *Id*. at 154. Accordingly, we enforced the trust with the restriction that the settlor intended: that the trust only terminate when the income was insufficient. *Id*.; *see also Moore v. Smith*, 443 S.W.2d 552, 555–56 (Tex. 1969) (assessing settlor's intent by examining the four corners of the trust).

Here, the settlor unequivocally stated his requirement that all disputes be arbitrated. He specified that, "[d]espite anything herein to the contrary," arbitration would be "the sole and exclusive remedy" for "any dispute of any kind involving this Trust or any of the parties or persons connected herewith (e.g., beneficiaries, Trustees) . . . ." Because this language is unambiguous, we must enforce the settlor's intent and compel arbitration if the arbitration provision is valid and the underlying dispute is within the provision's scope. *Meyer*, 211 S.W.3d at 305.

2. The TAA

The TAA provides that a "written *agreement* to arbitrate is valid and enforceable if the *agreement* is to arbitrate a controversy that: (1) exists at the time of the *agreement*; or (2) arises

between the parties after the date of the *agreement*." TEX. CIV. PRAC. & REM. CODE § 171.001(a) (emphases added). The TAA further states that a "party may revoke the agreement only on a ground that exists at law or in equity for the revocation of a *contract*." *Id*. § 171.001(b) (emphasis added). The Legislature specifically chose to enforce "agreements" to arbitrate. *Id*. § 171.001(a). It knew how to enforce only "contracts;" it selected that term to specify the grounds for revoking an agreement to arbitrate. *Id*. § 171.001(b). The language of the TAA indicates legislative intent to enforce arbitration provisions in agreements. If the Legislature intended to only enforce arbitration provisions within a contract, it could have said so. *See id*.; *TGS-NOPEC*, 340 S.W.3d at 441 ("The meaning of a word that appears ambiguous when viewed in isolation may become clear when the word is analyzed in light of the terms that surround it.").

Because the TAA does not define agreement, we must look to its generally accepted definition. *TGS-NOPEC*, 340 S.W.3d at 439. Black's Law Dictionary defines an agreement as "a manifestation of mutual assent by two or more persons." BLACK'S LAW DICTIONARY 78 (9th ed. 2009). Contract treatises have made similar observations. Williston commented:

> An agreement, as the courts have said, "is nothing more than a manifestation of mutual assent by two or more legally competent persons to one another." In some respects, the term agreement is a broader term than contract, and even broader than the term bargain or promise. It covers executed sales, gifts, and other transfers of property.

1 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 1:3, at 13–14 (4th ed. 1990) (citations omitted); *see also* 3 STEPHEN'S COMMENTARIES ON THE LAWS OF ENGLAND 4 (Edward Jenks ed., 17th ed. 1922) ("The term 'agreement,' although frequently used as synonymous with the word 'contract,' is really an expression of greater breadth of meaning and less

technicality. Every contract is an agreement; but not every agreement is a contract. In its colloquial sense, the term 'agreement' would include any arrangement between two or more persons intended to affect their relations (whether legal or otherwise) to each other."). Thus, although an agreement need not meet all the formal requirements of a contract, it must be supported by mutual assent.[4] BLACK'S LAW DICTIONARY 78 (9th ed. 2009); 1 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 1:3, at 13–14 (4th ed. 1990).

We therefore address whether the trust here was supported by the mutual assent required to render the trust an agreement and the arbitration provision valid. Typically, a party manifests its assent by signing an agreement. *See Mid-Continent Cas. Co. v. Global Enercom Mgmt., Inc.*, 323 S.W.3d 151, 157 (Tex. 2010) (holding that, in formal contract negotiations, signing the contract is not required so long as there is assent). But we have also found assent by nonsignatories to arbitration provisions when a party has obtained or is seeking substantial benefits under an agreement under the doctrine of direct benefits estoppel.[5] For example, in the case of *In re FirstMerit Bank, N.A.*, the de los Santos plaintiffs purchased a mobile home for their daughter and her husband (the Alvarezes, their co-plaintiffs) under a retail installment financing agreement with

[4] We acknowledge that we have previously discussed arbitration agreements under contract principles. *See J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 227–28 (Tex. 2003) ("Arbitration agreements are interpreted under traditional contract principles. Thus, an employer attempting to enforce an arbitration agreement must show the agreement meets all requisite contract elements." (citations omitted)). Those holdings are not in tension with our analysis here in light of Rachal's arguments, our long-standing deference to the settlor's intent, and the unique requirements of the TAA.

[5] We have noted that there are at least six theories in contract and agency law that may bind nonsignatories to arbitration agreements: (1) incorporation by reference; (2) assumption; (3) agency; (4) alter ego; (5) equitable estoppel; and (6) third-party beneficiary. *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 739 (Tex. 2005). Direct benefits estoppel, discussed herein, is a type of equitable estoppel. *Id*.

the seller. 52 S.W.3d 749, 752 (Tex. 2001). The agreement contained an arbitration addendum. *Id*. at 752. The de los Santoses signed the agreement but the Alvarezes did not. *Id*. at 752, 755. The seller assigned the contract to FirstMerit Bank, and the de los Santoses ceased making payments when the seller failed to make certain repairs. *Id*. at 753. FirstMerit took possession of the home, the de los Santoses and the Alvarezes both sued, and FirstMerit moved to compel arbitration. *Id*. We stated: "a litigant who sues based on a contract subjects him or herself to the contract's terms." *Id*. at 755. We thus held that, even though the Alvarezes did not sign the contract containing the arbitration clause, their suit on the contract was their assent to the contract's terms, including the arbitration provision. *Id*. at 755–56. We later noted that in addition to filing suit on the contract, the Alvarezes' occupancy of the home and planned future ownership of it further indicated their acceptance of the contract. *In re Weekley Homes, L.P.*, 180 S.W.3d 127, 134 (Tex. 2005).

We expressly adopted the federal doctrine of direct benefits estoppel in the context of arbitration agreements under state law in *In re Kellogg Brown & Root, Inc.*, where we held that a non-signatory who is seeking the benefits of a contract or seeking to enforce it "is estopped from simultaneously attempting to avoid the contract's burdens, such as the obligation to arbitrate disputes." 166 S.W.3d 732, 739 (Tex. 2005). As the Fourth Circuit described it, "the doctrine recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him." *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 418 (4th Cir. 2000) (quoted in *Kellogg Brown & Root*, 166 S.W.3d at 739). We noted in *Kellogg Brown & Root* that if the claims

are based on the agreement, they must be arbitrated, but if the claims can stand independently of the agreement, they may be litigated. 166 S.W.3d at 739–40; *see also In re U.S. Home Corp.*, 236 S.W.3d 761, 765 (Tex. 2007) (per curiam).

In *Weekley Homes*, we addressed the circumstances under which direct benefits estoppel binds parties for actions other than filing suit. 180 S.W.3d at 131–32. There, we stated that a "nonparty may be compelled to arbitrate if it deliberately seeks and obtains substantial benefits from the contract itself" during the performance of the agreement. *Id*. at 132–33. We likened the situation to promissory estoppel, where a promisor induces substantial action or forbearance by another and estoppel requires enforcing the promise to prevent injustice. *Id*. at 133. There, the plaintiff never signed the agreement to purchase the newly constructed home but claimed the authority of the agreement in directing the construction and repair of the home, submitted reimbursement claims for expenses incurred during repairs, and conducted settlement negotiations with the builder. *Id*. We held that these were sufficiently substantial actions demanding the builder comply with the contract to equitably estop the plaintiff from resisting the agreement's arbitration provision. *Id*.

We must examine here whether the direct benefits estoppel doctrine applies to an arbitration provision in a trust. A beneficiary may disclaim an interest in a trust. *See* TEX. PROP. CODE § 112.010; *see also Aberg v. First Nat'l Bank*, 450 S.W.2d 403, 407 (Tex. App.—Dallas 1970, writ ref'd n.r.e.) (stating the well-settled rule that a trust beneficiary who has not manifested his acceptance of a beneficial interest may disclaim such interest). And a beneficiary is also free to challenge the validity of a trust: conduct that is incompatible with the idea that she has consented to the instrument. *See Rapid Settlements, Ltd. v. SSC Settlements, LLC*, 251 S.W.3d 129, 148 (Tex.

App.—Tyler 2008, no pet.) (holding direct benefits estoppel inapplicable when a nonsignatory filed suit for a declaration that an arbitration agreement was not binding on it). Thus, beneficiaries have the opportunity to opt out of the arrangement proposed by the settlor.

On the other hand, a beneficiary who attempts to enforce rights that would not exist without the trust manifests her assent to the trust's arbitration clause. For example, a beneficiary who brings a claim for breach of fiduciary duty seeks to hold the trustee to her obligations under the instrument and thus has acquiesced to its other provisions, including its arbitration clause. In such circumstances, it would be incongruent to allow a beneficiary to hold a trustee to the terms of the trust but not hold the beneficiary to those same terms.

Here, Reitz both sought the benefits granted to him under the trust and sued to enforce the provisions of the trust. On the death of the settlor, Reitz did not disclaim an interest in the trust, and his suit directly seeks actual damages for any amounts inappropriately taken from the trust. *See* TEX. PROP. CODE § 112.010 (presuming a beneficiary accepts an interest in a trust and establishing time period to disclaim that interest). Reitz also sued to enforce the trust's provisions against the trustee. The trust specifically prohibited the trustee from making "any distribution to or for the benefit of himself which is not subject to an ascertainable standard under the Code" and contained a number of other powers of and restrictions on the trustee. Reitz claimed Rachal "has materially violated the terms of the Trust and his fiduciary duty by failing to account to the beneficiary and . . . has materially violated th[e] terms of the Trust by his conversion of the Trust assets which has resulted in material financial loss to the Trust." Reitz further claimed, among other things, he was "entitled to any profits that would accrue to the trust estate if there had been no breach of trust." In accepting

the benefits of the trust and suing to enforce its terms against the trustee so as to recover damages, Reitz's conduct indicated acceptance of the terms and validity of the trust.[6] In sum, we hold the doctrine of direct benefits estoppel applies to bar Reitz's claim that the arbitration provision in the trust is invalid. *See Weekley Homes*, 180 S.W.3d at 131–32; *Kellogg Brown & Root*, 166 S.W.3d at 739–40; *FirstMerit Bank*, 52 S.W.3d at 755–56.

Reitz argues, however, that direct benefits estoppel cannot apply here because there is no underlying contract. We have generally applied direct benefits estoppel when there is an underlying contract the claimant did not sign, but we have never held a formal contract is required for direct benefits estoppel to apply. Indeed, in *Weekley Homes*, we likened direct benefits estoppel to the defensive theory of promissory estoppel. 180 S.W.3d at 133. "[T]he promissory-estoppel doctrine presumes no contract exists." *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 226 (Tex. 2002) (citing *Wheeler v. White*, 398 S.W.2d 93, 96–97 (Tex. 1965)); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 90 & ch. 4, topic 2, intro. note (1981) (addressing promissory estoppel as one of several types of contracts that need not be supported by consideration to be enforceable). As equitable defensive theories, direct benefits estoppel and promissory estoppel promote fairness by holding a party to its position in the performance of an agreement or in bringing litigation. *See Weekley Homes*, 180 S.W.3d at 133; *Kellogg Brown & Root*, 166 S.W.3d at 740–41; *FirstMerit Bank*, 52 S.W.3d at 755. A valid, underlying contract is not required under these theories,

[6] Although we specified in *Kellogg Brown & Root* that claims are only subject to arbitration if they are based on the agreement containing the arbitration provision, the parties do not dispute here that the claims refer to and depend upon the trust. 166 S.W.3d at 739–40.

nor is it required here; thus, Reitz's argument is without merit. *See Subaru of Am.*, 84 S.W.3d at 226.[7]

3. Other Jurisdictions

Reitz points to the holdings of two courts in sister states that support his view that arbitration provisions in trusts are unenforceable. There is a dearth of authority as to the validity of an arbitration provision in a trust, and the opinions Reitz relies on have been superseded. The two courts—both intermediate courts—that considered this precise issue declined to enforce mandatory arbitration provisions in trusts. *See Diaz v. Bukey*, 125 Cal. Rptr. 3d 610, 615 (Ct. App. 2011), *pet. granted*, 257 P.3d 1129 (Cal. 2011), *remanded with directions*, 287 P.3d 67 (Cal. 2012); *Schoneberger v. Oelze*, 96 P.3d 1078, 1079 (Ariz. Ct. App. 2004), *superseded by statute*, ARIZ. REV. STAT. § 14-10205. These courts generally concluded that a trust's arbitration provision is not enforceable because a trust is not a contract between the grantor, trustee, and beneficiary and thus does not bind those who do no sign the instrument to arbitrate future trust disputes. This bright-line distinction between trusts and contracts was first discussed in *Schoneberger*, where an Arizona court of appeals explained:

> Arbitration rests on an exchange of promises. Parties to a contract may decide to exchange promises to substitute an arbitral for a judicial forum . . . . In contrast, a trust does not rest on an exchange of promises. A trust merely requires a trustor to transfer a beneficial interest in property to a trustee who, under the trust instrument . . . holds that interest for the beneficiary. The undertaking between trustor and trustee does not stem from the premise of mutual assent to an exchange of promises and is not properly characterized as contractual.

[7] Reitz has not asserted, and we thus need not decide, whether the doctrine of unclean hands bars Rachal from relying on the equitable doctrine of direct benefits estoppel.

96 P.3d at 1083 (internal citations and quotations omitted). A California intermediate court later adopted the Arizona court's explication. *Diaz*, 125 Cal. Rptr. 3d at 615. The court of appeals here followed the analysis in *Schoneberger*. 347 S.W.3d at 310–11.

But the Arizona Legislature superseded *Schoneberger* and the California Supreme Court vacated *Diaz*. Unlike the TAA's requirement that the arbitration provision be in an "agreement," the Arizona statute at issue in *Schoneberger* required the arbitration provision to be "in a written contract."[8] 96 P.3d at 1082. The Arizona Legislature superseded *Schoneberger*, providing that: "A trust instrument may provide mandatory, exclusive and reasonable procedures to resolve issues between the trustee and interested persons or among interested persons with regard to the administration or distribution of the trust." ARIZ. REV. STAT. § 14-10205.[9]

A California appellate court followed *Schoneberger* in refusing to enforce an arbitration provision in a trust. *Diaz*, 125 Cal. Rptr. 3d at 615. The California statute at issue, like the Texas statute, addresses arbitration provisions in "written agreements." CAL. CIV. PROC. CODE § 1281.1 ("[A]ny request to arbitrate . . . shall be considered as made pursuant to a written agreement to submit a controversy to arbitration."). The California Supreme Court instructed the court of appeals to vacate its decision and reconsider the case in light of *Pinnacle Museum Tower Association v. Pinnacle Market Development (US), LLC*, 282 P.3d 1217 (Cal. 2012). *Diaz v. Bukey*, 287 P.3d 67,

[8] The District of Columbia Court of Appeals has applied the same reasoning to decline to enforce a mandatory arbitration provision in a will. *In re Calomiris*, 894 A.2d 408, 410 (D.C. 2006). The court based its holding on Washington D.C.'s arbitration act, which—like Arizona's statute—refers to a contract rather than an agreement. *Id*. at 409.

[9] Florida has also enacted a statute providing for the arbitration of some trust disputes. FLA. STAT. § 731.401. Rachal suggests that this legislation was necessary because that arbitration statute required contracts rather than agreements to arbitrate.

67 (Cal. 2012). In *Pinnacle*, a condominium developer included a mandatory arbitration provision in the recorded declaration of restrictions, which also provided for the creation of an owners' association. *Id*. at 1221–22. The association sued the developer for construction defects, and the developer moved to compel arbitration based on the provision in the declaration of restrictions. *Id*. at 1223. The California Supreme Court held that the Federal Arbitration Act applied to the provision in question, which refers to arbitration provisions "in . . . a contract." *Id*. (quoting 9 U.S.C. § 2). The court held that the recorded declaration was contractual in nature, despite the fact that the individual owners—not the owners' association—agreed to be bound by the declaration, and that enforcing the arbitration provision against the owners' association was not unconscionable. *Id*. at 1228–29, 1233–34. The court of appeals has yet to issue its new opinion in light of *Pinnacle*.

We note that other courts, while not addressing the precise issue raised here, have nonetheless favorably viewed arbitration provisions in trusts. *See, e.g.*, *Radian Ins., Inc. v. Deutsche Bank Nat'l Trust Co.*, 638 F. Supp. 2d 443, 458 (E.D. Pa. 2009) (remanding a trust dispute involving a rescission claim to arbitration while retaining jurisdiction over questions of interpretation that arise during the arbitration); *Roehl v. Ritchie*, 54 Cal. Rptr. 3d 185, 187 (Ct. App. 2007) (determining that judicial confirmation of an open-ended arbitration award in a trust dispute did not bar a subsequent arbitration to resolve undetermined issues); *see also New S. Fed. Sav. Bank v. Anding*, 414 F. Supp. 2d 636, 643 (S.D. Miss. 2005) (noting that an arbitration provision in deed of trust is "not unenforceable solely because it is one-sided").

C. Scope

Having determined the arbitration provision at issue is enforceable against Reitz, Rachal must also establish that the dispute is within the scope of the agreement. *Meyer,* 211 S.W.3d at 305. Once a valid arbitration agreement is established, a "strong presumption favoring arbitration arises" and we resolve doubts as to the agreement's scope in favor of arbitration. *Ellis v. Schlimmer*, 337 S.W.3d 860, 862 (Tex. 2011). Reitz asserts that his lawsuit falls outside the scope of the agreement because the trust's terms indicate the settlor's intent to exempt trustee misconduct claims from the scope of the arbitration provision. We disagree.

When determining whether claims fall within the scope of the arbitration agreement, we look to the factual allegations, not the legal claims. *FirstMerit Bank*, 52 S.W.3d at 754. The arbitration provision here requires that:

> Despite anything herein to the contrary, I intend that as to any dispute of any kind involving this Trust or any of the parties or persons concerned herewith (e.g., beneficiaries, Trustees), arbitration as provided herein shall be the sole and exclusive remedy, and no legal proceedings shall be allowed or given effect except as they may relate to enforcing or implementing such arbitration in accordance herewith.

Reitz's suit against Rachal to enforce the trust's restrictions qualifies as "any dispute of any kind involving this Trust or any of the parties or persons connected herewith."

Reitz nonetheless argues that a subsequent provision in the trust regarding exoneration of trustees indicates an intent to allow for litigation of disputes with the trustee. The provision Reitz relies on refers to a trustee's liability for unintentional misconduct and permits the trustee to fund litigation or dispute related costs from the trust, providing that a beneficiary who initiates the proceedings without good faith shall have the defense costs deducted from his share of the trust income and assets. This provision does not defeat the arbitration requirement for two reasons. First,

to the extent the two provisions conflict, the arbitration provision—by its own terms—prevails over "anything herein to the contrary." Second, the trustee exoneration provision, when read in conjunction with the arbitration provision, still has meaning. Even if the arbitration provision requires that all disputes over the trust be resolved in arbitration, the trustee exoneration provision is effective in at least two situations: (1) when a claim filed in court is then sent to arbitration, and (2) when a claim is filed in, and stays in, court because direct benefits estoppel or another doctrine that would compel arbitration does not apply. Under the first scenario, the trustee exoneration provision simply acknowledges that some claims that belong in arbitration will be initiated in court and determines how these defense costs are paid. Under the second scenario, not all claims initiated in court can be compelled to arbitration. We previously noted that the doctrine of direct benefits estoppel will not provide the mutual assent necessary to compel arbitration in all circumstances. One who does not accept benefits under a trust and contests its validity could not be compelled to arbitrate the trust dispute under the doctrine of direct benefits estoppel. In such a case, the trustee exoneration provision determines how these defense costs are paid. Our construction of the arbitration and trustee exoneration privileges gives meaning to both provisions. *Universal C.I.T. Credit Corp. v. Daniel*, 243 S.W.2d 154, 158 (Tex. 1951). In sum, Rachal demonstrated the existence of a valid arbitration agreement that covers the claims at issue.

III. Conclusion

Beneficiary Reitz sued trustee Rachal to require him to comply with the terms of the trust at issue, which contains an arbitration provision. The TAA requires arbitration provisions to be in

written agreements. Reitz's assent to the trust is reflected in his acceptance of the benefits of the trust and his suit to compel the trustee to comply with the trust's terms. Reitz's claims that Rachal violated the terms of the trust are within the scope of the arbitration provision, which requires the arbitration of "any dispute of any kind involving this Trust." Thus, Rachal carried his burden of demonstrating that the trust contains a valid arbitration agreement that covers Reitz's claims. We reverse the judgment of the court of appeals and remand to the trial court to enter an order consistent with this opinion.

_____

Eva M. Guzman
Justice

OPINION DELIVERED: May 3, 2013

IN THE SUPREME COURT OF TEXAS

NO. 11-0713

IN THE INTEREST OF E.N.C., J.A.C., S.A.L., N.A.G. AND C.G.L., MINOR CHILDREN

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

Argued September 12, 2012

JUSTICE GREEN delivered the opinion of the Court.

A court cannot terminate a person's parental rights unless the State proves by clear and convincing evidence that the parent engaged in certain proscribed conduct, as specified in the Family Code, and that termination is in the best interest of the children. In this case, an immigrant convicted in another state of unlawful conduct with a minor and given a probated sentence years before his children were born was later deported to Mexico. The State relied on these facts in petitioning to terminate this father's parental rights, yet put on no evidence concerning the offense committed years earlier, nor the circumstances of his deportation. We are asked to determine whether legally sufficient evidence supports termination of this father's parental rights under these facts. We conclude the evidence is legally insufficient and, accordingly, reverse the court of appeals' judgment in part and remand the case to the trial court.

I. Facts and Procedural Background

Francisco, a citizen and resident of Mexico, was born in May 1975. Years before his children were born, Francisco was convicted in Wisconsin of an offense involving an underage girl and placed on probation. In 1996, Francisco moved from Wisconsin to Texas without completing the terms of his probation. Once in Texas, Francisco met Edna and married her. The couple lived together for eight or nine years. The marriage resulted in two children: J.A.C., born in mid-1998, and S.A.L., born in late-1999. Francisco supported the family, including a child born to Edna from a previous relationship.

In 2004 or 2005, after Francisco and Edna separated, Francisco approached the immigration authorities in Dallas for purposes of procuring a green card. Because Francisco had left Wisconsin in violation of his probation terms, he was arrested, jailed, and ultimately deported. Francisco is not allowed to return to the United States for ten years (until at least 2014), but he testified that he would like to return to the United States to help J.A.C. and S.A.L.[1]

In the meantime, J.A.C. and S.A.L., along with their three half-siblings, remained with Edna in Texas.[2] The Department of Family and Protective Services investigated Edna several times over the years, beginning in 2000, but the Department always chose to allow the children to remain with

[1] The record does not indicate the reason for the ten-year ban on reentry.

[2] Francisco is not the father of Edna's other three children. As such, only J.A.C. and S.A.L.—Francisco's children—are at issue in this proceeding.

their mother.[3] There were never any allegations concerning Francisco during this period, nor were there any negative findings concerning Edna, until this case.

Since his deportation, Francisco has resided in his hometown of San Miguel de Allende, Guanajuato, Mexico, where his mother also lives. Francisco has remarried,[4] has two young children, and works at a hotel where he makes the equivalent of $400 a month. Before the Department removed J.A.C. and S.A.L., Francisco would call them about three times a week or on weekends, and sometimes daily. Francisco's father, Alvaro, who remained in Texas, also took the children to visit Francisco and Francisco's mother in Mexico—J.A.C. twice and S.A.L. at least once. The children last visited their father one-and-a-half years before trial. Alvaro testified that, at the end of that visit, the children did not want to come home and that they wanted to stay with their father in Mexico.

Francisco also provided financial support to his children before they were removed to foster care. When Francisco and Edna separated, Edna apparently did not seek child support from Francisco. Instead, Francisco and Edna entered into an informal agreement where Alvaro would visit the children and bring money for the children's support and buy what the children needed. Francisco would also send clothes from Mexico for the children. To repay his father, Francisco

[3] The Department investigated Edna after receiving allegations of physical abuse in 2000, neglectful supervision in 2002, sexual abuse in 2006, and sexual abuse in 2008. The Department ruled out the alleged behavior in 2000, 2002, and 2006, and determined in 2008 that cousins alleged to have sexually abused one of the children no longer had access to the child and that Edna was protective of the child.

[4] Francisco testified that he believed he and Edna were divorced because Edna had told him the divorce was final.

would give money to his mother, who remained in Mexico. Edna testified that Francisco was a good father who provided support for the children.

The events leading to this termination proceeding began in January 2009, a few years after Francisco and Edna separated and Francisco was deported, when the Department investigated Edna for neglectful supervision. The Department ultimately determined that Edna was giving the children Tylenol PM to make them sleep and taking her mother's prescription pain medication. In February 2009, Edna gave birth to her fifth child, whose low birth weight triggered a referral to the Department by the hospital. Two months later, Edna was arrested for a DWI with S.A.L. in the car, which prompted the Department to remove the children. The Department petitioned to terminate both Edna's and Francisco's parental rights.[5]

In its combined permanency plans and permanency progress reports, the Department permitted Francisco one visit per month by conference call. *See* TEX. FAM. CODE §§ 263.3025, .303. The trial court's orders did not provide for visitation, other than by incorporating by reference recommendations from the Department. Nothing in the record provides further details on the Department's efforts to facilitate the monthly conference calls, except that the Department's reports indicate that Francisco was compliant in his response and communication with the Department, kept in regular contact with the caseworker, and participated in the scheduled conference calls with his children, "which have been positive for both parties." Although Francisco was initially able to

[5] The Department's original petition generically identified Francisco as the father of one of the children and stated that his address was unknown. Three days later, the Department amended its petition to identify Francisco as the father of J.A.C. and S.A.L., but continued to state that his address was unknown. Francisco was later served by certified mail in Mexico. The Department also successfully sought to terminate the parental rights of the fathers of Edna's other children. Those fathers did not appeal the trial court's termination order.

participate in the monthly conference calls with his children, he was unable to speak to the children once the foster parents moved the four older children, including J.A.C. and S.A.L., to Bryan in the four months before trial.[6] Francisco testified that he would call the Department office but no one would answer. Francisco testified that it was Edna, and not the Department, who informed him that the foster family had moved the children.

There is no evidence that Francisco was subject to any child support order either before or after the children were removed to foster care. The Department never requested support or undertook an evaluation of Francisco's means, nor did the Department offer Francisco a service plan. The Department's reports state that Francisco had been deported to Mexico because of "criminal activity involving sex with a minor," and he "will need to complete his probation and have restrictions lifted to return to the United States for the Department to evaluate his ability and willingness to provide for the children." Nonetheless, at trial, when Francisco was asked how much support he would be willing to provide for J.A.C. and S.A.L., he asked how much he should send, indicating that he was willing to get a second job if necessary. Francisco attempted to provide support for the children after they were removed to foster care by sending them clothing through his uncle, who traveled to the United States every two weeks.

Alvaro remained a presence in the children's life once the children were placed in foster care. Alvaro regularly visited the children with Edna and their maternal grandmother at the Department's

[6] The four older children, including J.A.C. and S.A.L., had been placed with one foster family, while the baby was placed with another.

Commerce office, bringing the children food, unless his work schedule interfered. Alvaro testified that he last saw the children a little over a month before trial.

At the bench trial, the Department put on testimony from the following witnesses: Edna, her assigned counselor, the caseworker, the caseworker's supervisor, a CASA volunteer acting as guardian ad litem, and a foster parent caring for Edna's baby. The Department did not call the foster parents caring for J.A.C. and S.A.L. as part of its case. The Department offered one exhibit, a document from Edna's DWI case, and asked the court to take notice of its file, including its reports. The children did not testify, but were brought to court so they could be interviewed by their attorney ad litem, who recommended against terminating Francisco's parental rights. The judge also spoke in chambers with J.A.C.

The caseworker recommended that Francisco's parental rights be terminated, testifying that she had no personal knowledge as to why Francisco was deported and was not aware of his having provided any support for the children in the eighteen months since the case began. The caseworker additionally testified that the children's foster family was committed to keeping them until they aged out. The caseworker indicated that the Department had never entered into a service plan with Francisco because he had been deported to Mexico.

The caseworker's supervisor also recommended that Francisco's parental rights be terminated, adding that the four older children were together in a long-term foster placement, and that the foster parents would have to think about adoption again if that became an option. The CASA volunteer recommended that Francisco's parental rights be terminated as well, reasoning that

he had a new wife and family in Mexico, could not return to the U.S. for ten years, by which time the children would be grown, and made too little money to help the children.

Francisco testified over the phone through an interpreter. Francisco stated that he never saw Edna drink, use drugs, or hurt the kids in any manner, and that Edna had been a good mother. Francisco testified that he wanted his children to reside with their mother or his family because they love the children. The only testimony or other evidence concerning Francisco's conviction came from Francisco on direct examination from his counsel:

Q: Okay. Now, you got in trouble in Wisconsin, right?

A: Yes. Correct.

Q: You were having—your girlfriend was underage?

A: Yes. Correct.

The Department asked no questions about this issue on cross-examination. The record does not contain the Wisconsin judgment, probation terms, or the charges brought. The Department presented no evidence concerning the date, circumstances, or offending conduct, or the girl's age. Because Francisco moved to Texas and met Edna in 1996, we can deduce that he was convicted in 1996 or earlier, when Francisco would have been twenty-one years old or younger.

The trial court terminated both Francisco's and Edna's parental rights in a November 18, 2010 order. With respect to Francisco, the trial court found by clear and convincing evidence that termination was in the best interest of J.A.C. and S.A.L., and that Francisco (1) knowingly placed or knowingly allowed the children to remain in conditions or surroundings which endangered their physical or emotional well-being; (2) engaged in conduct or knowingly placed the children with

persons who engaged in conduct which endangered their physical or emotional well-being; (3) failed to support the children in accordance with his ability; and (4) constructively abandoned the children. *See* TEX. FAM. CODE § 161.001(1)(D), (E), (F), and (N), (2).

Francisco filed a timely combined motion for new trial and statement of points for appeal that tracked the language of section 161.001(1) (D), (E), (F), and (O) of the Family Code, and also challenged the constitutionality of the statement-of-points statutory requirement.[7] The trial court denied Francisco's request for a new trial, found that Francisco's appeal was not frivolous and a record was necessary, and appointed counsel to represent Francisco on appeal.

A divided court of appeals affirmed the trial court's judgment as to Francisco. __ S.W.3d __, __ (Tex. App.—Texarkana 2011, pet. granted). The court of appeals addressed only the trial court's finding under section 161.001(1)(E) and the best-interest finding, holding that there was factually and legally sufficient evidence to support the findings that Francisco had engaged in conduct that endangered the physical and emotional well-being of the children, and that termination was in the children's best interest. *Id.* at __. Francisco filed a petition for review challenging the

[7] Francisco failed to challenge the trial court's finding that he violated section 161.001(1)(N), presumably inadvertently tracking the language of section 161.001(1)(O) in his statement of points. In the court of appeals, Francisco argued that his trial counsel was ineffective for failing to raise the issue of constructive abandonment under section 161.001(1)(N) in the statement of points. The court of appeals did not reach that issue, __ S.W.3d __, __ n.13 (Tex. App.—Texarkana 2011, pet. granted), and the Department does not argue waiver here. Francisco's statement of points also did not attack the trial court's best-interest finding. The Department does not challenge that omission. The Legislature has since repealed the requirement for a statement of points on appeal. *See* Act of May 5, 2011, 82d Leg., R.S., ch. 75, § 5, 2011 Tex. Gen. Laws 75; *see also In re J.O.A.*, 283 S.W.3d 336, 339 (Tex. 2009) (holding that the statement-of-points requirement is unconstitutional as applied when it precludes a parent from raising a meritorious complaint concerning the insufficiency of the evidence supporting a termination order).

legal sufficiency of the evidence as to the trial court's section 161.001(1)(E) and best-interest findings, which we granted. 55 Tex. S. Ct. J. 461 (Mar. 30, 2012).[8]

II. Standard of Review

Termination of parental rights requires proof by clear and convincing evidence. This heightened standard of review is mandated not only by the Family Code, *see* TEX. FAM. CODE § 161.001, but also the Due Process Clause of the United States Constitution. *See, e.g.*, *In re J.F.C.*, 96 S.W.3d 256, 263 (Tex. 2002); *see also Santosky v. Kramer*, 455 U.S. 745, 753–54 (1982) (recognizing the fundamental liberty interest a parent has in his or her child and concluding that the state must provide a parent with fundamentally fair procedures, including a clear and convincing evidentiary standard, when seeking to terminate parental rights). The Family Code defines clear and convincing evidence as "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. FAM. CODE § 101.007; *see J.F.C.*, 96 S.W.3d at 264. We strictly construe involuntary termination statutes in favor of the parent. *In re E.R.*, __ S.W.3d __, __ (Tex. 2012) (citing *Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985)).

We have previously examined the manner in which to apply the clear and convincing evidentiary standard onto our legal sufficiency review. In *J.F.C.*, we explained:

> In a legal sufficiency review, a court should look at all the evidence in the light most favorable to the finding to determine whether a reasonable trier of fact could have formed a firm belief or conviction that its finding was true. To give appropriate

[8] Edna's parental rights were terminated as to all five children and the court of appeals affirmed the termination. __ S.W.3d at __. Edna petitioned this Court for review as to that judgment, but we denied her petition. 55 Tex. S. Ct. J. 462 (Mar. 30, 2012). Thus, we reverse the court of appeals' judgment only as to Francisco.

> deference to the factfinder's conclusions and the role of a court conducting a legal sufficiency review, looking at the evidence in the light most favorable to the judgment means that a reviewing court must assume that the factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could do so. A corollary to this requirement is that a court should disregard all evidence that a reasonable factfinder could have disbelieved or found to have been incredible. This does not mean that a court must disregard *all* evidence that does not support the finding. Disregarding undisputed facts that do not support the finding could skew the analysis of whether there is clear and convincing evidence.
>
> If, after conducting its legal sufficiency review of the record evidence, a court determines that no reasonable factfinder could form a firm belief or conviction that the matter that must be proven is true, then that court must conclude that the evidence is legally insufficient. Rendition of judgment in favor of the parent would generally be required if there is legally insufficient evidence.

96 S.W.3d at 266; *see also In re J.O.A.*, 283 S.W.3d 336, 344–45 (Tex. 2009).

For a trial court to terminate a parent's right to his children, the State must prove by clear and convincing evidence both that: (1) the parent committed an act prohibited under Texas Family Code section 161.001(1), and (2) termination is in the children's best interest. *See* TEX. FAM. CODE § 161.001(1)–(2). Francisco challenges the court of appeals' holding as to both prongs.[9] We begin by considering whether the evidence is legally sufficient to justify the termination of Francisco's parental rights under section 161.001(1)(E) of the Family Code.

[9] The Department contends that Francisco waived his arguments before this Court challenging the legal sufficiency of the evidence as to the endangerment finding. The Department's waiver argument cuts too broadly. A party is entitled to challenge a court of appeals' analysis in this Court, even if the court of appeals primarily focuses on an issue that was not the focus of the party's briefing in the court of appeals (here, its reasons for affirming the trial court's endangerment finding). Further, in both this Court and the court of appeals, Francisco specifically challenged the legal sufficiency of the evidence as to the trial court's endangerment finding.

III. The Evidence Is Legally Insufficient to Support Termination of Francisco's Parental Rights Under Section 161.001(1)(E) of the Family Code

The court of appeals upheld the termination of Francisco's parental rights on grounds that he engaged in conduct or knowingly placed his children with persons who engaged in conduct endangering the physical or emotional well-being of his children. *See id.* § 161.001(1)(E). In considering whether the evidence is legally sufficient to support a finding of endangerment, we must determine whether there was "some evidence of endangerment on which a reasonable factfinder could have formed a firm belief or conviction of endangerment." *J.O.A.*, 283 S.W.3d at 346 (citing *J.F.C.*, 96 S.W.3d at 266). We have held that "endanger" means more than a threat of metaphysical injury or potential ill effects of a less-than-ideal family environment, but that endangering conduct need not be directed at the child. *See Tex. Dep't of Human Servs. v. Boyd*, 727 S.W.2d 531, 533 (Tex. 1987).

The evidence on which the Department relied to prove endangerment was virtually undisputed. In his testimony, Francisco acknowledged that he was convicted in Wisconsin of an offense involving a minor when he was younger, for which he received probation, long before J.A.C. and S.A.L. were born. After he and Edna separated, Francisco attempted to procure a green card and was arrested for violating the terms of his probation and deported. The court of appeals took this limited evidence and surmised an endangering course of conduct, beginning with the offense in Wisconsin and ending in deportation. The court of appeals explained that the trial court could determine that Francisco's inappropriate relationship involving an underage "child" established a voluntary course of conduct in that the series of events ultimately led to the loss of the children's

father figure. __ S.W.3d at __. The court of appeals acknowledged that deportation alone is insufficient to establish endangerment, but concluded that it is a fact properly considered given that Francisco's criminal acts subjected the children "to a life of uncertainty and instability, endangering their physical and emotional well-being." *Id.* at __.

While we agree that Francisco's conviction, probation violation, and deportation were all factors to be considered, on the basis of the record evidence before us, no reasonable fact-finder could have formed a firm belief or conviction that Francisco engaged in a course of endangering conduct. First, the Department bears the burden of showing how the offense was part of a voluntary course of conduct endangering the children's well-being, but did not offer evidence concerning the Wisconsin or deportation proceedings, aside from statements in its own reports, which we have set out and the substance of which Francisco does not challenge.[10] The only evidence concerning the conviction came from Francisco's own brief testimony on direct examination. On this record, we cannot determine whether the offense involved a seventeen-year-old girl (as mentioned, Francisco was likely twenty-one or younger when the offense was committed) or someone younger, nor do we

[10] The trial court took notice of the Department's reports, which included statements that Francisco had been deported to Mexico because of "criminal activity involving sex with a minor." The Department argues that these statements constitute legally sufficient evidence to support the endangerment finding. The Department also argues that Francisco has waived any argument concerning the trial court's notice of the file by failing to object to the notice. We need not decide whether statements in a report noticed by the trial court can support a finding, nor do we need to determine whether Francisco waived any argument concerning the statements. Even if the statements could constitute evidence supporting a finding, the statements are not legally sufficient evidence. While the statements are certainly very serious, given that the statements supply no details, that Francisco was given a probated sentence, that the events occurred at least eight years before Francisco was deported and at least thirteen years before the Department initiated these termination proceedings, and that in the long interim there is evidence Francisco consistently demonstrated his desire to care and provide for his children, the brief statements in the Department's records cannot be considered clear and convincing evidence of endangerment.

know whether the offense in Wisconsin would have constituted an offense under Texas law.[11] The court of appeals essentially affirmed the trial court's endangerment finding on the basis of supposition: the court inferred a worst-case scenario involving sex with a "child" that would have resulted in the endangerment of Francisco's own children. The trier of fact may draw inferences, but only reasonable and logical ones. *Hammerly Oaks, Inc. v. Edwards*, 958 S.W.2d 387, 392 (Tex. 1997) (observing that "[t]his Court has held that the trier of fact may draw inferences, but only reasonable and logical ones," and noting that the evidence relied on may not just be "'meager circumstantial evidence' which could give rise to any number of inferences, none more probable than another" (quoting *Blount v. Bordens, Inc.*, 910 S.W.2d 931, 933 (Tex. 1995))); *see also Schlumberger Well Surveying Corp. v. Nortex Oil & Gas Corp.*, 435 S.W.2d 854, 858 (Tex. 1969) (recognizing that "a vital fact may not be established by piling inference upon inference"). We agree that an offense occurring before a person's children are born can be a relevant factor in establishing an endangering course of conduct*, see J.O.A.*, 283 S.W.3d at 345, but the Department bears the

[11] Texas and Wisconsin law vary in how unlawful sex with a minor is treated. *Compare* TEX. PENAL CODE § 21.11, *with* WIS. STAT. ANN. §§ 948.02, .09 (West 2012). In Texas, the age of consent is seventeen. *See* TEX. PENAL CODE § 21.11. Texas also provides an affirmative defense if there are consenting parties close in age. *See id.* In Wisconsin, on the other hand, the age of consent is eighteen, and Wisconsin does not provide an affirmative defense for consenting parties who are close in age. *See* WIS. STAT. ANN. § 948.01(1) (West 2012). Wisconsin law makes it a Class A misdemeanor to have "sexual intercourse" with a "child who is not the defendant's spouse" and has attained the age of sixteen. *Id.* § 948.09; *see also id.* § 948.01(1), (6) (defining "child" and "sexual intercourse"). Given Francisco's young age at the time of his conviction, it is possible he would not have been subject to conviction in Texas had the conduct occurred here.

burden of introducing evidence concerning the offense and establishing that the offense was part of a voluntary course of conduct that endangered the children's well-being.[12]

Second, though we agree with the court of appeals that deportation, like incarceration, is a factor that may be considered (albeit an insufficient one in and of itself to establish endangerment), its relevance to endangerment depends on the circumstances. Under the court's reasoning, the mere threat of deportation or incarceration resulting from an unlawful act, regardless of severity, would establish endangerment. We disagree with that analysis. Many offenses can lead to an immigrant's deportation, including entering the country unlawfully. *See, e.g.*, 8 U.S.C. §§ 1227, 1325. Under the court's reasoning, virtually any offense that could lead to deportation—even a minor one committed long before the parent's children were born—would create such an unstable and uncertain environment as to establish endangerment, subjecting countless immigrants to the potential loss of their children. The court's broad reasoning necessarily applies to citizens as well. Any offense committed by a citizen that could lead to imprisonment or confinement would also apparently establish endangerment, simply because the parent's ability to be present in his children's lives would be uncertain. Our nation's Constitution forbids such a far-reaching interpretation of our

[12] The Department points to two court of appeals' decisions for the proposition that inappropriate conduct with a minor is a sufficient basis for proving endangerment. Both cases are inapposite. In *In re R.W.*, 129 S.W.3d 732 (Tex. App.—Fort Worth 2004, pet. denied), the father engaged in a long course of conduct that the court of appeals concluded endangered the child, including allegations of child molestation with another child, a long history of drug and alcohol abuse, a long history of mental health issues resulting in hospitalization on several occasions, several felony criminal convictions, and an inappropriate relationship with a minor. *Id.* at 738–44. Though it is unclear from the court of appeals' opinion the father's age at the time of the inappropriate relationship, the relationship in that case was but one in a long string of conduct that was endangering. *Id.* at 743. *In re R.G.* also does not support the Department's argument. *See* 61 S.W.3d 661 (Tex. App.—Waco 2001, no pet.). There, a father continually returned his children to their grandmother's house where sexual abuse was taking place, even after knowing that the abuse was occurring and, later, in contravention of a Department safety plan. *Id.* at 668. *R.G.* also applied an incorrect legal sufficiency standard of review that was later overturned in *J.F.C.* *Id.* at 667; *see J.F.C.*, 96 S.W.3d at 267.

parental rights termination statutes. *See, e.g.*, *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (noting the "extensive precedent" establishing that the Due Process Clause of the Fourteenth Amendment "protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children"); *see also Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (observing that "the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent"). Here, though Francisco engaged in a criminal act and left Wisconsin without completing his probation before his children were born, there is no evidence that these actions created such uncertainty and instability for his children sufficient to establish endangerment. Nor is there evidence that Francisco abandoned his parental responsibilities once he was forced to leave the country. Instead, the undisputed evidence illustrates that Edna and Francisco lived together as a family unit without apparent incident until they separated, and Francisco and his family remained a regular presence and source of support in the children's lives after he was deported.

We further agree with the court of appeals that there are similarities between incarceration and deportation in that the parent is no longer available to reside with the children in their home in the United States. But there are important differences. Unlike an incarcerated individual, a person who is deported is able to work, have a home, and support a family. More importantly, it is possible for the person's children to live with him.

Although the court of appeals focused on Francisco's conviction involving a minor and subsequent deportation as evidence supporting the trial court's endangerment finding, section 161.001(1)(E) also provides that a parent can engage in an endangering course of conduct if the

parent knowingly places the children with persons who engaged in conduct endangering the physical and emotional well-being of the children. The Department does not argue in its brief that Francisco violated this prong, but at oral argument suggested he did on the basis of Edna's endangering actions. It is undisputed that Edna never engaged in endangering conduct, per the Department's own records, until the underlying proceeding, long after Francisco was deported and living in another country. There is simply no evidence that Francisco knowingly placed the children with Edna while she was engaging in endangering conduct, nor is there evidence that Francisco allowed the children to remain with Edna after learning of her conduct. Francisco's uncontroverted testimony was that he was surprised by the instant proceeding and that he had never seen Edna use drugs.

Deportation flowing from an unknown offense occurring many years earlier cannot satisfy the State's burden of proving by clear and convincing evidence that a parent engaged in an endangering course of conduct, nor can mere guesswork undergird such a finding.[13] *See Serv. Corp.*

[13] We note that several other courts around the country have considered the relevance of illegal status in this country or deportation in parental rights termination proceedings, with the majority concluding that illegal status and deportation are not in themselves grounds for the termination of parental rights. *See, e.g.*, *In re M.M.*, 587 S.E.2d 825, 832–33 (Ga. Ct. App. 2003) (concluding that the evidence was insufficient to terminate a Mexican's parental rights when the basis was the father's illegal status in this country and the possibility that he could be deported); *In re Doe*, 281 P.3d 95, 102 (Idaho 2012) (concluding that evidence was insufficient to show a deported Mexican father unfit and reversing parental rights termination order); *In re B & J*, 756 N.W.2d 234, 239–40 (Mich. Ct. App. 2008) (concluding that the evidence was insufficient to terminate a Guatemalan's parental rights on the basis of failing to provide proper care or custody for a child after being deported to Guatemala when CPS had reported the parents to immigration authorities); *In re Angelica L.*, 767 N.W.2d 74, 94–96 (Neb. 2009) (concluding that the evidence was insufficient to terminate a Guatemalan's parental rights on the basis of twice failing to provide a child with adequate medical care and subsequent deportation on the basis of living illegally in this country); *Fairfax Cnty. Dep't of Family Servs. v. Ibrahim*, No. 0821-00-4, 2000 WL 1847638, at *2–3 (Va. Ct. App. Dec. 19, 2000) (concluding that termination of a Ghanan's parental rights was unjustified when the father was incarcerated and deported for importing drugs). *But see State Dep't of Children's Servs. v. Ahmad*, No. M2004-02604-COA-R3-PT, 2005 WL 975339, at *1, *3 (Tenn. Ct. App. Apr. 26, 2005) (concluding that evidence was sufficient to terminate a Nigerian's parental rights when the mother was convicted of felony theft, deported, and chose to allow her children to remain in foster care in this country); *In re M.F.*, No. 20080250-CA, 2008 WL 2224277, at *1–2 (Utah Ct. App. May 30, 2008) (concluding that evidence was sufficient to terminate a Mexican's parental rights when the father was incarcerated and deported and had not seen the children or provided support in almost two years); *Perez-Velasquez v. Culpeper Cnty. Dep't of Soc. Servs.*, No. 0360-09-4, 2009 WL

Int'l v. Guerra, 348 S.W.3d 221, 228 (Tex. 2011) ("If . . . the evidence does no more than create a mere surmise or suspicion and is so slight as to necessarily make any inference a guess, then it is no evidence."). As such, we conclude the evidence is legally insufficient to support termination of Francisco's parental rights under section 161.001(1)(E).[14]

We next evaluate the final prerequisite necessary to support an order terminating a person's parental rights: whether the evidence is legally sufficient to support the trial court's finding that termination of Francisco's parental rights is in the best interest of J.A.C. and S.A.L.

IV. The Evidence Is Legally Insufficient to Support Termination of Francisco's Parental Rights Under the "Best Interest" Prong in Section 161.001(2) of the Family Code

The Department is required to prove by clear and convincing evidence that termination of a parent's right to his children is in the children's best interest. *See* TEX. FAM. CODE § 161.001(2). In determining whether the evidence is legally sufficient to support a best-interest finding, we "consider the evidence that supports a deemed finding regarding best interest and the undisputed evidence," and ignore evidence a fact-finder could reasonably disbelieve. *J.F.C.*, 96 S.W.3d at 268.

1851017, at *2–3 (Va. Ct. App. June 30, 2009) (concluding that evidence was sufficient to terminate a Guatemalan's parental rights when the father was convicted of malicious wounding, incarcerated, and deported).

[14] The court of appeals affirmed the trial court's finding under section 161.001(1)(E) and thus did not reach the trial court's remaining findings under section 161.001(1)(D) (knowingly placed or allowed the child to remain in conditions or surrounding which endangered the child), (F) (failed to support the child in accordance with the parent's ability during a period of one year ending within six months of the date of the filing of the petition), and (N) (constructively abandoned the child who has been in managing conservatorship of Department for not less than six months, and Department has made reasonable efforts to return the child to the parent, the parent has not regularly visited or maintained significant contact with the child, and the parent has demonstrated an inability to provide the child with a safe environment). In this Court, Francisco does not challenge those additional trial court findings. We note, however, that the Department presented the same limited evidence concerning those findings as it did to support the endangerment finding.

We have previously articulated nonexclusive factors to be considered in determining whether termination of parental rights is in a child's best interest:

(1) the child's desires;

(2) the child's emotional and physical needs now and in the future;

(3) any emotional and physical danger to the child now and in the future;

(4) the parental abilities of the individuals seeking custody;

(5) the programs available to assist the individuals seeking custody to promote the best interest of the child;

(6) the plans for the child by the individuals or agency seeking custody;

(7) the stability of the home or proposed placement;

(8) the parent's acts or omissions which may indicate that the existing parent-child relationship is improper; and

(9) any excuse for the parent's acts or omissions.

Holley v. Adams, 544 S.W.2d 367, 371–72 (Tex. 1976). Of these, the court of appeals concluded that factors (1), (2), (6), (8), and (9) weighed in favor of termination of Francisco's parental rights, factor (7) was neutral, and factors (3), (4), and (5) weighed against termination. __ S.W.3d at __. We address each in turn.

The court of appeals first reasoned that there was "no evidence that any of the children wanted to live with their father in Mexico" to support its conclusion that the first *Holley* factor weighed in favor of termination. *Id.* at __. But, in doing so, the court incorrectly applied the standard of review and burden of proof. A trial court's best-interest finding must be supported by

clear and convincing evidence in the record. *See* TEX. FAM. CODE § 161.001(2). The court of appeals erred in relying on a *lack* of evidence to contradict a finding as if it were evidence supporting the finding. The Department did not introduce evidence that the children would not want to live with their father, nor did the Department controvert Alvaro's testimony concerning the children's wish to stay with their father after their most recent visit. A lack of evidence does not constitute clear and convincing evidence.

As to the second *Holley* factor, the court of appeals stated that the children's emotional and physical needs are great, but did not explain or cite any evidence illuminating how those needs differ from other children or would go unmet if the children were with Francisco. *See* __ S.W.3d at __. As such, we disagree that this factor weighs in favor of termination.

The court of appeals next pointed to Francisco's failure to articulate a plan for the children, beyond allowing the children to return to the mother, as evidence supporting termination under the sixth *Holley* factor. *Id.* at __. While we agree this amounts to some evidence, it is legally insufficient to weigh in favor of termination. As an initial matter, Francisco actually testified that the children should be with their mother *or his family*; thus, it is untrue that Francisco's only plan was for the children to remain with Edna. More importantly, though, there is no indication from the record that the Department considered the possibility of the children living with Francisco in Mexico; Francisco was never offered a service plan. The Department's only post-termination plan for the children was apparently to leave the four older children together with the same foster parents until they age out. Similarly, because the Department never assessed Francisco's situation in

Mexico, there is a lack of evidence establishing the instability of Francisco's home in Mexico pursuant to the seventh *Holley* factor.

The court of appeals stated that there is some evidence that Francisco's acts or omissions rendered the parent-child relationship improper under the eighth *Holley* factor, pointing to Francisco's improper relationship with a minor and deportation. *Id.* at __. But, as discussed, the record is devoid of evidence concerning the offense. We cannot say from this record that Francisco's conviction equates to a risk of his having an inappropriate relationship with his own children. In fact, the undisputed evidence indicates that Francisco's relationship with his children was a good one. Similarly, we disagree with the court of appeals' assertion that Francisco's failure to provide an excuse for "these acts" (presumably referring to the conviction and deportation) under the ninth *Holley* factor supported the trial court's best-interest finding, given that the evidence concerning those "acts" is legally insufficient to support a best-interest finding in the first place. *See id.* at __.

The court of appeals finally concluded that the third through fifth *Holley* factors weighed against termination of Francisco's parental rights, observing that testimony suggested that Francisco was a good father to the children who provided for their needs, and that there was no evidence the Department had programs available to assist Francisco in Mexico. *Id.* at __. We agree with the court's assessment of these three *Holley* factors, except to observe that the Department did not determine whether Mexican programs might be available to Francisco to promote the best interest of his children.

We note that the court of appeals additionally inferred that termination of Francisco's parental rights was in the children's best interest because the Department caseworker testified that

Francisco had not provided financial support for or contacted the children, with the exception of a few phone calls, and Alvaro testified it "would be good" if a married couple adopted the children and fed, clothed, and provided them with a good education. *See id.* at __. It appears from the record that any absence of financial support and telephone calls from Francisco was largely a result of the Department's actions. As discussed, the Department did not request court-ordered support, though Francisco provided his children with financial support and clothing on his own initiative. The Department's plans also limited Francisco's visitation to a once-a-month telephone call, and the Department's reports indicate Francisco was always compliant until the Department moved the children without informing him. Finally, the Department presented no evidence that another family wishes to adopt the children, or that the children's foster parents can provide for them in a way Francisco cannot. But, even if the evidence showed the children's foster family to have superior resources to Francisco, we decline to postulate that this would support a best-interest finding. *See, e.g.*, *In re Doe*, 281 P.3d 95, 102 (Idaho 2012) ("The fact that a child may enjoy a higher standard of living in the United States than in the country where the child's parent resides is not a reason to terminate the parental rights of a foreign national."); *In re Angelica L.*, 767 N.W.2d 74, 94 (Neb. 2009) ("[T]he fact that the State considers certain adoptive parents . . . 'better' . . . does not overcome the commanding presumption that reuniting the children with [their mother] is in their best interests—no matter what country she lives in . . . . [T]his court has never deprived a parent of the custody of a child merely because on financial or other grounds a stranger might better provide." (internal citations omitted)).

In sum, we conclude that no reasonable fact-finder could have formed a firm belief or conviction that termination of Francisco's parental rights was in the children's best interest, and the court of appeals erred in holding otherwise. *See* TEX. FAM. CODE § 161.001(2); *J.F.C.*, 96 S.W.3d at 272. We do not conclude that the children's best interest is unquestioningly for them to join their father in Mexico; it is possible that the children's best interest is to remain in the United States, whether in foster care or with Alvaro or another family member.[15] But the Department is required to meet its burden of proof, and the evidence introduced at trial fails, at this juncture, to support the Department's burden as to the best-interest finding.

V. Conclusion

Due process commands that courts apply the clear and convincing evidentiary standard in parental rights termination cases. *Santosky*, 455 U.S. at 769; *J.F.C.*, 96 S.W.3d at 263; *see also In re B.G.*, 317 S.W.3d 250, 257 (Tex. 2010) (observing that a parental rights termination case implicates "fundamental liberties" and "a parent's interest in maintaining custody of and raising his or her child is paramount" (quoting *In re M.S.*, 115 S.W.3d 534, 547 (Tex. 2003))). The Department is required to support its allegations against a parent by clear and convincing evidence; conjecture is not enough. Because the evidence is legally insufficient to support the trial court's order terminating Francisco's parental rights under section 161.001, we hold that the court of appeals erred in affirming the trial court's order as to Francisco. On remand, the Department has several options to consider, including offering Francisco a service plan to assess whether it would be feasible and

[15] It is unclear whether Alvaro remains in the United States. Alvaro testified that he may return to Mexico.

appropriate for him to have custody of his children, and allowing Francisco an opportunity to comply with the plan. *See, e.g.*, TEX. FAM. CODE §§ 263.101–.106. The fact that Francisco resides in Mexico should not seriously hamper the Department's efforts. *See, e.g.*, *Angelica*, 767 N.W.2d at 86–87 (discussing State of Nebraska's coordination with the Guatemalan consulate and agencies for the purpose of conducting a home study and determining whether sufficient services exist in Guatemala to monitor and protect the well-being of the children). We reverse the court of appeals' judgment in part and remand the case to the trial court for further proceedings in accordance with this opinion. *See* TEX. R. APP. P. 60.2(d).

_____

Paul W. Green
Justice

OPINION DELIVERED: October 12, 2012

IN THE SUPREME COURT OF TEXAS

NO. 11-0728

TEXAS DEPARTMENT OF CRIMINAL JUSTICE-COMMUNITY JUSTICE ASSISTANCE DIVISION, PETITIONER,

v.

LUZELMA CAMPOS, BETTY JO GONZALEZ, AND MISTY VALERO, RESPONDENTS

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

PER CURIAM

The Texas Department of Criminal Justice Community Justice Assistance Division (TDCJ) brings this interlocutory appeal from the denial of its plea to the jurisdiction as to claims for damages related to actions of two Nueces County Substance Abuse Treatment Facility (SATF) officers. The claims against TDCJ based on the use of tangible property involved intent to accomplish intentional torts, and its plea to the jurisdiction as to those claims should have been granted. Its plea as to the remaining claims also should have been granted because there was no allegation that those claims resulted from the use of tangible property. We reverse and render judgment dismissing the claims against TDCJ for want of jurisdiction.

Luzelma Campos, Betty Jo Gonzalez, and Misty Valero (collectively, the Plaintiffs) were referred to the SATF for detention. The SATF is operated by the local Community Supervision and

Corrections Department (CSCD). *See* TEX. GOV'T CODE §§ 76.004(b), 76.006(a)–(b). TDCJ furnishes administrative and technical assistance to the SATF, including officer training and certification. *See id.* §§ 509.003–.005, 509.008–.009.

In December 2000, the Plaintiffs sued Nueces County, TDCJ, and two SATF officers, Anthony Allen and Cordell Hayes. The Plaintiffs alleged that Allen and Hayes sexually harassed and assaulted them while they were at the SATF. As relevant to this appeal, they asserted claims against TDCJ for violation of 42 U.S.C. § 1983; premises defect; and negligent hiring, training, supervision, and implementation of policy. The Plaintiffs later added CSCD as a defendant.

TDCJ and CSCD filed a joint plea to the jurisdiction based on governmental immunity, which the trial court granted in November 2006.[1] The court of appeals affirmed the dismissal of the § 1983 claims but reversed as to the negligence claims. *Campos v. Tex. Dep't of Criminal Justice (Campos II)*, No. 13–08–00269–CV, 2009 WL 3385248, at *8 (Tex. App.—Corpus Christi Oct. 22, 2009, no pet.) (mem. op.). The appeals court held that (1) the Plaintiffs' pleadings were sufficient to allege a premises defect claim under the Texas Tort Claims Act (TTCA), *see* TEX. CIV. PRAC. & REM. CODE § 101.021(2); and (2) the Plaintiffs should be permitted to replead under their other theories of negligence after being allowed time for additional discovery. *Id.* at *3–*5, *8.

After remand, the Plaintiffs filed their fourth amended original petition. In it they alleged that in order to gain exclusive, private, unmonitored, and unfettered access to them and to wrongfully confine them during the assaults, Allen and Hayes used property such as a laundry room, a laundry

[1] In 2003, the trial court granted Nueces County's plea to the jurisdiction. The court of appeals reversed and remanded. *Campos v. Nueces Cnty.*, 162 S.W.3d 778, 782 (Tex. App.—Corpus Christi 2005, pet. denied). The County was ultimately dismissed from the suit.

cart, and a storage room. TDCJ and CSCD again filed a joint plea to the jurisdiction. This time the trial court denied the plea.

TDCJ and CSCD appealed and the court of appeals affirmed in part, reversed in part, and rendered in part. ___ S.W.3d at ___. The court dismissed all of the Plaintiffs' claims against CSCD and the premises liability claims against TDCJ because immunity had not been waived. *Id.* But it held that immunity was waived for the claims against TDCJ for negligent hiring, training, and supervision of employees and negligent implementation of policy because the TTCA waives the State's immunity for "personal injury . . . so caused by a condition or use of tangible personal or real property." *Id.* at ___; *see* TEX. CIV. PRAC. & REM. CODE § 101.021(2). It further held that the "intentional-torts exception," which excludes waiver for claims "arising out of assault, battery, false imprisonment, or any other intentional tort" did not bar the Plaintiffs' claims "merely because the allegedly negligent conduct was accompanied by intentional torts." ___ S.W.3d at ___; *see* TEX. CIV. PRAC. & REM. CODE § 101.057(2).

In this Court TDCJ argues that (1) the relationship between Plaintiffs' theories of liability and TDCJ is "too attenuated to waive immunity" under the TTCA, (2) the Plaintiffs' allegations against it assert a non-use or misuse of information for which the TTCA does not waive immunity, and (3) even assuming immunity is waived under the TTCA based on a misuse of property, the intentional-torts exception under Texas Civil Practice and Remedies Code section 101.057(2) bars the suit. We agree that TDCJ's immunity was not waived.

First we note that appellate courts generally have jurisdiction only over appeals from final judgments. *Bally Total Fitness Corp. v. Jackson*, 53 S.W.3d 352, 352 (Tex. 2001). But a party may

appeal from certain interlocutory orders, including the denial of a plea to the jurisdiction by a governmental unit. TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8). While the court of appeals' judgment is usually conclusive on interlocutory appeal, we may consider an interlocutory appeal when the court of appeals holds differently from a prior decision of this Court. TEX. GOV'T CODE §§ 22.001(a)(2), (e); 22.225(c). We have jurisdiction because the holding of the court of appeals conflicts with our decision in *Texas Department of Public Safety v. Petta*, 44 S.W.3d 575 (Tex. 2001).

The Plaintiffs urge that TDCJ's immunity has been waived by the TTCA because Allen and Hayes used tangible property in perpetrating the assaults. *See* TEX. CIV. PRAC. & REM. CODE § 101.021(2) (waiving immunity when injuries are caused by a condition or use of tangible property). They reference, for example, Allen and Hayes's use of a laundry cart that they rolled in front of the door to the laundry room to block the doorway when they performed the assaults. The court of appeals held that immunity from the negligence claims was waived because of this use or condition of property. We disagree with that conclusion. The Plaintiffs do not assert that Allen and Hayes used the property for any purpose or with any intent other than to effect their intentional assaults of the Plaintiffs. Additionally, the Plaintiffs' claims based on negligent conduct do not involve the use of tangible property. As we explain below, the Plaintiffs' allegations do not present a claim within the TTCA's waiver of immunity for governmental entities.

In *Petta* we addressed negligence claims against a governmental entity where the underlying conduct was intentional in nature. Melinda Petta sued the Texas Department of Public Safety after a trooper allegedly assaulted her. *Petta*, 44 S.W.3d at 576. We held that immunity was not waived

for claims based on conduct such as the trooper's hitting Petta's car window and shooting at her tires because those actions were intentional and fell within the exclusion for claims arising out of assault, battery, and false imprisonment. *Id.* at 580. We also held that immunity was not waived for claims that the Department negligently failed to furnish proper training and instruction to the trooper because information, even if written down, is not tangible property but is only an abstract concept. *Id.* at 580-81.

The court of appeals determined that this case is distinguishable from *Petta* because property such as a laundry room and adjacent storage room, a laundry cart, and keys were used in this case, and such property is tangible and not abstract. ___ S.W.3d at ___. But even assuming the Plaintiffs' injuries were caused by a use of tangible property, the Plaintiffs' only allegations regarding this property were that it was used in the course of Allen and Hayes gaining "exclusive, private, unmonitored, and unfettered access to the Plaintiffs, to thwart escape from the assaults, and to wrongfully confine Plaintiffs during the assaults." The property was only used with intent to accomplish the assaults of which the Plaintiffs complain. Thus, the property's use is encompassed within the exclusion of claims arising from intentional torts.[2] TEX. CIV. PRAC. & REM. CODE § 101.057(2); *see Petta*, 44 S.W.3d at 580.

[2] TDCJ asserts that contrary to Plaintiffs' allegations in their pleadings, Allen and Hayes are not State employees but are employees of CSCD. *See Delaney v. Univ. of Houston*, 835 S.W.2d 56, 59 (Tex. 1992) (concluding that the intentional tort exception only applies if a governmental employee's conduct is the subject of the complaint). But when reviewing a plea to the jurisdiction, we take as true all evidence favorable to the non-movant, indulging every reasonable inference and resolving any doubts in its favor. *See City of El Paso v. Heinrich*, 284 S.W.3d 366, 378 (Tex. 2009). Even if Allen and Hayes are not TDCJ employees and the intentional tort exception is inapplicable, our ultimate conclusion would not change because Campos must show a waiver of immunity for her separate negligence claim against TDCJ. *See Delaney*, 835 S.W.2d at 60.

However, even if a claim is based on an intentional tort, a governmental entity may still be liable for negligence if that negligence is distinct from the intentional tort. *Young v. Dimmitt*, 787 S.W.2d 50, 51 (Tex. 1990) ("Although a governmental unit is immune from claims arising out of intentional torts, petitioners' negligent employment and entrustment claims arise out of the alleged negligence of the city employees supervising the officer, not out of the officer's intentional tort." (citation omitted)). But a cause of action for negligent supervision or training must satisfy the TTCA's use of tangible property requirement. *Petta*, 44 S.W.3d at 581. The Plaintiffs' claims do not.

The Plaintiffs allege, without elaboration, that TDCJ failed to discipline prior inappropriate conduct by other employees, failed to properly hire, train, and supervise Allen and Hayes, and failed to screen, educate, train, supervise, investigate, or otherwise direct employees with regard to sexual harassment and assault. The Plaintiffs do not allege that a "use" of tangible property was involved in any of these failures. *See id.* at 580-81 (concluding that claims related to negligent failure to train, instruct, and discipline involved the misuse or non-use of information which is not tangible property). Thus, the TTCA does not waive TDCJ's immunity from the claims.

The Plaintiffs also allege that TDCJ is liable because it made tangible property available to Allen and Hayes. But providing someone with property that is not inherently unsafe is not a "use" under the TTCA. The Plaintiffs do not claim that the property Allen and Hayes used was inherently unsafe, so TDCJ's immunity is not waived for making the property available to them. *San Antonio State Hosp. v. Cowan*, 128 S.W.3d 244, 246 (Tex. 2004) ("If all 'use' meant were 'to make available,' the statutory restriction would have very little force.").

Finally, the Plaintiffs claim that TDCJ permitted surveillance cameras to be improperly located. "Use" under the TTCA means "to put or bring into action or service; to employ for or apply to a given purpose." *Id.* Even assuming the truth of the allegations that TDCJ determined improper locations for placement of the cameras, its decisions do not equate to "using" the cameras, that is, putting or bringing them into service or employing or applying them to a given purpose. Using the cameras for surveillance is different from deciding where to place them so they might later be used.

Although the allegations in the Plaintiffs' pleadings do not demonstrate the court's jurisdiction, neither do they affirmatively negate it. The situation is a matter of pleading sufficiency, and in such situations, plaintiffs should generally be given an opportunity to amend the pleadings. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226-27 (Tex. 2004). However, if a governmental entity has asserted in the trial court that it is immune and a plaintiff fails to allege or show facts demonstrating a waiver of immunity after having a reasonable opportunity to conduct discovery directed to the issue and amend the pleadings, then the case should be dismissed. *Rusk State Hosp. v. Black*, ___ S.W.3d ___, ___ (Tex. 2012); *Harris Cnty. v. Sykes*, 136 S.W.3d 635, 639 (Tex. 2004). In this case the Plaintiffs amended their petition three times over a period of nine years after TDCJ filed its first plea to the jurisdiction. Prior to the Plaintiffs' last amendment the court of appeals had noted "it is unclear from the pleadings how the surveillance cameras and rooms in the SATF facility may have been used, as opposed to not used, and thereby caused an injury." *Campos II*, 2009 WL 3385248, at *5. The plaintiffs have had a reasonable opportunity to engage in discovery on the immunity question and amend their pleadings, but nevertheless have not alleged or shown

facts demonstrating their injuries were caused by TDCJ's use of tangible property. Accordingly, they have failed to demonstrate a waiver of TDCJ's immunity.

We grant TDCJ's petition for review. Without hearing oral argument, *see* TEX. R. APP. P. 59.1, we reverse the judgment of the court of appeals and dismiss the Plaintiffs' claims against TDCJ.

OPINION DELIVERED: October 26, 2012

IN THE SUPREME COURT OF TEXAS

NO. 11-0729

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, PETITIONER,

v.

CITY OF WACO, RESPONDENT

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

Argued February 28, 2013

JUSTICE DEVINE delivered the opinion of the Court.

Dairies that feed large numbers of cattle for extended periods in confined areas are termed "concentrated animal feeding operations" (CAFOs). Because these operations often impact their environment, they generally must obtain water-quality permits from the Texas Commission on Environmental Quality (the "TCEQ" or "Commission"). These permits are designed to control the waste produced at such facilities and through regulation prevent it from polluting nearby water sources.

When a CAFO applies for a permit, interested parties may object to the proposed permit during a comment period. These parties may also seek to intervene and request a public hearing on the proposed permit. But before granting a contested case hearing—a trial-like proceeding with

attendant expense and delay—a threshold determination must be made as to whether the party is an "affected person" with standing to request such a hearing.

In this appeal, the TCEQ granted an amendment to a dairy CAFO's water-quality permit over objections from a downstream city, which claimed that the dairy's operations under the amended permit would adversely affect the quality of the municipal water supply. The city sought to intervene in the permit process and obtain a contested case hearing. After a period for public comment and meeting, the Commission granted the amended permit without a contested case hearing, and the city sought judicial review, complaining that it was entitled to a contested case hearing because it was an "affected person." By rule, an affected person may request a contested case hearing, "when authorized by law." 30 Tex. Admin. Code § 55.201(b)(4).

The court of appeals agreed that the city was an affected person and held that the Commission abused its discretion in denying the city's request for a contested case hearing. 346 S.W.3d 781, 827 (Tex. App.–Austin 2011). The court accordingly reversed the district court's judgment, which had affirmed the Commission's decision, and remanded the matter to the TCEQ. Because we do not agree that the Commission abused its discretion in denying the hearing request, we reverse and render judgment for the Commission.

I

Waste water discharges are generally regulated and permitted through the federal Clean Water Act and the delegation of the federal National Pollutant Discharge Elimination System

("NPDES") Program to the State of Texas.[1] The Clean Water Act requires states to prepare reports every two years on the quality of water in the state and to make recommendations for reducing pollution. 33 U.S.C. § 1315. The federal act further requires states to update water-quality standards every three years. The standards are then used to set effluent limitations in water-quality permits. *Id.* § 1313(c)(1).

In Texas, the TCEQ has the primary authority to establish surface water quality standards, which it implements, in part, in its permitting actions. *See* 33 U.S.C. § 1313(a), (d); TEX. WATER CODE § 26.023; *see also id.* § 5.013(a)(3) (granting the TCEQ general jurisdiction over "the state's water quality program including issuance of permits, enforcement of water quality rules, standards, orders, and permits, and water quality planning"). The agency continually monitors and evaluates the state's water quality as part of its primary responsibility to preserve and conserve the state's natural resources. TEX. WATER CODE § 5.012. Over the past fifteen years, the TCEQ has devoted particular attention to the water quality of the North Bosque River.

The North Bosque River extends from its headwaters in Erath County, through Hamilton and Bosque Counties, and into McLennan County where it joins two other branches of the Bosque to form Lake Waco. Lake Waco serves as the municipal water supply for the City of Waco. The City owns all adjudicated and permitted rights to the water impounded in the lake, which is the sole source of drinking water for approximately 160,000 people.

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[1] At one time, water quality protection was left largely to the states, but with the enactment of the Federal Pollution Control Act Amendments of 1972, commonly known as the Clean Water Act, the federal government took on this responsibility. *See* 33 U.S.C. §§ 1251-1387. The Clean Water Act created a federal permitting system (the NPDES) that requires a permit of any person discharging pollutants into a surface water body.

In recent decades, the dairy industry in the North Bosque watershed has experienced significant growth. This, in turn, has raised concerns over the increasing volumes of animal waste produced by these dairies and the possibilities for such waste to damage the water quality of the North Bosque and, ultimately, Lake Waco.

The drinking water in Waco has historically had taste and odor problems. For many years, the City has attributed these problems to algae blooms in Lake Waco, which the City believes to be exacerbated by the proliferation of animal waste in the North Bosque watershed. As a result, the City and others have sought to impose stricter regulatory limits on dairies in the North Bosque watershed.

The Clean Water Act requires Texas and the other states to identify water bodies that do not meet, or are not expected to meet, water-quality standards. 33 U.S.C. § 1313(d)(1). In 1998, the Commission determined that two segments[2] (Segments 1255 and 1226) of the North Bosque River above Lake Waco were "impaired" under "narrative" water-quality standards "related to nutrients and aquatic plant growth."[3] Segment 1255 extends from the North Bosque's headwaters to a point just downstream from Stephenville, and Segment 1226 extends from that point to where the river flows into Lake Waco. Lake Waco itself, however, was not determined to be an "impaired" water body.

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[2] For purposes of water quality management, the TCEQ segments the state's major surface waters.

[3] The court of appeals defined a "narrative" water-quality standard as "qualitative, somewhat subjective assessments of 'too much,' in contrast to quantitative or numeric measures." 346 S.W.3d at 793.

Once a water body is identified as impaired, the state must determine a "total maximum daily load" or TMDL for the water body. The TMDL serves to budget the maximum amount of a pollutant that a water body can receive and still meet the applicable water-quality standard. *See id.* § 1313(d)(1)(C). Following study and public comment from the City and others, the Commission determined that soluble phosphorus, which it attributed primarily to dairies' waste application fields and municipal water-treatment plants, was the key variable that could be controlled to limit algal plant growth in the North Bosque River. The Commission accordingly approved TMDLs that proposed a fifty-percent reduction in soluble phosphorus loading over time. After further study and comment (including comments from the City), the Commission in 2002 proposed an implementation plan through which dairies and cities could reduce phosphorus loadings. In 2004, the Commission amended its rules, making parts of the plan legally enforceable. *See* 30 Tex. Admin. Code §§ 321.31-321.47.

Meanwhile, in 2001, the Legislature, at the City's urging, imposed new environmental restrictions on dairy CAFOs located in a "major sole source impairment zone" (MSSIZ). *See generally* TEX. WATER CODE §§ 26.501-.504. At the time of enactment, the North Bosque watershed was the only area to which the MSSIZ legislation applied. *See id.* § 26.502 (defining major sole source impairment zone). The legislation required that new or expanded CAFOs located within a MSSIZ obtain an individual water-quality permit—a permit tailored to the dairy's particular circumstances. *See id.* § 26.503(a). Before this legislation, CAFOs in the North Bosque watershed could operate under general permits, a permit type exempted from the contested-case-hearing process. *See* 30 Tex. Admin. Code § 55.201(i)(7). The MSSIZ legislation thus effectively removed

that exemption for CAFOs covered by the statute, opening their permit proceedings to the potential for contested-case hearings.

The Commission thereafter amended its rules to incorporate the legislative changes for CAFOs in the North Bosque River impairment zone. *See* 30 TEX. ADMIN. CODE §§ 321.32-.35, .39, .48, .49. The amended rules required dairy CAFOs in the watershed to obtain individual permits when their current permits expired. *Id.* The amended rules also imposed stricter requirements on the management and disposal of wastewater and manure by the CAFOs.

About this same time, the Environmental Protection Agency adopted new rules and guidelines governing CAFOs. 40 C.F.R. § § 122, 123, 412. The federal changes expanded the federal definition of CAFOs and imposed stricter nutrient-management and record-keeping requirements on the facilities. *See id.* In response, the Commission again rewrote its rules in 2004 to mirror the federal changes, imposing more stringent controls on CAFOs, especially those in the North Bosque watershed. *See* 30 Tex. Admin. Code §§ 321.31-.47. The rules provided, however, that CAFOs needing individual permits could continue to operate under their old authorizations so long as the operator applied for an individual permit by July 27, 2004. 30 Tex. Admin. Code § 321.33(g). In March 2004, the operators of the O-Kee Dairy applied to amend their water-quality permit.

The O-Kee Dairy is in Hamilton County about 80 miles upstream from Lake Waco. It is situated a few miles from the North Bosque River but within its watershed. Under the new regulations, O-Kee needed to convert from a general to an individual permit. In its application, the

dairy also sought to expand its herd from 690 to 999 cows and its total waste-application acreage from 261 to 285.4 acres.

The Commission's executive director declared the O-Kee Dairy permit application administratively complete, conducted technical review, prepared a draft permit, and issued a preliminary decision that the draft permit met all statutory and regulatory requirements. The draft permit proposed to increase the dairy's maximum herd size and total waste application acreage as requested. The draft also proposed several new measures to strengthen the overall water-quality protections at the facility, even with the increase in the number of cows. These measures included reducing the possibility of discharges from the dairy's retention control structures (RCSs)[4] by, among other things, more than doubling their total storage capacity and improving monitoring of sludge and water levels. There were also new restrictions aimed at reducing the risk of waste runoff from the waste application fields. The dairy was further required to expand the size of non-vegetative buffer zones around the waste application fields and to transport excess waste off-site. The new measures purported to conform to the numerous regulatory changes imposed on Texas dairy CAFOs since the issuance of the dairy's previous water-quality permit.

The executive director's preliminary decision that the draft permit met all statutory and regulatory requirements triggered a period of public notice and comment. See TEX. WATER CODE § 5.553(b), (c). The City submitted public comments and requested a public meeting, which was granted. *See id.* § 5.554. At the conclusion of the public comment period, the executive director

[4] Retention control structures are ponds used to collect runoff of manure and wastewater from areas where cows are confined.

responded to the City's public comments, agreeing to make some changes to permit provisions governing waste application in the dairy's waste application fields or off-site, but otherwise rejecting the City's complaints. *See id.* § 5.555.

The City next filed a written request for a contested case hearing that incorporated its prior comments, replied to the executive director's responses, and identified the legal and factual issues it considered to be in dispute. *See id.* § 5.556; 30 Tex. Admin. Code § 55.201 (Texas Comm'n on Envtl. Quality, Requests for Reconsideration or Contested Case Hearing). In its request, the City asserted it was an "affected person" with a personal justiciable interest in the O-Kee permit application process. The City attached two affidavits to its hearing request–one from a professional engineer, Bruce L. Wiland, whom the City presented as an expert in water-quality analysis, the other from the City's water-utility director, Richard L. Garrett, also an engineer. The City's claim to affected-party status rested on the assertions and opinions of these two experts, which the court of appeals summarized as follows:

> • The City possesses a personal justiciable interest in the quality of the water in Lake Waco because it owns all adjudicated and permitted rights to the water impounded in the lake and uses the water as its sole source of supply for its municipal water utility, exclusive of emergency connections. The City must treat the water to ensure that it is safe for uses that include drinking and bathing and that it will be regarded as palatable by the customers to whom the City sells the water, including 113,000 City residents, approximately 45,000 residents of surrounding municipalities, and major industrial customers "that place a premium on the quality of the water they use." Otherwise, the City is placed at a competitive disadvantage in preserving and growing its water-utility customer base and, ultimately, its broader economic health.
>
> • For many years, the City has received complaints about offensive taste and odor in its drinking water. The source of these problems has proven to be a geosmin (earthy odor) produced by decaying algae that grows in Lake Waco during warm weather. Beginning in the 1980s, Lake Waco began to experience more frequent and longer

durations of algal blooms, with correspondingly more taste and odor problems in the City's drinking water. To counter these problems, the City has incurred escalating costs in attempting to treat the water. Despite these additional expenditures, current treatment methods (chiefly, the use of powdered activated carbon) have repeatedly fallen short of eliminating the geosmin, necessitating that the City deliver offensive smelling and tasting water to customers for the time being and that it plan and budget to install different and more expensive water-treatment systems in the future.

• There is a causal linkage between the increasing algal growths in Lake Waco (and resultant taste and odor problems in the City's drinking water) and phosphorus loading from dairies upstream in the North Bosque watershed. The North Bosque contributes approximately 64 percent of the total flow into Lake Waco and over 72 percent of the total phosphorus loading to the lake. Between 30 to 40 percent of the lake's total phosphorus load is attributable to dairy operations in the North Bosque watershed, most of which stems from runoff and discharges that occur during heavy rainstorms. This phosphorus loading attributable to dairies in the North Bosque watershed, in turn, is the primary cause of the lake's heavy algal growth.

• In addition to contributing nutrients that lead to algal growth and, ultimately, to taste and odor problems in drinking water, CAFOs in the North Bosque watershed are also a source of bacteria and other pathogens entering Lake Waco. In addition to driving up water treatment costs, the presence of these pathogens in the lake endanger the health and enjoyment of the City's many citizens who swim, fish, sail, ski, and engage in other water recreation there.

• If the problems with the proposed O–Kee Dairy permit identified in the City's comments are not remedied to any greater extent than described in the executive director's response, the increases in the dairy's herd size from 690 to 999 will increase the amounts of phosphorus and bacteria transmitted from the dairy, its waste application fields, and third-party fields into the North Bosque and downstream to Lake Waco, where it will contribute to increased algal growth, more bacteria, and the problems that follow. Although Lake Waco is approximately eighty miles downstream from the O–Kee Dairy, the distance does not substantially reduce these adverse effects because the primary mechanism through which these pollutants are transported are heavy rains, which can deliver the pollutants downstream in as little as 3–5 days.

346 S.W.3d at 795-96. Anyone may publicly comment on a pending water-quality permit, but only those commentators who are also "affected persons" may obtain a public hearing. TEX. WATER CODE § 26.028(c); 30 Tex. Admin. Code § 55.201(b).

After analyzing a non-exclusive list of factors prescribed by agency rule for making this determination, the executive director concluded that the City was not entitled to a hearing because it did not meet the requirement of an "affected person" with regard to the O-Kee Dairy permit. *See id.* § 55.203(c). The executive director accordingly recommended that the Commission deny the City's request for a contested case hearing. 30 Tex. Admin. Code § 55.209(d), (e). The City replied, filing a supplemental affidavit from its expert Wiland, who disputed the executive director's analysis and elaborated on his opinion of the causal link between claimed deficiencies in the proposed permit and water-quality problems in Lake Waco. *See id.* § 55.209(g).

After a public meeting at which the Commission considered the City's hearing request and the O-Kee Dairy permit application, *see id.* § 55.209(g), the City's hearing request was denied. *See id.* § 55.211(b). The Commission also adopted the executive director's response to public comment, approved the permit amendment, and issued the permit as the executive director proposed. Although the City was denied a contested case hearing, it was afforded several opportunities to make a record in the agency, including during the public comment period, at two public meetings, in a written request for contested case hearing, and in responses to the executive director's written comments and analysis. There is no indication that the Commission prevented the City from filing any evidence it deemed relevant to the proposed amended permit.

The City sought judicial review of the Commission's order in district court. *See* TEX. WATER CODE §§ 5.351, .354. The district court affirmed the Commission's decision. The City next appealed to the court of appeals, which reversed and remanded the case to the Commission. 346 S.W.3d 781, 827. The court of appeals concluded that the City was an affected person that was entitled to a contested case hearing and that "the Commission acted arbitrarily and abused its discretion in concluding" otherwise. *Id*. The Commission has appealed that decision to this Court.

II

Chapter 26 of the Texas Water Code governs CAFO water-quality permits, authorizing the TCEQ to "issue permits and amendments to permits for the discharge of waste or pollutants into or adjacent to waters in the state." TEX. WATER CODE § 26.027(a). Under this chapter, the Commission is required to give public notice of a permit application and, when requested by a commissioner, the executive director, or "any affected person," hold a "public hearing" on the application. *Id.* § 26.028(a),(c), (h). Exempt from the "public hearing" requirement, however, are applications to amend or renew a water-quality permit that do not seek either to "increase significantly the quantity of waste authorized to be discharged" or "change materially the pattern or place of discharge," if "the activities to be authorized . . . will maintain or improve the quality of waste authorized to be discharged," and meet certain other requirements. *Id.* § 26.028(d).

The term "public hearing" is not defined in chapter 26, *see id.* § 26.001 (Definitions), but in context can refer either to a hearing before the Commission or a contested case hearing before the State Office of Administrative Hearings. *See id.* § 26.020 (authorizing the Commission to hold hearings "with respect to administering the provisions of this chapter"); *id.* § 26.01 (authorizing the

Commission to delegate any hearing to the State Office of Administrative Hearings). Public hearings under chapter 26 can be expansive, such as a public hearing on water quality standards at which "any person may appear and present evidence" or limited, such as a public hearing on a particular application for a water quality permit. *Compare id.* § 26.024 (pertaining to public hearings on standards) *with id.* § 26.028(c) (pertaining to public hearings on permit applications). In the permit application context, the Code indicates that a public hearing means a contested case hearing under the Texas Administrative Procedure Act. *See* TEX. WATER CODE § 5.551 (referring to "an opportunity for public hearing under Subchapters C-H, Chapter 2001, Government Code, regarding commission actions relating to a permit issued under Chapter 26 [of the Water Code]"). Chapter 5, subchapter M, of the Water Code makes that connection while laying out the procedure for notice and opportunities for public comment, public meetings, and contested case hearings in the environmental permitting process. *See id.* at §§ 5.551-.559.

As part of that procedure, subchapter M provides that interested parties, who have filed comments during the process, may request a contested case hearing. *Id.* § 5.556(c). The Commission may not grant the request, however, without first determining that the requestor is an "affected person," *id.*, which subchapter M defines as:

> [A] person who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the administrative hearing. An interest common to members of the general public does not qualify as a personal justiciable interest.

TEX. WATER CODE § 5.115(a); *see also* 30 Tex. Admin. Code § 55.103 (Agency rule incorporating same definition of "affected person"). The Commission is further delegated the authority to

promulgate "rules specifying factors which must be considered in determining whether a person is an affected person." TEX. WATER CODE § 5.115(a). Pursuant to that authority, the Commission has drafted the following rule:

> (c) In determining whether a person is an affected person, all factors shall be considered, including, but not limited to, the following:
>
> (1) whether the interest claimed is one protected by the law under which the application will be considered;
>
> (2) distance restrictions or other limitations imposed by law on the affected interest;
>
> (3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
>
> (4) likely impact of the regulated activity on the health and safety of the person, and on the use of property of the person;
>
> (5) likely impact of the regulated activity on use of the impacted natural resource by the person; and
>
> (6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

30 Tex. Admin. Code §55.203(c)(1)-(6).

In addition to being an affected person, the requestor must timely file a written request for a contested case hearing, "identify[ing] the person's personal justiciable interest affected by the [permit] application" and "list[ing] all relevant and material disputed issues of fact that were raised during the public comment period and that are the basis of the hearing request." 30 Tex. Admin. Code § 55.201 (a), (c), (d)(2), (4); *see also* TEX. WATER CODE § 5.556(d).

After a request is filed, the executive director, the public interest counsel, or the applicant for the permit can file a response to the request. 30 Tex. Admin. Code § 55.209(d). The response must

address whether the requestor is an affected person and which issues raised in the request are disputed. The Commission then "evaluates" the request and must grant it if it is made by an "affected person" and is (1) timely filed, (2) "is pursuant to a right to hearing authorized by law," (3) complies with the form and content requirements of rule section 55.201, and (4) "raises disputed issues of fact that were raised during the [public] comment period, that were not withdrawn . . . and that are relevant and material to the commission's decision on the application." *See* 30 Tex. Admin. Code §§ 55.211(b)(3), (c).[5] The Commission's evaluation of the request is thus a threshold determination of whether the party is an "affected person" but by rule that determination "is not itself a contested case subject to the APA." *See id.* § 55.211(a).

As a matter of statutory interpretation, the court of appeals concluded that section 5.115's affected-person definition embodied the constitutional principles of standing. *See* 346 S.W.3d at 801 (observing that the "cornerstone" of the definition "denotes the constitutionally minimal requirements for litigants to have standing to challenge governmental actions in court"). The court explained that those principles required the City to establish a concrete and particularized injury in fact, not common to the general public, that is: (1) actual or imminent; (2) fairly traceable to the issuance of the permit as proposed; and (3) likely to be redressed by a favorable decision on its complaint. *Id.* at 801, 810-11.

[5] The Commission may also: (1) find the request deficient and proceed to act on the permit application without a hearing; (2) refer the request itself to State Office of Administrative Hearings for a contested case hearing on the sole question of whether the requestor is an "affected person"; or (3) grant a hearing request in the "public interest." 30 Tex. Admin. Code § 55.211(b)–(d).

The court concluded that the City possessed a legally protected interest in Lake Waco's water quality, distinct from that of the general public, but that the City's personal justiciable interest in the O-Kee Dairy permit application—its status as an affected party—depended on the resolution of disputed fact issues. *Id.* at 811. The court further acknowledged that the Commission had weighed the evidence and found these disputed facts against the City, reasoning that the City had failed to establish "the requisite 'concrete and particularized,' imminent injury 'fairly traceable' to the issuance of the O-Kee Dairy permit and likely redressed by denying the permit or imposing additional conditions." *Id.* The court summarized the Commission's factual determinations, bearing on the City's status as an affected party, in its opinion, writing:

> · the amended O-Kee Dairy permit would not increase but reduce the risk and amount of phosphorus or pathogens being contributed by the dairy to the North Bosque River;
>
> · any phosphorus or pollutants the dairy did contribute would be "assimilated" or "diluted" as they washed downstream so as to have no ultimate impact on Lake Waco;
>
> · assuming any phosphorus from the dairy actually reached Lake Waco, whether it would contribute to algal growth would be, at best, speculative because (a) myriad other sources also contribute phosphorus to Lake Waco (e.g., other dairies, municipal water treatment plants), (b) other nutrients also contribute to algal growth (e.g., nitrogen from row-crop farms along the other rivers that flow into Lake Waco), and (c) many factors other than nutrients, such as sunlight and climate, influence algal growth;
>
> · in any event, there is no connection between algal growth and episodes of taste and odor problems in Lake Waco drinking water, which predate the growth of the dairy industry in the North Bosque watershed; and
>
> · bacteria is not an issue in Lake Waco, which meets regulatory standards for contact recreation, and is not among the water bodies deemed "impaired" by bacteria. Nor

> has North Bosque segment 1226–the segment immediately north of Lake Waco that includes the O-Kee Dairy–been deemed impaired by bacteria since 2002.

Id. at 811. Although not determined in a contested case hearing, the court found no reason to foreclose the Commission's discretion to consider evidence when determining "whether a 'request was filed by an affected person as defined by Section 5.115.'" *Id*. at 813 (quoting TEX. WATER CODE § 5.556(c)).

The court, however, rejected the Commission's thesis that the City could not show any concrete or imminent adverse effect or injury if the amended permit were approved simply because the amended permit was designed to be more protective of the North Bosque's water quality than the current one. The court reasoned that the relative protectiveness of the amended permit was, standing alone, irrelevant because it was an "acknowledged certainty" that there would be some discharge or runoff into the North Bosque under the amended permit. *Id*. at 822. And, if that discharge were to "harm Lake Waco's water quality and the City's legally protected interest in it, the City would have a personal justiciable interest in ensuring that the permitted activities comply with current legal requirements." *Id.* The court then concluded that "to the extent that the Commission denied the City's hearing request based on the premise that the amended O-Kee Dairy permit would be 'more protective' of the environment than the current one, it acted arbitrarily by relying on a factor that is irrelevant to the City's standing to obtain a hearing." *Id.* at 822-23.[6] Finally, the court

[6] Alternatively, assuming that the more protective features of the amended permit might be considered relevant to the City's standing, the court concluded that the Commission nevertheless abused its discretion in not referring the issue for a contested case hearing because of the overlap of disputed fact issues on standing and the merits of the permit application. 346 S.W.3d at 823. Concluding that the water code and Commission rules create an entitlement to a contested case hearing that is analogous to a civil claimant's right to have disputed material fact issues determined at trial, the court held that the Commission could not resolve disputed, merit-based issues relevant to standing without a contested

suggested that the Commission had conceded the City's entitlement to a contested case hearing by classifying the O-Kee Dairy permit as a "major amendment," because the City otherwise met the definition of an "affected person." *Id.* at 825.

III

The Commission complains that its classification of the O-Kee permit application as a major amendment was not a concession that the City (or for that matter an affected person) was entitled to a contested case hearing. A major amendment is defined by rule as one that "changes a substantive term . . . or a limiting parameter of a permit." 30 Tex. Admin. Code § 305.62(c)(1). A minor amendment, on the other hand, is one that "improve[s] or maintain[s] the permitted quality or method of disposal of waste" (among other things). *Id.* The Commission submits that the terms are not mutually exclusive. An application to amend a permit may fit both definitions. For example, an amendment that changes a substantive term and improves the quality of the waste discharge, the Commission submits, is both major and minor.

The distinction is significant in the first instance because a contested case hearing is not available for a minor amendment to an existing permit. 30 Tex. Admin. Code § 55.201(i)(1). But there is also no express right to a contested case hearing merely because the applicant seeks a major amendment. *See* 30 Tex. Admin. Code § 55.201(i)(5) (limiting right to contested case hearing where applicant is not applying to increase significantly the quantity of waste discharged or materially change the pattern or place of discharge, among other considerations).

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case hearing. *Id.* at 824-25 (citing *Tex. Dep't of Parks and Wildlife v. Miranda*, 133 S.W.3d 217 (Tex. 2004).

Although the Water Code generally grants a person affected by a permit application a right to a public hearing, the Code also provides exceptions to this general rule. TEX. WATER CODE § 26.028(c), (d). Exempt from this public hearing requirement is an application to amend or renew a water-quality permit that does not seek either to "increase significantly the quantity of waste authorized to be discharged" or "change materially the pattern or place of discharge," if "the activities to be authorized . . . will maintain or improve the quality of waste authorized to be discharged," and meet certain other requirements. *Id.* § 26.028(d); *see also* 30 Tex. Admin. Code § 55.201(i)(5). Relying on this exemption, the Commission argued in the court of appeals that it could "consider a permit's likely effects in determining whether a hearing requestor is an affected person." 346 S.W.3d at 825. As noted, the court of appeals viewed the inquiry as irrelevant to the issue of the party's status as an affected person, and, in any event, conceded by the Commission as not exempt from the hearing requirement because of the "major amendment" label it attached to the application. *Id*. at 822-25. In light of the discretion the statute confers on the Commission in determining the need for a public hearing, however, we cannot agree that a proposed amended permit that purports to provide greater protection for water quality is an irrelevant consideration when evaluating the need for a public hearing.

The Commission asserts that the more protective nature of the amended permit is a relevant factor in its determination of whether the City will be affected by the permit. But whether we accept this as part of the affected person analysis, as the Commission urges, or follow the court of appeals' analysis of "affected person" as merely a codification of the constitutional principal of standing does not ultimately determine the City's right to a hearing in this case. Under either approach, we must

account for the Commission's discretion to limit or deny public hearings on amended permits that maintain or improve the quality of any discharge and that neither increase significantly the quantity of waste authorized to be discharged nor change materially the pattern or place of discharge. TEX. WATER CODE § 26.028(d). Thus, even assuming the City might otherwise qualify as an affected person under the statute's definition, it may still not be entitled to a public hearing if section 26.028(d)'s exception reasonably applies.

The Commission's list of factors to be considered in determining affected person status and the public hearing exemption expressed in section 26.028(d) overlap to some degree. *Compare* 30 Tex. Admin. Code § 55.203(c) *with* TEX. WATER CODE § 26.028. For example, one of the Commission's factors focuses on the "likely impact of the regulated activity on use of the impacted natural resource by the person." 30 Tex. Admin. Code § 55.203(c)(5). During the comment period, the City argued that the increase in the size of the O-Kee herd authorized by the amended permit would naturally lead to more waste and inevitably to more phosphorous and other nutrients and pathogens making their way into the North Bosque and eventually into Lake Waco, which, in turn, would increase the City's water treatment costs. The City supported its argument with expert opinion in affidavit form. One of the City's experts attested to a causal link between the increasing algal growths in Lake Waco and phosphorus loading from dairies upstream in the North Bosque watershed. This expert estimated that the North Bosque contributed about 64 percent of the total flow into Lake Waco. He further attributed about 30 to 40 percent of the lake's total phosphorus load to dairy operations in the North Bosque, stemming from runoff and waste discharges during heavy rainstorms. This source of phosphorus loading was in his opinion the primary cause of the

lake's heavy algal growth and resulting taste and odor problems in the City's drinking water. The executive director, however, did not agree that the proposed amendment to the O-Kee permit would have an adverse affect on Lake Waco or the City.

Relying on the sworn application, attached expert reports, the analysis and opinions of professionals on its staff, and reports, opinions and data about the North Bosque watershed gathered and analyzed by the TCEQ for nearly a decade, the executive director recommended that the Commission issue O-Kee's amended permit without a hearing. With this recommendation, he included a map and fact sheet, the draft permit, his response to public comments, and the dairy's compliance history. The fact sheet discussed the water-quality inventory for Segments 1226 and 1255, the TMDLs, the TDML implementation plan, the "White Paper" (which was also submitted by the City), and interoffice memos of the professional staff documenting their analysis of the application.

The Commission points out that a permit application to the TCEQ amounts to an affidavit with expert reports attached. The applicant must verify that the information submitted is true, accurate, and complete. 30 Tex. Admin. Code §§ 305.44(b), 321.34(b). Maps and technical reports must be prepared by a licensed professional engineer, a licensed professional geoscientist, or other qualified person. 30 Tex. Admin. Code § § 305.45(a)(6), (8), 321.34(f). The applications are then reviewed by the executive director's professional staff.

The Commission submits that the O-Kee permit was drafted by an engineer on the executive director's staff and reviewed by several other professionals. A geoscientist on the executive director's Water Quality Assessment Team evaluated the proposed permit, as did a soil

conservationist and an engineer at the National Resource Conservation Service and the Texas Soil & Water Conservation Board. The draft permit incorporated their comments. The Land Application Team concluded that the permit application proposed adequate buffer zones, and the Water Quality Assessment Team determined that the permit terms "are expected to preclude a permitted increase in pollutant loadings from [the dairy]."

The Commission had before it evidence that the proposed permit's modifications to the dairy's management of its wastewater and manure would reduce the pollutants from the dairy that were likely to be discharged into the watershed. There was also evidence that the more stringent waste application requirements imposed by the proposed permit would reduce the amount of phosphorus runoff from waste application fields. Indeed, the proposed permit implemented the new regulations promulgated by the Commission to comply with Environmental Protection Agency rules and guidelines governing CAFOs. *See* 40 C.F.R. § § 122, 123, 412. These new requirements were categorized by their intended goals: reduce the potential for discharges, minimize the nutrient loading to land and surface water, and increase Commission oversight of the dairy's operational activities.

The proposed permit thus requires the dairy to bring its operations into compliance with the new rules regulating CAFOs. This includes increasing its wastewater and manure retention control structure capacity by approximately 13 acre feet. The increased storage capacity is designed to reduce the number of discharges from the dairy during heavy rainfall events, and reflects that, under the new rules, CAFOs may only discharge during a 25 year/10 day rainfall event as opposed to a 25 year/24 hour rainfall event. The existing retention structures were designed to capture and retain

runoff from a 7.3 inch rainfall; the new structures must capture and retain runoff from a 12.2 inch rainfall. The dairy is also required to implement a retained control structure management plan to assure that it maintains wastewater volumes within the designed operating capacity of the structures, except during chronic or catastrophic rainfall events, and maintain sludge at or below the design sludge volume. These management tools reduce the likelihood of discharge during smaller rainfall events and reduce overflows associated with insufficient wastewater storage capacity.

The proposed permit also requires changes in the land application of manure and wastewater from the dairy, imposing a nutrient management plan designed to minimize nutrient loading to land and surface water through measurement of soil and waste phosphorus levels. This measurement, known as a risk potential assessment,[7] ensures that phosphorus levels remain in a proper balance, which, in turn, reduces runoff risk. Further, in order to minimize nutrient loading, the land application rate of manure and wastewater must be based on the crop's phosphorus requirements rather than its nitrogen requirements as under the old permit. For a coastal bermuda crop, all other things being equal, the result is a 40% decrease in the application rate. Manure, sludge, or wastewater in excess of that permitted to be applied to the land must be delivered to a composting facility, delivered to a permitted landfill, beneficially used by land application outside the watershed, or provided to operators of third-party fields for beneficial use in a manner consistent with

[7] Risk potential is determined by measuring, among other things, the current phosphorus levels in the soil, the proposed phosphorus application rate, and dairy's proximity to the nearest water body–here the Bosque. Application rates are then adjusted according to the risk potential–i.e. the higher the risk, the lower the application rate. In addition, the application rate is determined by the amount of nutrients needed for optimal crop production and then balances that need between the nutrients in the soil and the nutrient source–manure and wastewater. Once the nutrients are in balance, it is very unlikely that excess nutrients will leave the site and affect water quality.

Commission rules. The regulations on manure disposal contained in the proposed permit limit the unregulated disposal of manure and wastewater in the watershed.

Any waste stored temporarily on-site must be stockpiled in well-drained areas and adequately sloped to ensure proper drainage and prevent ponding of water. To protect against discharge, stockpiles must generally be kept beneath impermeable roofs to ensure that waste does not leave the storage area. Waste may also be composted on-site so long as it is done in accordance with Commission rules. *See* 30 Tex. Admin. Code § 332.

Excess waste that cannot be used on site must be removed. *See* TEX. WATER CODE 26.503(b)(2). Most removal methods require delivery of the waste to locations outside of the North Bosque watershed, but the Code also allows delivery of waste to third-party fields—areas of land in the watershed not owned, operated or otherwise controlled by the permitee. The City objected to this aspect of the permit, but the Commission found it to be in compliance with the rules, which require all transferred waste to be applied to those fields at the proper agronomic rate based on the soil's existing phosphorus content. 30 Tex. Admin. Code §§ 321.36, 321.40. The dairy is further prohibited from delivering manure or wastewater to a third-party field once the soil test phosphorus analysis shows a level equal to or greater than 200 ppm. Moreover, the third-party fields must be identified in the dairy's pollution prevention plan, and quarterly reports with the name, locations, and amounts of manure and wastewater transferred to operators of third party fields must be submitted. To ensure compliance with all the new requirements, the permit implements increased oversight of operational activities by the Commission. These measures require O-Kee to submit reports to the

Commission concerning, among other things, land application records, annual soil samples, and chronic rainfall discharges.

The Commission considered these management tools and found that although there will be more cows at the dairy, the overall impact of the permit's requirements will be to reduce the likelihood that phosphorus from the dairy will enter the watershed. The Commission concluded that the proposed permit would effectively decrease, rather than increase, the amount of phosphorus discharged into the watershed and thus have an overall beneficial environmental impact. It therefore rejected the City's argument that the City would be adversely affected by its granting the permit.

The City questions whether the proposed permit will improve the water quality in the North Bosque and argues that, in any event, it has a justiciable interest in the proposed permit because it authorizes the discharge of waste that ultimately affects its interests in Lake Waco. The City thus focuses on potential harm rather than any relative environmental improvement under the proposed permit. The issue, however, is whether the City has a statutory right to intervene in the permitting process and obtain a contested case hearing under the Administrative Procedure Act.

Although the APA defines "contested case" and sets the procedural framework, it does not independently provide a right to a contested case hearing. *Eldercare Props., Inc. v. Tex. Dep't of Human Servs.*, 63 S.W.3d 551, 557 (Tex. App.–Austin 2001, pet. denied). The agency's enabling act determines whether rights are to be determined after an opportunity for adjudicative hearing, and agency rules may decide whether that opportunity may include a contested case hearing. For example, this court of appeals has previously affirmed the TCEQ's rule that a request for a contested case hearing is not itself a contested case hearing, concluding that a hearing request may be decided

through a less formal proceeding before the Commission. *Collins v. Tex. Natural Res. Conservation Comm'n*, 94 S.W.3d 876, 884-85 (Tex. App.–Austin 2002, no pet.).

Collins involved a poultry farm that applied for an individual water quality permit to change from a dry waste management system to a system that generated wastewater to be stored in lined lagoons and irrigated onto crop land. A neighbor to the poultry operation protested the application and requested a contested case hearing. After briefing and a limited hearing before the State Office of Administrative Hearings to determine the neighbor's proximity, the TCEQ denied the neighbor's hearing request. Construing Water Code § 5.115, as it existed before the statute's amendment in 1999, the court found that the Commission's denial of the hearing request was supported by substantial evidence. *Id*. at 885.

The *Collins* court also rejected the neighbor's claim that he was denied due process. The court reasoned that the issuance of a permit in itself does not deprive a neighboring landowner of any concrete liberty or property interest. *Id.* at 884-85. The court observed that the Commission's rules seek to protect such interests and expressly state that "the issuance of a permit does not authorize any injury to persons or property or an invasion of any other property rights." *Id*. at 884 (quoting 30 Tex. Admin. Code § 305.122(c). The court further concluded that even if a private property interest were at issue, "due process never requires all the trial-like procedures of a statutory contested case hearing." *Id*. at 885. The court of appeals accordingly upheld the Commission's denial of the neighbor's hearing request, concluding that the Commission's process for evaluating hearing requests by persons who claimed to be affected, satisfied procedural due process requirements. *Id*.

Focusing on its "affected party" analysis, the court of appeals concludes that the case here is controlled by other decisions which hold "that it is the existence of some impact from a permitted activity, and not necessarily the extent or amount of impact, that is relevant to standing." 346 S.W.3d at 822 (citing *United Copper Indus., Inc. v. Grissom*, 17 S.W. 3d 797, 802-04 (Tex. App.–Austin 2000, pet. dism'd) and *Heat Energy Advanced Tech., Inc. v. West Dall. Coal. for Envtl. Justice*, 962 S.W.2d 288, 295 (Tex. App–Austin 1998, pet. denied)). *United Copper* and *Heat Energy* likewise focus on the requestor's status as an affected person and do not otherwise consider the person's statutory right to a hearing or statutory exceptions to that right.

In *Heat Energy*, the owner of a hazardous and industrial waste storage and processing facility sought to renew its permit to conduct its business. 962 S.W.2d at 289. A coalition of nearby residents asked the Commission to conduct a contested case hearing on the renewal application. *Id.* The request was filed pursuant to section 361.088 of the Solid Waste Disposal Act, which requires the Commission to "provide an opportunity for a hearing to the applicant and persons affected" before a permit is issued, amended, extended or renewed. TEX. HEALTH & SAFETY CODE § 361.088(c). The requirement for a contested case hearing does not apply, however, when the application is to renew a permit for the storage or processing of hazardous waste that was generated on-site and not mixed with waste generated elsewhere, and the Commission has complied with the notice and comment requirements of the Water Code. *Id*. § 361.088(e); *see also* TEX. WATER CODE §§ 5.552–.555. This hearing-requirement exemption was not at issue in *Heat Energy*. Similarly, no hearing-requirement exemption was discussed, or even asserted, in *United Copper*.

The Commission complains that the court of appeals has misread the statutory exemption and agency rules that define hearing rights under chapter 26 of the Water Code. Agency rules provide that an affected person may request a contested case hearing "when authorized by law." 30 Tex. Admin. Code § 55.201(b)(4). But no right to a contested case hearing exists for "an application, under Texas Water Code, Chapter 26, to renew or amend a permit" under certain circumstances. *Id.* § 55.201(i)(5). Thus, a person affected by a proposed water-quality permit has the right to request a hearing (if the person meets the statutory definition of "affected person" in section 5.115 of the Water Code), but the Commission has discretion to deny the request when the proposed permit is an amendment or renewal and (1) the applicant is not applying to significantly increase the discharge of waste or materially change the pattern or place of discharge, (2) the authorization under the permit will maintain or improve the quality of the discharge, (3) when required, the Commission has given notice, the opportunity for a public meeting, and considered and responded to all timely public comments, and (4) applicant's compliance history raises no additional concerns. TEX. WATER CODE § 26.028(d); Tex. Admin. Code § 55.201(i)(5). And again, the court of appeals has held that that determination is not itself a contested case hearing but may be made through a less formal proceeding before the Commission. *Collins,* 94 S.W.3d at 884-85. The statute similarly supports a less formal determination when section 26.028(d) applies, stating that the Commission may under these circumstances approve an application to renew or amend a permit "at a regular meeting without the necessity of holding a public hearing." TEX. WATER CODE § 26.028(d).

We conclude that there is evidence in the record to support the Commission's determination that the proposed amended permit here did not seek to significantly increase or materially change

the authorized discharge of waste or otherwise foreclose Commission discretion to consider the amended application at a regular meeting rather than after a contested case hearing. The Commission therefore did not abuse its discretion in denying the City's request for a contested case hearing on O-Kee's application for an amended permit.

The court of appeals' judgment remanding the matter to the Commission for a contested case hearing is accordingly reversed and judgment is rendered affirming the Commission's decision to deny the hearing request.

_____
John P. Devine
Justice

Opinion Delivered: August 23, 2013

IN THE SUPREME COURT OF TEXAS

NO. 11-0767

MICHAEL ROBERT TEDDER, PETITIONER,

v.

GARDNER ALDRICH, LLP, RESPONDENT

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

Argued November 7, 2012

JUSTICE HECHT delivered the opinion of the Court.

JUSTICE LEHRMANN did not participate in the decision.

The principal question in this case is whether legal services provided to one spouse in a divorce proceeding are necessaries for which the other spouse is statutorily liable to pay the attorney. We answer no and therefore reverse the court of appeals' judgment[1] and affirm the trial court's judgment.

Michael Tedder sued his wife, Stacy Tedder, for divorce and custody of their two children. After nearly two years of contentious litigation, a jury found that the couple should be joint

[1] S.W.3d (Tex. App.–Fort Worth 2011) (mem. op.).

managing conservators of their children, and the parties then settled all the other issues between them.

Stacy hired Gardner Aldrich, LLP to represent her in the proceedings. Her contract with the firm provided that it would "seek to have the court order your husband to pay for all legal fees incurred by you, but . . . this is a matter in the Court's discretion and . . . you remain directly liable to the firm for payment for legal services rendered." After the jury verdict, Gardner Aldrich withdrew as Stacy's counsel and then intervened in the case, suing both Stacy and Michael for its fees.[2] The firm had already been paid $50,000 from the community estate and claimed an additional $151,747.28. Gardner Aldrich couched its claim in part as a sworn account.[3] Michael and Stacy denied the firm's claim, but not under oath.

After a hearing, the trial court indicated that it would allow Gardner Aldrich to recover only against Stacy and would order Michael to pay Stacy $190,000 for her attorney fees. It was then that Michael and Stacy settled, agreeing, among other things, that the final decree would award Gardner Aldrich attorney fees against Stacy only and would not award Stacy attorney fees against Michael.

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[2] The intervention was improper. A person may intervene in an action if (1) he could have brought the action himself, or it could have been brought against him; (2) "the intervention will not complicate the case by an excessive multiplication of the issues"; and (3) "intervention is almost essential to effectively protect the intervenor's interest." *Guar. Fed. Sav. Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652, 657 (Tex. 1990). Gardner Aldrich certainly did not meet the first requirement. It probably did not meet the second, since the interjection of its claim added issues to the divorce proceeding and delayed its final resolution. And it did not meet the third, inasmuch as it could have sued Michael and Stacy in a separate action. But Rule 60 of the Texas Rules of Civil Procedure provides that "[a]ny party may intervene by filing a pleading, subject to being stricken out by the court for sufficient cause on the motion of any party", and neither Michael nor Stacy moved to strike the intervention.

[3] *See* TEX. R. CIV. P. 185.

The trial court rendered judgment in accordance with their agreement. Not long afterward, Stacy sought the protection of the bankruptcy court and was eventually discharged.

Gardner Aldrich appealed. As a procedural matter, the court of appeals held that Michael's failure to deny Gardner Aldrich's claim under oath did not entitle the firm to judgment.[4] On the substance of the firm's claim, the court held that Michael was liable for Stacy's legal fees for two reasons: the obligation was a "community debt" for which both spouses were jointly and severally liable,[5] and the legal fees were "necessaries" for which Michael was liable to the firm under Section 2.501 of the Texas Family Code.[6] Accordingly, the court rendered judgment for Gardner Aldrich against Michael and Stacy jointly and severally.[7]

We granted Michael's petition for review.[8]

Gardner Aldrich argues, as it did in the court of appeals, that Michael is precluded from defending against its claim because it is supported by affidavit and not denied under oath. The firm bases its argument on Rule 185 of the Texas Rules of Civil Procedure, which provides in pertinent part:

> When any action . . . is founded upon a[] . . . claim . . . for personal service rendered, . . . and is supported by the affidavit of the party, . . . the same shall be taken as prima facie evidence thereof, unless the party resisting such claim shall file a written denial,

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[4] ___ S.W.3d at ___.

[5] *Id.* at ___.

[6] *Id.* at ___.

[7] *Id.* at ___.

[8] 55 Tex. Sup. Ct. J. 664 (May 11, 2012).

> under oath. A party resisting such a sworn claim . . . [who] does not timely file a written denial, under oath, . . . shall not be permitted to deny the claim . . .

But Rule 185 contemplates that the defendant has personal knowledge of the basis of the claim, as our 1883 decision in *McCamant v. Batsell*[9] makes clear.

In that case, Batsell sued McCamant for reimbursement of amounts he had paid others acting as McCamant's surety.[10] Though Rule 185 had not been adopted, the same procedure was prescribed by statute.[11] We held that because a suretyship could exist only by contract, Batsell's action was for breach of contract, not on a sworn account.[12] And as for whether McCamant was required to file a sworn denial disputing Batsell's payments to McCamant's creditors, we said:

> The law does not permit, much less encourage, guesswork in swearing; and to require a defendant to swear that a transaction between a plaintiff and a third person, of which he may have no personal knowledge whatever, either did or did not occur in whole or in part, before he will be permitted to controvert the *ex parte* affidavit of his adversary, would be to encourage swearing without knowledge, which is morally perjury, or in some cases to forego a just defense, which might be clearly established under the well settled rules of evidence.[13]

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[9] 59 Tex. 363 (1883).

[10] *Id.* at 366.

[11] Tex. Rev. Civ. Stat. art. 2266 (1879) ("When any action . . . is founded upon an open account, supported by . . . affidavit . . . , the same shall be taken as *prima facie* evidence thereof, unless the defendant shall . . . file a written denial under oath . . . . Where he fails to file such affidavit he shall not be permitted to deny the account . . . ."), recodifying Act approved April 2, 1874, 14th Leg., R.S., ch. 53, § 1, 1874 Tex. Gen. Laws 52, *reprinted in* 8 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897, at 52 (Austin, Gammel Book Co. 1898).

[12] *Id.*

[13] *Id.* at 371.

Gardner Aldrich dismisses this statement as dicta and seeks support from *Rizk v. Financial Guardian Insurance Agency*.[14] There, a defendant filed a sworn denial of the verified claim, asserting among other things that he had neither requested nor agreed to pay for the items made the basis of the claim.[15] The issue was not whether a sworn denial was necessary but whether it was too general or inconsistent with other asserted defenses.[16] We held it was not.[17]

Our statement in *McCamant* was sound. When it appears from the plaintiff's account itself that the defendant was a stranger to the account, the defendant need not file a sworn denial to contest liability.[18] Michael had no agreement with Gardner Aldrich, never promised to pay for its representation of Stacy, and because of the attorney-client privilege, had no way of knowing what charges had been made or what had been paid (other than the $50,000 paid from the community estate). Rule 185 does not require a party to swear to what he does not and cannot know. We thus agree with the court of appeals that Michael was not required to deny Gardner Aldrich's claim under oath in order to contest his liability for its fees.

The court of appeals held that Michael is liable to Gardner Aldrich for Stacy's attorney fees because they were a "community debt", a concept often misused to impose liability on a spouse who

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[14] 584 S.W.2d 860 (Tex. 1979).

[15] *Id.* at 862.

[16] *Id.* at 861.

[17] *Id.* at 863.

[18] *Sundance Oil Co. v. Aztec Pipe & Supply Co.*, 576 S.W.2d 780, 781 (Tex. 1978) (per curiam) ("There being a fact question as to whether the defendant was a party to the transaction . . . the sworn account is not considered as prima facie proof of the debt. Therefore, a sworn denial is not required in order for the respondent to controvert or disprove the account.").

did not incur the debt. Confusion over the significance of "community debt" has been ascribed to our opinion in *Cockerham v. Cockerham*, where we said that "debts contracted during marriage are presumed to be on the credit of the community and thus are joint community obligations, unless it is shown the creditor agreed to look solely to the separate estate of the contracting spouse for satisfaction."[19] We immediately added: "[T]he fact that the debts are community liabilities would not, without more, necessarily lead to the conclusion they were joint liabilities. Characterization of the debts as community liabilities is only one aspect of the circumstances to be considered in determining whether the debts are joint."[20] But the first statement, and the entire analysis, has proved misleading. As Professor Joseph McKnight explained thirty years ago:

> Much of the judicial discussion of "community debt" is based on the erroneous supposition that all "community debts" are equally shared by the spouses whether they are both makers of the debt or not. That supposition is not warranted by the basic principles of Texas law. Apart from the context of acquiring necessaries, debt incurred by only one spouse does not affect the other spouse at all except that it makes the nonobligated spouse's share of community property liable for payment if the property sought for payment is subject to the sole or joint management of the spouse who incurs the debt.
>
> * * *
>
> It is high time that the community debt argument be put to rest. The phrase "community debt" has long been useful in characterizing borrowed money or property that a spouse buys on credit. If the lender or seller does not specifically look to the borrower's or buyer's separate property for payment, it is clear that a community debt has been incurred, and thus that the money borrowed or property bought is community property. But to take the phrase out of this context, as well as to say that the designation of such a debt as "community" makes both spouses liable for it (when only one of them has contracted it), is clearly contrary to the express

[19] 527 S.W.2d 162, 171 (Tex. 1975).

[20] *Id.*

> terms of section 5.61 [of the Family Code, currently Section 3.202]. Under Texas law as amended and recodified in 1969, a community debt means nothing more than that some community property is liable for its satisfaction.[21]

Professor Featherston has succinctly observed, "[m]arriage itself does not create joint and several liability."[22] These and other commentators agree that one spouse's liability for debts incurred by or for the other is determined by statute.[23] We agree.

Section 3.201(a) states:

> A person is personally liable for the acts of the person's spouse only if:
>
> (1) the spouse acts as an agent for the person; or
>
> (2) the spouse incurs a debt for necessaries as provided by [Section 2.501].[24]

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[21] Joseph W. McKnight, *Family Law: Husband and Wife*, 37 SW. L.J. 65, 76-77 (1983). Gardner Aldrich's argument based on Section 3.202(c) suffers the same flaw as the court of appeals' community debt rationale. Section 3.202(c) provides only that "[t]he community property subject to a spouse's sole or joint management, control, and disposition is subject to the liabilities incurred by the spouse before or during marriage." TEX. FAM. CODE § 3.202(c). The effect of the provision is that Stacy's legal fees might have been paid from community property. It does not impose liability on Michael.

[22] Tom Featherston & Allison Dickson, *Marital Property Liabilities: Dispelling the Myth of Community Debt*, 73 TEX. BAR J. 16, 19 (2010).

[23] *See*, *e.g.*, JOHN J. SAMPSON ET AL., SAMPSON & TINDALL'S TEXAS FAMILY CODE ANNOTATED 35 (21st ed. 2011) ("Section 3.201, regarding personal liability of the spouses, is specifically intended to clarify the misleading and confusing discussion in *Cockerham v. Cockerham*."); James W. Paulsen, *Acquiring Separate Property on Credit: A Review and Proposed Revision of Texas Marital Property Doctrine*, 37 ST. MARY'S L.J. 675, 715 n.191 (2006) ("[Section 3.201] is widely regarded as a legislative reaction to, and repudiation of *Cockerham*'s reasoning.") (citing, *inter alia*, an earlier edition of SAMPSON & TINDALL); Thomas Featherston, Jr. & Lynda S. Still, *Marital Liability in Texas . . . Till Death, Divorce, or Bankruptcy Do They Part*, 44 BAYLOR L. REV. 1, 16 (1992) ("Recent legislation should be interpreted as putting an end to the *Cockerham* test. [Section 3.201's predecessor] provides that one spouse will not be personally liable for the acts of the other spouse by reason of the marital relationship. Instead a spouse is liable only if the other spouse acts at the agent of the otherwise innocent spouse or if the other spouse incurs a debt for 'necessaries.' This 'anti-*Cockerham*' statement appears to clarify the previously murky waters regarding the personal liability of one spouse for debts of the other."); McKnight, 37 SW. LJ. at 77.

[24] TEX. FAM. CODE § 3.201(a).

Section 2.501 states:

> (a) Each spouse has the duty to support the other spouse.
>
> (b) A spouse who fails to discharge the duty of support is liable to any person who provides necessaries to the spouse to whom support is owed.[25]

Thus, one spouse is not liable for the other's debt unless the other incurred it as the one's agent or the one failed to support the other and the debt is for necessaries. Applied to this case, Michael is not liable to pay Gardner Aldrich for legal services it rendered to Stacy unless those services were necessaries.[26]

We have suggested that a spouse's necessaries are things like food, clothing, and habitation[27] — that is, sustenance — and we have squarely rejected the view that a spouse's legal fees in a divorce proceeding fall into this category. In *Carle v. Carle* we stated:

> [I]t is not a correct approach . . . to classify the wife's attorney's fees as a necessity, and then apply the rule that necessities are primarily the obligations of the community and secondarily of the husband's separate estate. . . . [T]he trial court [has discretion] in determining the proper division of the community estate of the parties. . . . The attorney's fee is but a factor to be considered by the court in making an equitable division of the estate, considering the conditions and needs of the parties and all of the surrounding circumstances.[28]

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[25] *Id.* § 2.501.

[26] Gardner Aldrich argues that Michael failed to support Stacy because he did not provide her funds to pay its fees. We need not consider this argument.

[27] *Francis v. Francis*, 412 S.W.2d 29, 31 (Tex. 1967).

[28] 234 S.W.2d 1002, 1005 (Tex. 1950).

The court of appeals overlooked *Carle*, as have others. To the extent those opinions are inconsistent with today's decision, we disapprove them.[29]

The trial court would have done as *Carle* instructed, requiring Michael to pay Stacy for her attorney fees, but the parties then agreed on a different result. The trial court was correct in rendering the decree on which Michael and Stacy agreed and refusing to order Michael to pay Stacy's attorney fees. Accordingly, we reverse the judgment of the court of appeals and render judgment that Gardner Aldrich take nothing.

Nathan L. Hecht
Justice

Opinion delivered: May 17, 2013.

[29] Section 106.002 of the Family Code authorizes a trial court in a suit affecting the parent-child relationship to "render judgment for reasonable attorney's fees and expenses and order the judgment and postjudgment interest to be paid directly to an attorney", and provides that "[a] judgment for attorney's fees and expenses may be enforced in the attorney's name by any means available for the enforcement of a judgment for debt." Gardner Aldrich does not claim under this provision, and we do not consider its application. Nor do we consider whether legal services can be considered necessaries for a child.

IN THE SUPREME COURT OF TEXAS

NO. 11-0772

JOSEPH E. HANCOCK, PETITIONER,

v.

EASWARAN P. VARIYAM, RESPONDENT

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

Argued December 5, 2012

JUSTICE GUZMAN delivered the opinion of the Court.

In this defamation suit involving two physicians, we clarify a longstanding distinction between defamation and defamation *per se* in the context of statements that relate to one's profession. While a defamatory statement is one that tends to injure a person's reputation, such a statement is defamatory *per se* if it injures a person in her office, profession, or occupation.[1] The common law deems such statements so hurtful that the jury may presume general damages (such as for mental anguish and loss of reputation). Here, in a letter sent to colleagues and others, a physician accused a fellow physician of lacking veracity and speaking in half truths, resulting in an award of $90,000 in actual damages for mental anguish and loss of reputation and $85,000 in exemplary damages. Because the statements did not ascribe the lack of a necessary skill that is peculiar or

[1] RESTATEMENT (SECOND) OF TORTS § 573 (1977).

unique to the profession of being a physician, we hold that they did not defame the physician *per se*. Thus, we cannot presume damages for mental anguish and loss of reputation, and consequently the physician was required to prove actual damages. We further conclude there is no evidence of mental anguish because evidence of some sleeplessness and anxiety—but evidence of no disruption in patient care or interaction with colleagues who read the defamatory letter—does not rise to the level of a substantial disruption in daily routine or a high degree of mental pain and distress. Likewise, there is no evidence of loss of reputation because there is no indication that any recipient of the defamatory letter believed its statements. Lastly, because the physician did not establish actual damages, he cannot recover exemplary damages. We therefore reverse the court of appeals' judgment affirming these damages and render judgment that the plaintiff take nothing.

I. Background

Dr. Easwaran P. Variyam was the Chief of the Gastroenterology Division of the Texas Tech University Health Sciences Center (the Division) in Lubbock, a state chartered medical school. Dr. Joseph E. Hancock served as an associate professor under Variyam. A dispute arose between the doctors in 2006 over the transfer of patients from Hancock's care to Variyam's after Variyam became the on-call doctor for the Division. Variyam sent a letter to Hancock "to express [his] disapproval in the strongest words possible of the lack of professionalism and disregard for patient care that you exhibited this morning." The letter detailed the alleged manner in which Hancock's transfer of patients violated the Division's policy and copied the Chair of the Department of Internal Medicine (the Department). The letter gave Hancock an opportunity to respond before Variyam lodged a formal complaint.

Hancock responded by sending a letter the same day to the Chair of the Department, the Dean of the School of Medicine, a Division colleague, and the entity reviewing the Division's application for accreditation for its gastroenterology fellowship. In the letter, Hancock resigned his faculty position under Variyam, stated that Variyam had a "reputation for lack of veracity" and "deals in half truths, which legally is the same as a lie."[2] The Division's fellowship was not accredited, and in February 2006, the Chair of the Department removed Variyam as Chief of the Division.

Variyam sued Hancock for defamation and sought damages for his removal as Chair, loss of reputation, and mental anguish. Hancock moved for partial summary judgment on Variyam's claim for damages for removal as Chair, which the trial court granted. The trial court subsequently granted a directed verdict that Hancock's letter was defamatory *per se*. The jury rejected Hancock's substantial truth defense and awarded Variyam $30,000 for loss of past reputation, $30,000 for loss of future reputation, $15,000 for past mental anguish, $15,000 for future mental anguish, and $85,000 in exemplary damages (after finding by clear and convincing evidence Hancock made the statements with malice). The trial court entered judgment on the award.

The court of appeals affirmed, reasoning that accusations that someone is a liar are "so obviously hurtful to the person aggrieved that no proof of [their] injurious character is required to make [them] actionable." 345 S.W.3d 157, 164. The court rejected Hancock's argument that the statements were not defamatory *per se* because they were ambiguous and did not injure Variyam in his profession. *Id*. at 165–67. The court also found legally and factually sufficient evidence of

[2] "Veracity" is defined as truthfulness or accuracy. BLACK'S LAW DICTIONARY 1695 (9th ed. 2009).

damages and noted that general damages are difficult to determine and left largely to the fact finder.[3] *Id.* at 169–71. We granted Hancock's petition for review. 55 Tex. Sup. Ct. J. 1169, 1171 (Tex. Aug. 17, 2012).

II. Discussion

Hancock argues the court of appeals erred in affirming the directed verdict because the statements were not defamatory *per se*. Hancock also contends the evidence of damages is legally insufficient. We agree and address each argument in turn.

A. Defamation *Per Se*

Hancock asserts his statements that Variyam had a "reputation for lack of veracity" and "deals in half truths" cannot constitute defamation *per se* because, among other things, they did not injure Variyam in his profession as a physician. Variyam responds that the statements were defamatory *per se* because his profession requires a truthful reputation in regard to patient care, interaction with other physicians, teaching, research, and publishing. We agree with Hancock.

Defamation is generally defined as the invasion of a person's interest in her reputation and good name. W. PAGE KEETON ET AL., PROSSER & KEETON ON TORTS § 111, at 771 (5th ed. 1984 & Supp. 1988); *see also* TEX. CIV. PRAC. & REM. CODE § 73.001. Defamation is delineated into defamation *per se* and *per quod*. Historically, defamation *per se* has involved statements that are

[3] The court of appeals also concluded the trial court did not err in admitting an anonymous letter at trial. 345 S.W.3d at 175. Hancock does not contest that holding here.

so obviously hurtful to a plaintiff's reputation that the jury may presume general damages,[4] including for loss of reputation and mental anguish.[5] A statement that injures a person in her office, profession, or occupation is typically classified as defamatory *per se*.[6] Defamation *per quod* is defamation that is not actionable *per se*. BLACK'S LAW DICTIONARY 480 (9th ed. 2009).

As the United States Supreme Court has explained, the rationale for presuming harm in defamation *per se* cases "has been the experience and judgment of history that 'proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact.'" *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 760 (1985) (quoting W. PROSSER, LAW OF TORTS § 112, at 765 (4th ed. 1971)). The Court has further explained that presuming damages in defamation *per se* cases "furthers the state interest in providing remedies for defamation by ensuring that those remedies are effective." *Id*. at 761.

As we recently observed, the damages a defamation *per se* plaintiff may recover is an issue "courts have not resolved . . . in an entirely consistent manner." *Salinas v. Salinas*, 365 S.W.3d 318,

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[4] General damages are noneconomic in nature, such as for loss of reputation and mental anguish, *see Bentley v. Bunton*, 94 S.W.3d 561, 604 (Tex. 2002), while special damages are economic in nature, such as for lost income, *see* RESTATEMENT (SECOND) OF TORTS § 575 cmt. b (1977) ("Special harm . . . is the loss of something having economic or pecuniary value.").

[5] *See Bentley*, 94 S.W.3d at 604; *Main v. Royall*, 348 S.W.3d 381, 390 (Tex. App.—Dallas 2011, no pet.); *Tex. Disposal Sys. Landfill, Inc. v. Waste Mgmt. Holdings, Inc.*, 219 S.W.3d 563, 580 (Tex. App.—Austin 2007, pet. denied); *Morrill v. Cisek*, 226 S.W.3d 545, 549 (Tex. App.—Houston [1st Dist.] 2006, no pet.); *Rawlins v. McKee*, 327 S.W.2d 633, 635 (Tex. Civ. App.—Texarkana 1959, writ ref'd n.r.e.).

[6] *Tex. Disposal Sys.*, 219 S.W.3d at 581; *Moore v. Waldrop*, 166 S.W.3d 380, 384 (Tex. App.—Waco 2005, no pet.); *see also* RESTATEMENT (SECOND) OF TORTS § 573 (1977) ("One who publishes a slander that ascribes to another conduct, characteristics or a condition that would adversely affect his fitness for the proper conduct of his lawful business, trade or profession . . . is subject to liability without proof of special harm.").

320 n.2 (Tex. 2012). We last discussed defamation *per se* in depth in 1942. *Renfro Drug Co. v. Lawson*, 160 S.W.2d 246 (Tex. 1942). The constitutional landscape as it relates to defamation has changed significantly since our *Renfro* decision. To provide appropriate context for examining the issues presented, we briefly discuss the most significant and relevant developments.

In *Gertz v. Robert Welch, Inc.*, the United States Supreme Court sought to reconcile the competing concerns of free speech and a free press with the legitimate state interest in compensating victims of defamation for the harm inflicted upon them. 418 U.S. 323, 340–42 (1974). The Court held that the state interest in compensating defamation victims "extends no further than compensation for actual injury. . . . [T]he States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." *Id*. at 349. The Court pointedly observed that "the States have no substantial interest in securing for plaintiffs . . . gratuitous awards of money damages far in excess of any actual injury." *Id*. The Court concluded:

> It is therefore appropriate to require that state remedies for defamatory falsehood reach no farther than is necessary to protect the legitimate interest involved. It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury. . . . [A]ll awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury.

Id. at 349–50.

The Court reiterated in *Time, Inc. v. Firestone* that *Gertz* required compensatory awards to be supported by competent evidence concerning the injury. 424 U.S. 448, 459 (1976). But the Court later clarified in *Dun & Bradstreet* that this requirement pertained to public speech and that, in a

defamation suit between private defendants concerning private speech, recovery of presumed and punitive damages does not violate the First Amendment. 472 U.S. at 761. For private speech, the Court explained that the First Amendment still provides protection—just not the stringent protection afforded public speech.[7] *Id*. at 760.

To extrapolate the effect these holdings have on defamation *per se*, we note that there are three types of damages that may be at issue in defamation *per se* proceedings: (1) nominal damages; (2) actual or compensatory damages; and (3) exemplary damages. RESTATEMENT (SECOND) OF TORTS § 907 cmt. a (1977). If a statement is defamatory but not defamatory *per se*, only the latter two categories of damages are potentially recoverable. Nominal damages "are a trivial sum of money awarded to a litigant who has established a cause of action but has not established that he is entitled to compensatory damages." *Id*. § 907. In defamation *per se* cases, nominal damages are awarded when "there is no proof that serious harm has resulted from the defendant's attack upon the plaintiff's character and reputation" or "when they are the only damages claimed, and the action is brought for the purpose of vindicating the plaintiff's character by a verdict of a jury that establishes the falsity of the defamatory matter." *Id*. § 620 cmt. a. We have defined nominal damages as a

[7] After *Gertz* and *Dun & Bradstreet*, there must still be a showing of fault in a defamation *per se* claim between private parties over a matter of private concern. *See* RESTATEMENT (SECOND) OF TORTS § 580B (1977). That appropriate standard of fault in such a case in Texas is negligence if the plaintiff is a private figure, *Foster v. Laredo Newspapers, Inc.*, 541 S.W.2d 809, 820 (Tex. 1976), or actual malice if the plaintiff is a public or limited-purpose public figure, *Turner v. KTRT Television, Inc.*, 38 S.W.3d 103, 119 (Tex. 2000).

"trifling sum," such as $1. *MBM Fin. Corp. v. Woodlands Operating Co.*, 292 S.W.3d 660, 665 (Tex. 2009).[8]

Actual or compensatory damages are intended to compensate a plaintiff for the injury she incurred and include general damages (which are non-economic damages such as for loss of reputation or mental anguish) and special damages (which are economic damages such as for lost income).[9] Historically in Texas, defamation *per se* claims allow the jury to presume the existence of general damages without proof of actual injury. *Bentley v. Bunton*, 94 S.W.3d 561, 604 (Tex. 2002); *see also* RESTATEMENT (SECOND) OF TORTS § 621 cmt. a (1977). But the First Amendment requires competent evidence to support an award of actual or compensatory damages when the speech is public or the level of fault is less than actual malice. *See Firestone*, 424 U.S. at 459; *Gertz*, 418 U.S. at 349–50. Thus, the Constitution only allows juries to presume the existence of general damages in defamation *per se* cases where: (1) the speech is not public, or (2) the plaintiff proves actual malice. *See Dun & Bradstreet*, 472 U.S. at 761; *Gertz*, 418 U.S. at 349–50.

Awards of presumed actual damages are subject to appellate review for evidentiary support. *Bentley*, 94 S.W.3d at 605–06 (plurality); *Saenz v. Fidelity & Guar. Ins. Underwriters*, 925 S.W.2d 607, 614 (Tex. 1996). And the plaintiff must always prove special damages in order to recover them.

The third and final category of damages potentially at issue in defamation *per se* claims is exemplary damages. In Texas, if only nominal damages are awarded, exemplary damages are not

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[8] There is some question as to whether even nominal damages may be presumed after *Gertz*. *See* RESTATEMENT (SECOND) OF TORTS § 620 cmt. c (1977) ("The effect of [*Gertz*] on the granting of an award for nominal damages when there is no proof of some actual injury thus remains in some doubt.").

[9] *See supra* note 4.

recoverable. TEX. CIV. PRAC. & REM. CODE § 41.004(a). But if more than nominal damages are awarded, recovery of exemplary damages are appropriately within the guarantees of the First Amendment if the plaintiff proves by clear and convincing evidence that the defendant published the defamatory statement with actual malice. *Dun & Bradstreet*, 472 U.S. at 761; *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80, 285–86 (1964).

With the appropriate common-law and constitutional framework in mind, we determine whether the statements here were defamatory *per se* and the corresponding effect on damages. As an initial matter, the parties note we have yet to decide whether the determination of a statement as defamatory *per se* is a question for the court or the trier of fact. The court must first determine whether a statement is reasonably capable of a defamatory meaning from the perspective of an ordinary reader in light of the surrounding circumstances. *Musser v. Smith Protective Servs., Inc.*, 723 S.W.2d 653, 655 (Tex. 1987). If the statement is not reasonably capable of a defamatory meaning, the statement is not defamatory as a matter of law and the claim fails. *Id*. Likewise, the determination of whether a statement is defamatory *per se* is first an inquiry for the court. If the court determines that an ordinary reader could only view the statement as defamatory and further concludes that the statement is defamatory *per se*, it should so instruct the jury and have the jury determine damages. If the court determines that a statement is ambiguous or of doubtful import, the jury should determine the statement's meaning. *Id.*

A statement constitutes defamation *per se* if it "injures a person in his office, profession, or occupation." *Tex. Disposal Sys. Landfill, Inc. v. Waste Mgmt. Holdings, Inc.*, 219 S.W.3d 563, 581 (Tex. App.—Austin 2007, pet. denied). Hancock argues, among other things, that his statements that

Variyam lacks veracity and deals in half truths did not uniquely injure Variyam in his profession as a physician and thus were not defamatory *per se*. Variyam responds that the statements were intended to, and did, injure him in his profession because the letter was circulated to other physicians and a failure to be truthful would impact his patient care, teaching, research, and publishing. We agree with Hancock that the statements did not injure Variyam in his profession as a physician and thus were not defamatory *per se*.

The Restatement more fully defines a statement that injures one in her profession as a statement that "ascribes to another conduct, characteristics or a condition that would adversely affect his fitness for the proper conduct of his lawful business, trade or profession, or of his public or private office, whether honorary or for profit . . . ." RESTATEMENT (SECOND) OF TORTS § 573 (1977). Examples provide guidance of what injury to a person in her profession actually means. Comments to the applicable section of the Restatement provide:

> When peculiar skill or ability is necessary, an imputation that attributes a lack of skill or ability tends to harm the other in his business or profession. Statements that a physician is a drunkard or a quack, or that he is incompetent or negligent in the practice of his profession, are actionable. So too, a charge that a physician is dishonest in his fees is actionable, *although an imputation of dishonesty in other respects does not affect his character or reputation as a physician.*
>
> . . . .
>
> Disparagement of a general character, equally discreditable to all persons, is not enough unless the particular quality disparaged is of such a character that it is peculiarly valuable in the plaintiff's business or profession. . . . Thus, a statement that a physician consorts with harlots is not actionable per se, although a charge that he makes improper advances to his patients is actionable; the one statement does not affect his reputation as a physician whereas the other does so affect it.

Id. § 573 cmt. c, e (emphasis added).

The statements that Variyam lacked veracity and dealt in half truths in the context they were made are not defamatory *per se* because they do not injure Variyam in his profession as a physician. Variyam accused Hancock of violating Division policy on transferring patients. In response, Hancock accused Variyam of lacking veracity and dealing in half-truths. Variyam argues, and the court of appeals agreed, that having a reputation for untruthfulness would "affect his relationship with other physicians that might send him business or work." 345 S.W.3d at 165–66. The court of appeals noted that "[l]ike lawyers and bankers, a physician such as Variyam, by definition, depends greatly on his reputation." *Id*. at 166. But the inquiry is not whether a reputation is necessary for a profession. If that were true—because all professions require reputations of some sort—all statements defaming professionals would be defamatory *per se*. Rather, the proper inquiry is whether a defamatory statement accuses a professional of lacking a peculiar or unique skill that is necessary for the proper conduct of the profession. RESTATEMENT (SECOND) OF TORTS § 573 cmt. c, e (1977).

The specific trait of truthfulness is not peculiar or unique to being a physician. As the comments to the Restatement illustrate, "a charge that a physician is dishonest in his fees is actionable, although an imputation of dishonesty in other respects does not affect his character or reputation as a physician." *Id*. § 573 cmt. c. Likewise, "a statement that a physician consorts with harlots is not actionable per se, although a charge that he makes improper advances to his patients is actionable; the one statement does not affect his reputation as a physician whereas the other does

so affect it." *Id.* § 573 cmt. e. Accordingly, the allegations that Variyam lacked veracity and dealt in half truths do not adversely affect his fitness for proper conduct as a physician.[10] *Id.* § 573.

Variyam also asserts that a reputation for untruthfulness hinders his relations with his peers and his ability to research and publish. But few trades, businesses, and professions involve no human interaction. If an accusation of untruthfulness is defamatory *per se* for a physician in her profession, it would likewise be defamatory *per se* for other trades, businesses, and professions that rely on human interaction. In short, Hancock's charges do not adversely affect Variyam's fitness for the proper conduct of being a physician and are not defamatory *per se*. *Id.*; *see also Hirsch v. Cooper*, 737 P.2d 1092, 1094–95 (Ariz. Ct. App. 1986) (holding that statement by one physician that he "wouldn't send my dog or cat" to another physician injured the other physician in his profession), *disapproved on other grounds by Godbehere v. Phoenix Newspapers, Inc.*, 783 P.2d 781 (Ariz. 1989).[11]

[10] The Restatement speaks of physicians generally, but not all physicians possess the same job description. Many physicians engage primarily in patient care, for example, while others predominantly produce publishable medical research. This record indicates that Variyam performed some patient care, administration, and publishable research but does not delineate the extent to which he performed each of these duties. Thus, we need not decide whether "dishonesty allegations" might constitute defamation *per se* if, for example, Variyam focused mostly on producing peer-reviewed academic research.

[11] Hancock also asserts that the statements cannot constitute defamation *per se* because they require the use of extrinsic evidence to determine the falsity of the statements. Additionally, Hancock claims that the letter constitutes non-actionable opinion and the trial court erred in failing to include a proximate cause instruction. Because the statements are not defamatory *per se* and there was no evidence of actual damages, *see infra* Part II.B, we need not reach these remaining issues.

B. Damages

Having concluded that Hancock's statements were not defamatory *per se*, we need not decide whether the statements were defamatory because—even if they were as a matter of law—there is no evidence of actual damages.

The jury awarded $30,000 for past and future mental anguish. Hancock asserts that the evidence of mental anguish damages does not rise to the level of evidence we required in *Parkway Co. v. Woodruff*, 901 S.W.2d 434, 443 (Tex. 1995), and *Service Corp. International v. Guerra*, 348 S.W.3d 221, 231 (Tex. 2011), for a substantial disruption in daily routine. Variyam argues his evidence is similar to the legally sufficient evidence of mental anguish in *Bentley*, 94 S.W.3d at 606–07. We agree with Hancock that Variyam failed to introduce evidence of a substantial disruption in his daily routine or a high degree of mental pain and distress.

There must be both evidence of the existence of compensable mental anguish and evidence to justify the amount awarded. *Bentley*, 94 S.W.3d at 606; *Saenz*, 925 S.W.2d at 614. Mental anguish is only compensable if it causes a "substantial disruption in . . . daily routine" or "a high degree of mental pain and distress." *Parkway*, 901 S.W.2d at 444 (quoted in *Bentley*, 94 S.W.3d at 606). "Even when an occurrence is of the type for which mental anguish damages are recoverable, evidence of the nature, duration, and severity of the mental anguish is required." *Guerra*, 348 S.W.3d at 231.

In *Guerra*, the daughters and widow of a decedent sued a cemetery for moving the decedent's body against their wishes. *Id*. at 226. One daughter claimed that the experience "has been the hardest thing that I have had to go through with my family and myself. I have had lots of nights that

I don't sleep just thinking," that it had been "very difficult," and that she "cannot begin to express the frustration and agony we have all gone through." *Id*. at 232. She nonetheless testified that she had continued to work, participate in volunteer and other activities, and travel. *Id*. Another daughter testified that "it's not part of my life. I didn't have to accept that and I do not accept it and I won't accept it." *Id*. And the third daughter testified that "[w]e're not at peace. We're always wondering. You know, we were always wondering where our father was. It was hard to hear how this company stole our father from his grave and moved him. That was hard." *Id*. (alteration in original). Other witnesses also testified that the experience was devastating for the family. *Id*. But coupled together, we held that the testimony was still not some evidence of a substantial disruption in daily routine or a high degree of mental pain and distress. *Id*. ("[G]eneralized, conclusory descriptions of how an event affected a person are insufficient evidence on which to base mental anguish damages.").

The mother, on the other hand, had such severe stress that she experienced burning in her stomach, for which she sought medical treatment. *Id*. at 233. She also sought treatment for anxiety and depression, and she experienced headaches and sleeplessness. *Id*. We held that this was some evidence of mental anguish. *Id*.

Likewise, in *Bentley*, a judge accused of corruption experienced embarrassment in the community where he spent almost all of his life, was distressed, lost sleep, and—according to his friends' testimony—was depressed, had suffered a major change in demeanor, and would never be the same. 94 S.W.3d at 576, 606–07. Further, his family was disrupted, his children were distressed at school when peers would discuss the issue, and Bentley testified that, everywhere he went, people

would stop and say they heard he had been called corrupt, even though most of these people were well-meaning. *Id*. at 576. We held that this was evidence of mental anguish. *Id*. at 606.

Here, the bulk of Variyam's testimony relating to mental anguish was as follows:

Q: Okay. Has Dr. Hancock's attack on your reputation affected you emotionally?

A: Yes.

Q: Has it been disruptive to you and your family?

A: Yes.

Q: Has it been embarrassing to you?

A: Yes.

Q: Has it been distracting to you at home?

A: Yes.

Q: What about at work?

A: Yes, it has been disruptive.

Q: Do you let it interfere with your patient care at work?

A: I try my best not to. I have had —

Q: You haven't had any specific problems with any patients as a result of this distraction you have had?

A: I have always put on a different hat when you see patients.

Q: Has it been stressful for you since Dr. Hancock sent that letter out at work?

A: Yes.

Variyam also answered that the letter was "still stuck in [his] mind" and that he was embarrassed when seeing the recipients of the letter, though it did not stop him from seeing them. He further responded that he was afraid of the recipients conveying the contents of the letter to others, he was humiliated, and that, "in some ways," he acted differently than in the past because he is "more introspective" and has "emotional difficulties." He also testified about talking to a friend that supported him and that he considered moving from Lubbock, in part because of the letter, but he did not move. Variyam also complained of sleeplessness at first, but reported sleeping better at the time of trial.

Taken together, this testimony, like that of the daughters in *Guerra*, does not reflect a substantial disruption in daily routine or a high degree of mental pain and distress. *See* 348 S.W.3d at 232. Unlike the mother in *Guerra*, Variyam did not require medical attention. *See id*. at 233. And unlike the judge in *Bentley*, Variyam did not elaborate on the impact of anxiety or depression on his life, nor did other witnesses corroborate an outward manifestation of the mental anguish Variyam allegedly experienced. *See* 94 S.W.3d at 606–07. Variyam also continued interacting with the recipients of the letter and he testified that the letter did not affect his care of patients. In all, we do not believe this to be evidence of a substantial disruption in daily routine or a high degree of mental pain and distress. *See Gunn Infiniti, Inc. v. O'Byrne*, 996 S.W.2d 854, 860–61 (Tex. 1999) (no evidence of mental anguish damages where claimant testified he had "a lot of anguish, a lot of grief" and disappointment and humiliation because they did not rise to the level of a high degree of mental pain and distress or indicate a substantial disruption of his daily routine); *Parkway*, 901

S.W.2d at 445 (holding that "anger, frustration, or vexation . . . do not support the conclusion that these emotions rose to a compensable level").

The jury also awarded $60,000 as past and future loss of reputation damages. Because Hancock's statements were not defamatory *per se*, loss of reputation may not be presumed, and there must be competent evidence to support this award of reputation damages. Hancock asserts that Variyam offered no competent evidence of loss of reputation, instead relying on the presumption in defamation *per se* cases that is inapplicable here. Variyam counters there is some evidence of loss of reputation in Variyam's demotion, the Division's denied accreditation, and Hancock's admission that—if his statements were false—it would amount to character assassination. We agree with Hancock that Variyam failed to introduce competent evidence of loss of reputation.

The three pieces of evidence Variyam relies on are not probative of loss of reputation. Variyam first relies on his demotion, alleging the jury could infer from the demotion that his reputation was damaged. But the trial court granted partial summary judgment that the letter did not cause the demotion and instructed the jury to not consider damages caused by the demotion. As Variyam has not challenged those rulings on appeal, we do not consider the demotion as evidence of loss of reputation.[12]

Second, Variyam asserts that the jury could reasonably infer from the denial of accreditation for the Division's gastroenterology fellowship that the letter damaged his reputation with the

[12] Variyam also relies on a statement made by the Chair of his Department—that Variyam would no longer would be Chief of the Division if he felt he could not trust Variyam—as providing a reasonable inference that Hancock's letter adversely affected the amount of trust the Chair placed in Variyam. But this inference necessarily relies on the proposition that Variyam was demoted due to the letter, an issue on which the trial court granted summary judgment in favor of Hancock.

accrediting body. But when Variyam was asked who at the accrediting body would have received the letter, the trial court sustained an objection that the question called for speculation. Further, this inference violates the equal inference rule, which provides that a jury may not reasonably infer an ultimate fact from "meager circumstantial evidence which could give rise to any number of inferences, none more probable than another." *Hammerly Oaks, Inc. v. Edwards*, 958 S.W.2d 387, 392 (Tex. 1997) (quotation marks omitted). Here, there were multiple possible grounds for the accrediting body denying accreditation for the Division fellowship, but Variyam offered no evidence that the inference regarding the letter was more probable than other possible inferences.

Third, Variyam argues Hancock admitted that his statements, if false, would amount to character assassination. But loss of reputation for defamation is concerned with a recipient believing the statement. If every recipient discredits the statement, no loss of reputation has occurred. For example, Variyam testified that he feared colleagues would not send referrals to him because of the letter. If this fear materialized, Variyam would be entitled to special damages upon proof, which would also serve as proof for loss of reputation. But the record does not reflect any evidence that a recipient of the letter believed Hancock's statements. Accordingly, Variyam offered no evidence of loss of reputation.

Variyam also claims that, had the lower courts not found Hancock's statements constituted defamation *per se*, he would have been in the difficult position of having to prove the falsity of the defamatory statement, which tends to rebut damage to reputation. Where the statements are defamatory *per se*, this tension is less present because the jury may presume damages for loss of reputation. For statements not so injurious as to constitute defamation *per se*, the plaintiff may only

recover the damages she proves the statements actually caused (as well as exemplary damages if applicable). The tension Variyam perceives as unfairness we view as necessary to strike the balance this Court and the United States Supreme Court have long wrestled with in reconciling the federal and state constitutional rights of free speech and the Texas constitutional right to recover for reputational torts.[13]

Finally, after finding actual malice by clear and convincing evidence, the jury awarded $85,000 in exemplary damages. Exemplary damages are not available unless a plaintiff establishes actual damages. *Fed. Express Corp. v. Dutschmann*, 846 S.W.2d 282, 284 (Tex. 1993) (per curiam) ("Recovery of punitive damages requires a finding of an independent tort with accompanying actual damages."); TEX. CIV. PRAC. & REM. CODE § 41.004(a). Because no evidence supports the jury's award of actual damages, exemplary damages are not available. *See Dutschmann*, 846 S.W.2d at 284.

III. Conclusion

In sum, Hancock's statements that Variyam lacked veracity and dealt in half-truths were not defamatory *per se* because they did not injure Variyam in his profession as a physician by ascribing that he lacked a necessary skill peculiar or unique to the profession. Specifically, the statements here regarded Variyam's truthfulness, not the lack of a necessary, peculiar skill which would render Variyam unfit for proper conduct as a physician. Accordingly, to recover for defamation, Variyam was required to prove actual damages, which he did not do. There is no evidence of mental anguish

[13] TEX. CONST. art. I, §§ 8 ("Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege."), 13 ("All courts shall be open, and every person for an injury done him, in his lands, goods, person *or reputation*, shall have remedy by due course of law." (emphasis added)).

because evidence that Variyam experienced some sleeplessness and other anxiety does not rise to the level of a substantial disruption in his daily routine or a high degree of mental pain and distress. Likewise, there is no evidence of loss of reputation because the evidence Variyam relies on is based on unpreserved error, violates the equal inference rule, and fails to indicate that any recipient of the letter believed its statements. Finally, because Variyam did not establish actual damages, he cannot recover exemplary damages. Accordingly, we reverse the judgment of the court of appeals and render judgment that Variyam take nothing.

_____

Eva M. Guzman
Justice

OPINION DELIVERED: May 17, 2013

IN THE SUPREME COURT OF TEXAS

NO. 11-0778

THE CITY OF HOUSTON, TEXAS, PETITIONER,

v.

ROGER BATES, MICHAEL L. SPRATT AND DOUGLAS SPRINGER, RESPONDENTS

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

Argued January 9, 2013

JUSTICE GREEN delivered the opinion of the Court, in which CHIEF JUSTICE JEFFERSON, JUSTICE JOHNSON, JUSTICE WILLETT, and JUSTICE DEVINE joined; in which JUSTICE HECHT and JUSTICE LEHRMANN joined as to Parts I and II.A; and in which JUSTICE GUZMAN and JUSTICE BOYD joined as to Parts I and II.B.

JUSTICE HECHT filed an opinion concurring in part and dissenting in part, in which JUSTICE LEHRMANN joined.

JUSTICE GUZMAN filed an opinion concurring in part and dissenting in part, in which JUSTICE BOYD joined.

This appeal involves a pay dispute between the City of Houston and three retired fire fighters previously employed by the Houston Fire Department (HFD). The retired fire fighters sued the City to recover allegedly unauthorized deductions from their termination pay upon retirement. The retired fire fighters asserted two distinct claims. First, two of the retired fire fighters claimed that the City

wrongfully deducted pay for overtime hours that HFD required fire fighters to work after the implementation of a new shift schedule in November 2001. Second, the retired fire fighters alleged that the City improperly calculated each fire fighter's "salary" for purposes of paying termination pay upon their retirement. The trial court found in favor of the retired fire fighters on both claims. The court of appeals affirmed the trial court's judgment, which awarded two of the retired fire fighters reimbursement for overtime pay and all of the retired fire fighters additional termination pay for accrued and unused sick and vacation leave. ___ S.W.3d ___, ___ (Tex. App.—Houston [14th Dist.] 2011, pet. granted) (mem. op.). We reverse the court of appeals' judgment as to the first claim related to the overtime pay, affirm its judgment as to the second claim related to additional termination pay, and render judgment consistent with this opinion.

I. Background

Prior to their retirements, Roger Bates, Michael L. Spratt, and Douglas Springer (collectively, the retired fire fighters) spent their careers as fire fighters with HFD. Spratt and Springer retired in 2004, and Bates retired in 2005. Upon retirement, the City paid the retired fire fighters termination pay pursuant to sections 143.115 and 143.116 of the Texas Local Government Code. *See* TEX. LOC. GOV'T CODE §§ 143.115–.116. The retired fire fighters ultimately sued the City, seeking reimbursement for (1) overtime pay that the City docked from their termination pay (the "debit dock" claim), and (2) additional termination pay based on the City's exclusion of premium pay from the calculation of their salaries for purposes of paying out the termination pay.

A. Debit Dock Claim

In many urban areas, fire fighters are often required to work 24-hour shifts. Due to the demands of the job, the Legislature has enacted various statutes governing fire fighters' pay and hours. For example, section 142.0017 of the Local Government Code requires a City to compensate a fire fighter for overtime pay if the fire fighter works more than an average of 46.7 hours per week calculated over a 72-day work cycle. TEX. LOC. GOV'T CODE § 142.0017(b). Utilizing a 72-day work cycle, HFD scheduled fire fighters to work one of four shift schedules. In any one shift schedule, a fire fighter would work eighteen 24-hour shifts throughout the 72-day work cycle. Because the shift schedules did not reach the 46.7-hour weekly average, HFD required fire fighters to work two additional 24-hour shifts, called "debit days," each work cycle. On a debit day, HFD assigned a fire fighter to work on a different shift schedule and many times at a different fire station. As a result, debit days were unpopular and had a high rate of absenteeism. Nevertheless, debit days remained a part of the regularly scheduled work shift for fire fighters. Fire fighters were required to show up on a debit day and work just like any other day in their shift schedules.

In November 2001, HFD added an extra 24-hour debit day to each 72-day work cycle due to staffing shortages. This extra debit day pushed the fire fighters' weekly average of hours worked to forty-nine—entitling them to 2.3 hours of overtime pay each week (or twenty-four hours over the course of the 72-day work cycle). To encourage attendance on debit days, HFD designated the last eight hours of each debit day as the portion eligible for overtime pay. HFD required a fire fighter to be physically present to get overtime pay for that time period. Under HFD's accounting procedures, if a fire fighter was on authorized leave on a debit day, then HFD paid the fire fighter

for sixteen hours, charged his leave account for those sixteen hours, but did not pay overtime pay for the remaining eight hours and did not charge his leave account for those hours. This schedule consisting of an average of forty-nine hours a week lasted for approximately two years.

When Springer and Spratt retired from HFD, the City deducted previously paid overtime from Springer's and Spratt's termination checks. The City claimed that Springer and Spratt were overpaid for "Debit Day Overtime," which, according to the City, was generated from the City paying overtime for debit days Springer and Spratt did not physically work. The overtime pay that the City deducted from Springer's termination check related to 8-hour shifts on debit days that the City allowed Springer to "ride out" prior to retirement.[1] The overtime pay that the City deducted from Spratt's termination check related to vacation leave he took on a scheduled debit day. Springer and Spratt do not dispute that they did not physically work the debit days for which the City previously paid them for overtime. Instead, they argued in the trial court that they were on authorized leave during those debit days. And, because section 142.0017 requires that time spent on "authorized leave" be included in calculating the number of hours a fire fighter worked during a 72-day work cycle, they claimed that they were entitled to overtime pay regardless of whether they were physically present for the designated overtime period. After a bench trial, the trial court rendered judgment for Springer and Spratt on their debit dock claims and awarded them $610.15 and $152.20, respectively. The court of appeals affirmed. ___ S.W.3d at ___.

[1] The City allowed fire fighters to "ride out" accumulated holiday time prior to retirement, which effectively allowed retiring fire fighters to be paid for all of their accumulated holiday time despite the ordinance which otherwise limited fire fighters to receive pay for a maximum of eleven accumulated holidays upon termination. HOUSTON, TEX., CODE OF ORDINANCES ch. 34, art. I, § 34-59(e)(6).

B. Termination Pay Claim

The Local Government Code and the City's ordinances allow fire fighters to accumulate unused sick and vacation leave. *See, e.g.*, TEX. LOC. GOV'T CODE §§ 143.045–.046; HOUSTON, TEX., CODE OF ORDINANCES ch. 34, art. I, § 34-3. When a fire fighter leaves HFD's employment, sections 143.115 and 143.116 of the Local Government Code entitle a fire fighter to a lump-sum payment for accumulated but unused vacation and sick leave. *See* TEX. LOC. GOV'T CODE §§ 143.115 (vacation leave), .116 (sick leave). In most cases, sections 143.115 and 143.116 require accumulated vacation and sick leave to be valued at the fire fighter's "salary" at the time the fire fighter accumulated the leave. *See id.* §§ 143.115(b), .116(b). This lump-sum payment is often referred to as termination pay.

The City enacted ordinances that excluded certain types of premium pay, including educational incentive pay and assignment pay, from the definition of "salary" for purposes of calculating accumulated benefit leave for termination pay. *See* HOUSTON, TEX., CODE OF ORDINANCES ch. 34, art. I, § 34-3(c); *see also id.* ch. 14, art. III, §§ 14-243, 14-244 (requiring sick leave to be valued at a fire fighter's "daily average rate of base pay plus longevity"). The ordinances create a financial disparity between the amount of pay a fire fighter received when he utilized his sick and vacation leave during his employment and when he received accumulated sick and vacation leave as termination pay. For instance, an HFD fire fighter that used sick or vacation leave to miss a shift received his base pay plus all other forms of premium pay that the fire fighter was entitled to at that time, which could include longevity pay, educational incentive pay, and assignment pay. In other words, if an HFD fire fighter took a day of paid leave, the City paid the fire fighter the same

as if he had physically worked that day. On the other hand, the City paid a fire fighter his base pay and only longevity pay as termination pay for all accumulated sick and vacation leave. Under this "long-term City policy," an HFD fire fighter was financially better off utilizing all of his paid leave during his employment than accumulating it for purposes of termination pay upon retirement.

Upon retirement, the City issued checks to the retired fire fighters for their termination pay, which did not include the premium pay. The retired fire fighters challenged the ordinances on the grounds that they were preempted by the statutory scheme promulgated by the Legislature and codified in the Local Government Code. The trial court found that the retired fire fighters were entitled to the full amount of their salaries for unused and accrued sick and vacation leave, which required inclusion of educational incentive pay and assignment pay. The court of appeals affirmed. ___ S.W.3d at ___.

II. Analysis

The City challenges the court of appeals' judgment on the debit dock claim and the termination pay claim. First, the City argues that Springer and Spratt were not entitled to be reimbursed for overtime pay because section 142.0017(e)(2) of the Local Government Code does not require the City to count hours a fire fighter is on unpaid leave for purposes of computing a fire fighter's eligibility for overtime compensation. Second, the City argues that its ordinances are not preempted by provisions of the Local Government Code governing fire fighters' termination pay because the Local Government Code does not explicitly define the term "salary." We address each issue in turn.

A. Debit Dock Claim

The debit dock claim issue requires us to construe section 142.0017 of the Local Government Code, which governs overtime pay and applies to home-rule municipalities like the City of Houston. *See* TEX. LOC. GOV'T CODE § 142.0017(a). Specifically, our task is to determine whether the Legislature intended the phrase "any other authorized leave" in section 142.0017(e)(2) to encompass only other forms of *paid* leave, which is the City's position.

We review issues of statutory interpretation de novo. *See Loaisiga v. Cerda*, 379 S.W.3d 248, 254–55 (Tex. 2012). Our primary objective when interpreting a statute is to give effect to the Legislature's intent. *Molinet v. Kimbrell*, 356 S.W.3d 407, 411 (Tex. 2011). We begin with the statute's text and the presumption that the Legislature intended what it enacted. *Fresh Coat, Inc. v. K-2, Inc.*, 318 S.W.3d 893, 901 (Tex. 2010). Legislative intent is best expressed by the plain meaning of the text unless the plain meaning leads to absurd results or a different meaning is supplied by legislative definition or is apparent from the context. *Tex. Lottery Comm'n v. First State Bank of Dequeen*, 325 S.W.3d 628, 635 (Tex. 2010). When the text of the statute is clear and unambiguous, we apply the statute's words according to their plain and common meaning unless a contrary intention is apparent from the statute's context. *Molinet*, 356 S.W.3d at 411.

Beginning with the statute's text, section 142.0017(b) provides, in pertinent part:

> A fire fighter . . . may not be required or permitted to work more than an average of 46.7 hours a week during a 72-day work cycle designated by the department head. If the fire fighter . . . is required to work more than an average of 46.7 hours a week during a 72-day work cycle designated by the department head, the person is entitled to be compensated for the overtime as provided by Subsection (f).

TEX. LOC. GOV'T CODE § 142.0017(b). To calculate how many hours a fire fighter is "required to work" for purposes of computing the fire fighter's weekly average in a 72-day work cycle, section 142.0017(e) instructs the City that "all hours are counted":

> (1) during which the fire fighter . . . is required to remain available for immediate call to duty by continuously remaining in contact with a fire department office by telephone or by radio; and
> (2) that are sick time, vacation time, meal time, holidays, compensatory time, death in the family leave, or any other authorized leave.

Id. § 142.0017(e). If the City requires a fire fighter to work hours in excess of a weekly average of 46.7 hours per 72-day work cycle, then section 142.0017(f) requires the City to pay a fire fighter overtime "without regard to the number of hours worked in any one week of the work cycle." *Id.* § 142.0017(f).

Simply put, the statutory scheme in section 142.0017 requires the City to pay fire fighters overtime rates when a fire fighter was required to work in excess of the 46.7-hour weekly average computed over a 72-day work cycle. *Id.* § 142.0017(b), (f). To compute the number of hours a fire fighter was required to work in a 72-day work cycle, the City must add (1) all hours physically worked, (2) all hours spent on call, and (3) all hours that fall within the enumerated categories in section 142.0017(e)(2), which includes "any other authorized leave." *See id.* § 142.0017(e). To get the weekly average, the City may divide the total by 72 days and then multiply this daily average by seven (or divide the total by the number of weeks in a 72-day work cycle). If the weekly average exceeds 46.7, then the City is required to pay overtime at time-and-a-half rates for the excess time. *Id.* § 142.0017(f).

The dispute in this case centers on the phrase "any other authorized leave" in section 142.0017(e)(2). Our rules of statutory construction dictate that we apply the term's plain meaning unless the Legislature has prescribed the term a different meaning—either expressly or by context—or the plain meaning leads to an absurd result. *See Tex. Lottery Comm'n*, 325 S.W.3d at 635. We note first that the term "leave" is not expressly defined by Chapter 142 of the Texas Local Government Code. Black's Law Dictionary defines "leave" as an "[e]xtended absence for which one has authorization." BLACK'S LAW DICTIONARY 973 (9th ed. 2009). Webster's New International Dictionary defines "leave" as "an authorized absence or vacation from duty or employment usu. [usually] with pay." WEBSTER'S NEW INTERNATIONAL DICTIONARY 1287 (2002). Neither definition, however, provides that "leave" always means only paid leave. Whereas we are typically inclined to apply a term's common meaning, a contrary intention is apparent from the statute's context. *See TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011) ("Undefined terms in a statute are typically given their ordinary meaning, but if a different or more precise definition is apparent from the term's use in the context of the statute, we apply that meaning.").

The context of section 142.0017 demonstrates that the phrase "any *other* authorized leave" cannot be read in isolation. *See In re Hall*, 286 S.W.3d 925, 928–29 (Tex. 2009) ("[W]e will not give an undefined statutory term a meaning that is out of harmony or inconsistent with other provisions in the statute."). If the Legislature intended the phrase "authorized leave" to be interpreted according to its common meaning (i.e., encompassing all forms of leave, both paid and unpaid) and without reference to the surrounding statutory scheme, then its specific enumeration of six forms of paid leave that precede the phrase would have been for naught. *See Tex. Lottery*

Comm'n, 325 S.W.3d at 635 ("We presume the Legislature selected language in a statute with care and that every word or phrase was used with a purpose in mind."). When general words follow specific, enumerated categories, we limit the general words' application to the same kind or class of categories as those expressly mentioned. *City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 29 (Tex. 2003). This statutory construction aid, known as *ejusdem generis*, requires us to construe words no more broadly than the Legislature intended.[2] *See Marks v. St. Luke's Episcopal Hosp.*, 319 S.W.3d 658, 663 (Tex. 2010). In addition, "the meaning of particular words in a statute may be ascertained by reference to other words associated with them in the same statute." *City of San Antonio*, 111 S.W.3d at 29; *see also Combs*, 340 S.W.3d at 441 ("It is a fundamental principle of statutory construction and indeed of language itself that words' meanings cannot be determined in isolation but must be drawn from the context in which they are used."). Here, the phrase "any other authorized leave" is preceded by six categories of paid leave: "sick time, vacation time, meal time, holidays, compensatory time, death in the family leave." TEX. LOC. GOV'T CODE § 142.0017(e)(2). Given the surrounding statutory scheme, we conclude that the Legislature intended "any other authorized leave" in section 142.0017(e)(2) to have the limited meaning of encompassing only other forms of *paid* leave.

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[2] The dissent criticizes the Court's use of the statutory construction canon *ejusdem generis* because, in the dissent's view, the term "leave," read in isolation, is unambiguous and thus should be construed as inclusive of both paid and unpaid leave. ___ S.W.3d at ___. As this Court has repeatedly noted and as the dissent concedes, however, words cannot be construed separately from the context in which they are used. *See, e.g.*, *City of Waco v. Kelley*, 309 S.W.3d 536, 542 (Tex. 2010). In construing section 142.0017(e)(2), the dissent ignores important contextual cues—six forms of paid leave preceding "any other authorized leave." Yet when construing a similar phrase within section 142.0015 in support of the dissent's construction of "leave" in section 142.0017(e)(2), the dissent relies on the statutory context—a form of unpaid leave following "authorized leave." The dissent cannot have it both ways. As the dissent's own analysis indicates, and as our statutory construction cases make clear, context matters. *See, e.g.*, *Combs*, 340 S.W.3d at 441.

The dissent reaches the conclusion that "leave" in section 142.0017(e)(2) includes unpaid leave by construing the term as it is used within the context of two provisions in section 142.0015—provisions that, by their owns terms, do not apply to the City's fire fighters. ___ S.W.3d at ___ (Guzman, J., dissenting in part). *Compare* TEX. LOC. GOV'T CODE § 142.0017(a) ("This section applies only in a municipality with a population of more than 1.5 million."), *with id.* § 142.0015(e–1) (providing that this subsection applies only to municipalities with a population of one million or more that have *not* adopted Chapter 143), *and id.* § 142.0015(f–1) (providing that this subsection applies only to police officers). This construction would require us to draw meaning from the Legislature's use of "leave" in a context where the term is surrounded by additional forms of leave that the Legislature did not include in the statute that applies to the City in this case. *Compare id.* § 142.0017(e)(2) (providing that all hours are counted "that are sick time, vacation time, meal time, holidays, compensatory time, death in the family leave, or any other authorized leave"), *with id.* § 142.0015(e–1) (providing that hours worked include "any authorized leave, including attendance incentive leave, vacation leave, holiday leave, compensatory time off, jury duty, military leave, or leave because of a death in the family"), *and id.* § 142.0015(f–1) (same). We must presume, however, that the Legislature's inclusion of only forms of paid leave and its omission of forms of unpaid leave in section 142.0017(e)(2) were purposeful. *See Quick v. City of Austin*, 7 S.W.3d 109, 123 (Tex. 1998) (presuming that the omission of a phrase contained within similar statutes had a purpose). Accordingly, we decline to construe "leave" based on two provisions that do not apply to the City and that are syntactically dissimilar from the provision at issue in this case.

The facts are undisputed that, even if Springer and Spratt were on "approved leave" for the designated overtime shift, their leave time was unpaid and their leave accounts were not charged for those shifts. Therefore, applying our narrow construction of "leave" in section 142.0017(e)(2), the City was not required to count each debit day's final 8-hour shift when computing the hours Springer and Spratt were required to work during a 72-day work cycle for purposes of overtime compensation because they were on *unpaid* leave. Accordingly, the court of appeals erred when it affirmed the trial court's judgment awarding both Springer and Spratt reimbursement for previously deducted paid overtime from their termination checks.

B. Termination Pay Claim

The termination pay claim involves an issue of statutory preemption. Home-rule cities, like the City of Houston, derive their powers from the Texas Constitution. *See* TEX. CONST. art. XI, § 5; *see also* TEX. LOC. GOV'T CODE § 51.072(a) ("The municipality has full power of local self-government."). The Legislature may limit a home-rule city's broad powers when it expresses its intent to do so with "unmistakable clarity." *Dall. Merch.'s & Concessionaire's Ass'n v. City of Dallas*, 852 S.W.2d 489, 490–91 (Tex. 1993). "An ordinance of a home-rule city that attempts to regulate a subject matter preempted by a state statute is unenforceable to the extent it conflicts with the state statute." *Id.* at 491; *see also* TEX. CONST. art. XI, § 5 (providing that no ordinance "shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State"). If a reasonable construction giving effect to both the state statute and the ordinance can be reached, then a city ordinance will not be held to have been preempted by the state statute. *Dall. Merch.'s*, 852 S.W.2d at 491. Here, we must determine whether the Local

Government Code's statutory scheme regarding the payment of accumulated benefit leave upon retirement preempts the City's ordinances that limit the valuation of accumulated benefit leave to base salary and longevity pay only.

We begin with the statutory text. *Fresh Coat, Inc.*, 318 S.W.3d at 901. Sections 143.115 and 143.116 provide that a fire fighter is entitled to receive a lump-sum payment for accumulated sick and vacation leave upon termination of employment. TEX. LOC. GOV'T CODE §§ 143.115, .116. Vacation leave remaining at retirement is valued at the "full amount of the [fire fighter's] salary for the period of the [fire fighter's] accumulated vacation leave." *Id.* § 143.115(b). Sick leave accumulated after September 1, 1985, is valued at the fire fighter's "average salary in the fiscal year in which the sick leave was accumulated." *Id.* § 143.116(b). Thus, determining "salary" is critical in calculating termination pay. Section 143.110 provides the mode of compensation for fire fighters. *Id.* § 143.110. Section 143.110(a) states that a fire fighter is entitled to a "base salary," and subsection (b) continues as follows:

> In addition to the base salary, each fire fighter . . . is entitled to each of the following types of pay, if applicable:
>
> (1) longevity pay;
> (2) seniority pay;
> (3) educational incentive pay as authorized by Section 143.112;
> (4) assignment pay as authorized by Section 143.113; and
> (5) shift differential pay as authorized by Section 143.047.

Id. § 143.110(a), (b). The retired fire fighters posit that, under this statutory scheme, the Legislature made clear that "salary" includes base salary plus any other forms of pay that a fire fighter was entitled to receive at the time the benefit leave was accumulated for purposes of paying out

termination pay. In contrast, the City argues that the statutory scheme does not preempt its power to define the elements of "salary" for purposes of paying out termination pay because the Legislature did not expressly provide a definition of "salary," as the term is used in sections 143.115 and 143.116. The City also avers that the Legislature did not intend to create a substantive change in the law when it replaced "salary" in former Article 1269m of the Texas Revised Civil Statutes with "base salary" in section 143.110 in 1987.

We must determine whether the Legislature expressed an unmistakably clear intent to preempt the City's power to determine how termination pay is calculated through its enactment of sections 143.115 and 143.116. To do so, we must interpret "salary," which the Legislature has not expressly defined, within the context of sections 143.115 and 143.116. We apply the common meaning of "salary" unless a different meaning is apparent from the context or the plain meaning leads to absurd or nonsensical results. *Tex. Lottery Comm'n*, 325 S.W.3d at 635. Black's Law Dictionary defines "salary" as "[a]n agreed compensation for services . . . [usually] paid at regular intervals on a yearly basis." BLACK'S LAW DICTIONARY 1454 (9th ed. 2009). Webster's New International Dictionary similarly defines "salary" as "fixed compensation paid regularly . . . for services." WEBSTER'S NEW INTERNATIONAL DICTIONARY 2003 (2002). Applying that plain meaning—compensation paid on a regular basis—within the context of the statutes, we hold that the Legislature clearly intended "salary" to encompass all of the components of compensation that a fire fighter receives regularly, which necessarily includes premium pay.[3]

[3] We note that the City's ordinances similarly define "regular rate of pay," as inclusive of base pay, longevity pay, educational incentive pay, assignment pay, and higher classification pay. HOUSTON, TEX., CODE OF ORDINANCES ch. 34, art. III, § 34-59(a)(4).

Our construction of "salary" in sections 143.115 and 143.116 is consistent with the overall legislative scheme related to a fire fighter's compensation. Section 143.110 provides that a fire fighter is entitled to a "base salary" and additional pay for five types of premium pay, if eligible. TEX. LOC. GOV'T CODE § 143.110. The City would have us read "base salary," as used in section 143.110, and "salary," as used in sections 143.115 and 143.116, interchangeably. We refuse to adopt such a construction. The plain language of section 143.110 demonstrates that the Legislature uses "base salary" and "base pay" reciprocally. This is evident from section 143.110(c), which provides that "[a] police department may include the number of years, not to exceed five, that the police officer served in another police department" when "computing longevity pay and *base pay* under this section." *Id.* § 143.110(c) (emphasis added). Therefore, we conclude that the Legislature intended the term "base salary" or "base pay" in section 143.110 to be one of six potential components of a fire fighter's salary—and not merely a term to be used interchangeably with sections 143.115 and 143.116's reference to "salary."

While we agree with the City that the Legislature has clearly given the City discretion to offer educational incentive pay and assignment pay, *see id.* §§ 143.110, .112–.113, we do not agree with the City's position that these sections impliedly extend the City's discretion to define "salary" as it sees fit for purposes of termination pay. Instead, under our construction of "salary" as used in sections 143.115 and 143.116, the statutory scheme preempts the City from excluding those components when calculating termination pay once the City has exercised its discretion to offer such premium pay during a fire fighter's employment with HFD. The provisions of the City's ordinances that exclude forms of premium pay from the definition of "salary" for purposes of termination pay

irreconcilably conflict with sections 143.115 and 143.116. Accordingly, the preempted provisions are unenforceable.

The dissent and the City argue that the statute that preceded section 143.110 compels a different construction of "salary" in sections 143.115 and 143.116. ___ S.W.3d at ___ (Hecht, J., dissenting in part). In support, the dissent and the City note that the Legislature did not intend a substantive change in the law when it moved provisions of Article 1269m to the Local Government Code in 1987. *Id.* at ___. Thus, the dissent and the City's position is that the term "base salary" in section 143.110 has no significance in light of former Article 1269m, which provided that fire fighters "shall be paid the same salary and in addition thereto be paid any longevity or seniority or educational incentive pay." *Id.* at ___ (citing Act of May 8, 1973, 63rd Leg., R.S., ch. 140, § 1, 1973 Tex. Gen. Laws 300, 301, *repealed by* Act of May 21, 1987, 70th Leg., R.S., ch. 149, § 49, 1987 Tex. Gen. Laws 707, 1307). However, in light of its surrounding provisions, we are not convinced that former Article 1269m is as clear as the dissent contends. The Legislature used the term "base salary" in Article 1269m reciprocally with "salary." For instance, Article 1269m provides in the next sentence that a lower-classification fire fighter who is hired temporarily in a higher-classification position "shall be paid the *base salary* of such higher position plus his own longevity pay during the time he performs the duties thereof." Act of May 8, 1973, 63rd Leg., R.S., ch. 140, § 1, 1973 Tex. Gen. Laws 300, 301 (repealed 1987) (emphasis added). We construe the Legislature's change from "salary" in the applicable provision of Article 1269m to "base salary," as section 143.110 currently provides, as indicative of the Legislature's clarification of the prior law and not as a substantive change. *Compare id.* (providing that a fire fighter "shall be paid the same salary and in addition

thereto be paid any longevity or seniority or educational incentive pay"), *with* TEX. LOC. GOV'T CODE § 143.110 (providing that fire fighters of the same classification "are entitled to the same base salary . . . [and] [i]n addition to the base salary, each fire fighter . . . is entitled to" five types of premium pay, if applicable).

Finally, the City argues that if we hold that the ordinance provisions that limit the availability of premium pay as part of termination pay are unenforceable, then we must also invalidate the City's ordinances that generally authorize payment of premium pay. The City contends that the ordinances are connected in subject matter and cannot be fairly severed and enforced separately from each other. We disagree. When an ordinance contains an express severability clause, the severability clause prevails when interpreting the ordinance. *See* TEX. GOV'T CODE § 311.032(a) ("If any statute contains a provision for severability, that provision prevails in interpreting that statute."); *see also Comm'n for Lawyer Discipline v. Benton*, 980 S.W.2d 425, 441 (Tex. 1998) (applying the Disciplinary Rules of Professional Conduct's severability clause to reach the conclusion that the remainder of Rule 3.06(d) remains in effect despite the Court's holding that the term "or embarrass" is unconstitutionally vague). Here, the City's Code of Ordinances contains an express severability clause, which provides that:

> [S]ections, paragraphs, sentences, clauses and phrases of this Code are severable, and if any phrase, clause, sentence, paragraph or section of this Code shall be declared unconstitutional by the valid judgment or decree of any court of competent jurisdiction, such unconstitutionality shall not affect any of the remaining phrases, clauses, sentences, paragraphs and sections of this Code.

HOUSTON, TEX., CODE OF ORDINANCES ch. 1, § 1-8. Based on the severability clause, the invalidity of provisions that limit the availability of premium pay when calculating termination pay do not

affect the validity of any of the remaining portions of the ordinances or any other ordinances. We therefore affirm the portion of the trial court's judgment awarding the retired fire fighters damages for additional termination pay for accrued but unused sick and vacation leave.

III. Conclusion

In sum, Springer and Spratt were not entitled to receive reimbursement for overtime pay. However, all of the retired fire fighters were entitled to recover additional termination pay. Accordingly, we reverse the court of appeals' judgment as to the debit dock claim, affirm its judgment as to the termination pay claim, and render judgment that Springer and Spratt take nothing as to their claims for previously docked overtime pay.

_____

Paul W. Green
Justice

OPINION DELIVERED: June 28, 2013

IN THE SUPREME COURT OF TEXAS

NO. 11-0778

THE CITY OF HOUSTON, TEXAS, PETITIONER,

v.

ROGER BATES, MICHAEL L. SPRATT AND DOUGLAS SPRINGER, RESPONDENTS

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

JUSTICE HECHT, joined by JUSTICE LEHRMANN, concurring in part and dissenting in part.

I agree with the Court's resolution of the firefighters' debit dock claim but not their termination pay claim. Accordingly, I join only Parts I and II-A of the Court's opinion.

Sections 143.116(a)-(b) and 143.115(b) of the Texas Local Government Code require that a Houston firefighter who leaves civil service be paid a lump sum for accumulated sick leave and up to 60 accumulated vacation days, based on his or her "salary".[1] Section 143.110(b) provides that "[i]n addition to . . . base salary", a firefighter may be entitled to various types of premium pay —

[1] Section 143.116 at (a) and (b) of the Texas Local Government Code provides in pertinent part: "(a) A fire fighter . . . who leaves the classified service . . . [is] entitled to receive in a lump-sum payment the full amount of the fire fighter's . . . accumulated sick leave . . . (b) . . . Sick leave . . . is valued at the fire fighter's . . . average salary in the fiscal year in which the sick leave was accumulated."

Section 143.115(b) provides in pertinent part: "A fire fighter . . . who leaves the classified service . . . is entitled to receive in a lump-sum payment the full amount of the person's salary for the period of the person's accumulated vacation leave up to a maximum of 60 working days."

longevity pay, seniority pay, educational incentive pay, assignment pay, and shift differential pay. The Court construes these statutes to mean that for purposes of calculating termination pay, "salary" includes "base salary" and any premium pay. The Court reasons that the dictionary definition of salary is compensation paid regularly, and since premium pay is also compensatory and regularly rendered, it must be "salary". Using the same logic, one could conclude that because humans have hair and walk upright, characteristics shared by monkeys, monkeys are humans. The dictionary definition of "salary" neither requires nor even suggests that *all* regularly paid compensation qualifies, much less that elements of compensation cannot be excluded from the term "salary" for specific purposes. Educational incentive pay, assignment pay, and shift differential pay are regularly paid when due but are by statute "in addition to [a firefighter's] regular pay".[2] If these forms of premium pay are regularly paid but not regular pay, are they "salary" for purposes of calculating termination pay? Perhaps, perhaps not. The point is that the answer to the question cannot be found in a dictionary.

But the answer can, in this instance, be found in the history of the statutory provisions. Identical statutory lump-sum termination pay requirements were in effect in 1976 as part of Article 1269m of the Revised Civil Statutes.[3] But Section 143.110(b)'s predecessor, Article 1269m, § 8,

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[2] TEX. LOC. GOV'T CODE §§ 143.042(c) ("The assignment pay is in an amount and is payable under conditions set by ordinance and is in addition to the regular pay received by members of the fire or police department."); 143.047(b) ("The shift differential pay is in an amount and is payable under conditions set by ordinance and is in addition to the regular pay received by members of the fire or police department."); 143.112(c) ("The educational incentive pay is in addition to the regular pay received by a fire fighter or police officer.").

[3] Act of May 2, 1975, 64th Leg., R.S., ch. 131, § 1, 1975 Tex. Gen. Laws 302, 302, formerly TEX. REV. CIV. STAT. ANN. art. 1269m, § 26(b), provided in part: "(a) [A] fireman . . . who leaves the classified service . . . shall receive in a lump sum payment the full amount of his salary for the period of his accumulated sick leave. . . . (b) [A] fireman . . . who leaves the classified service . . . shall receive in a lump sum payment the full amount of his salary for the period

stated that a firefighter was entitled to "be paid [a] salary and in addition thereto be paid any longevity or seniority or educational incentive pay that he may be entitled to."[4] Clearly, a firefighter's "salary" did not include premium pay. Then in the next sentence, the statute provided that a firefighter temporarily moved to a higher position "shall be paid the base salary of such higher position plus his own longevity pay".[5] "Base salary", too, did not include premium pay. As the Court concedes, Article 1269m used "salary" and "base salary" interchangeably.

In 1976, Houston adopted an ordinance requiring termination pay in accordance with these statutes, adding at the end:

> For purposes of determining the amount to which a fireman . . . is entitled . . . , "salary" shall mean the authorized base pay of the employee plus the longevity rate he has attained up to the date of separation or death. For purposes of this section, "salary" shall not include educational or training incentive pay or any other form of premium pay except as provided above.[6]

Houston's ordinance was consistent with Article 1269m. The substance of the ordinance has remained in effect to this day.[7]

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of his accumulated vacation leave [for up to 60 days]."

[4] Act of May 8, 1973, 63rd Leg., R.S., ch. 140, § 1, 1973 Tex. Gen. Laws 300, 301 (amended 1979 and 1985), *repealed and recodified by* Act of May 1, 1987, 70th Leg., R.S., ch. 149, §49, 1987 Tex. Gen. Laws 707, 913, 1307 (former TEX. REV. CIV. STAT. ANN. art. 1269m, § 8(b), recodified in relevant part at TEX. LOC. GOV'T CODE §§ 143.110 -.111).

[5] *Id.*

[6] Houston, Tex., Ordinance 76-1882 § 1 (Nov. 2, 1976).

[7] Houston, Tex., Code of Ordinances ch. 34, art.1, § 34-3(c).

In 1987, the provisions of Article 1269m were moved to the Local Government Code[8] as part of what the Legislature expressly stated was "a recodification only", in which "no substantive change in the law is intended".[9] The Court argues that changing "salary" to "base salary" was not a substantive change but merely a clarification. While the Court was looking up the word "salary" in the dictionary, it should have flipped a few pages over to "substantive", which means "real rather than apparent".[10] A "clarification" that includes premium pay as salary when it was previously excluded, invalidates part of a home city ordinance, costs the City and its taxpayers enormous amounts, and casts in doubt whether the City would ever have authorized premium pay if it had known the cost later imposed on its decision is substantive.

The Court points to another part of Section 143.110 that refers to longevity pay as separate from "base pay", equates "base pay" to "base salary", and concludes that they along with premium pay are all parts of a firefighter's "salary" for purposes of computing termination pay. But the conclusion does not follow from the premises. No one questions that firefighters' base pay is separate from premium pay. The issue is whether both are included in the "salary" on which termination pay is calculated. They clearly were not in 1976, and nothing material has changed since then. The Court agrees that the City has total discretion whether to offer educational incentive pay and assignment pay at all, but if it does, it has no discretion whatever to offer them on its own terms. This limitation on the City's discretion is not to be found in the statutory provisions.

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[8] Act of May 1, 1987, 70th Leg., R.S., ch. 149, § 1, 1987 Tex. Gen. Laws 707, 913, 915.

[9] Act of May 1, 1987, 70th Leg., R.S., ch. 149, § 51, 1987 Tex. Gen. Laws 707, 1308.

[10] WEBSTER'S THIRD NEW INT'L DICTIONARY 2280 (2002).

Had the firefighters' termination pay claim been made in 1976, it could scarcely have been taken seriously. The only change since 1976 has been a substitution of words in a statutory recodification intended to be nonsubstantive. That is not, in my view, sufficient support for the firefighters' claim.

Accordingly, I respectfully dissent from the Court's award of additional termination pay to the firefighters.

Nathan L. Hecht
Justice

Opinion delivered: June 28, 2013.

IN THE SUPREME COURT OF TEXAS

NO. 11-0778

THE CITY OF HOUSTON, TEXAS, PETITIONER,

v.

ROGER BATES, MICHAEL L. SPRATT AND DOUGLAS SPRINGER, RESPONDENTS

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

JUSTICE GUZMAN, joined by JUSTICE BOYD, concurring in part and dissenting in part.

I agree with the Court that the firefighters are entitled to additional termination pay. But I disagree that the firefighters are not entitled to overtime pay under their debit dock claim and therefore dissent from Part II.A of the opinion and the judgment. Chapter 142 of the Local Government Code requires municipalities to pay overtime rates once a firefighter reaches a certain statutory level of hours, which includes time on call as well as "any other authorized leave." Here, the question presented is whether "any other authorized leave" includes unpaid authorized leave. Our canons for construing statutes are numerous, but the cardinal canon is that statutes mean what they say. We do not resort to lesser canons when the plain meaning of a term is unambiguous. Because the Court here affirms that the plain meaning of leave is an authorized absence and does not exclude unpaid leave, that should end its inquiry. But the Court proceeds to use the canon of

ejusdem generis to create an ambiguity and then resolve it in a manner that violates our cardinal canon by holding that the list of types of leave preceding the term indicates that it is constricted to paid leave. This interpretation is an especially peculiar result, given that the Legislature explained in Chapter 142 that authorized leave includes forms of unpaid leave such as military leave. Our canons of construction are meant to glean legislative intent—not defeat it. Authorized leave means what it says, which necessarily includes unpaid leave. Because I would hold that the department must comply with its statutory duty to compensate the firefighters at overtime rates for leave it approves, I respectfully dissent.

I. Background

Section 142.0017 of the Local Government Code requires the Houston Fire Department (HFD) to compensate firefighters for overtime pay if they average over 46.7 hours of work per week during a 72-day work cycle. TEX. LOC. GOV'T CODE § 142.0017(b). Before 2001, HFD scheduled firefighters for 18 24-hour shifts during a 72-day work cycle (averaging 42 hours per week over a 72-day work cycle). Some of these shifts included debit days, where a firefighter was required to work a different schedule and frequently at a different station. These 20 shifts over a 72-day period averaged just under 46.7 hours per week for the cycle and allowed HFD to avoid paying overtime rates.

Staffing shortages caused HFD to include an additional shift to the 72-day work cycle in 2001. The additional debit day increased the 72-day work cycle average to 49 hours per week, obligating HFD to pay 2.3 hours of overtime compensation per week. Debit days were unpopular among firefighters because of the different shift and potential for a different station, resulting in high

absenteeism. But in light of the staff shortage, attendance on debit days became important for HFD. To encourage attendance on debit days while attempting to avoid an obligation to pay overtime, HFD designated the last eight hours of each debit day as the time eligible for overtime pay. If a firefighter was on authorized leave on a 24-hour debit day, HFD policy stated that it would pay the firefighter for the first 16 hours (with an offsetting deduction in their leave account) but not pay base or overtime pay for the remaining eight hours or deduct from their leave account. Nonetheless, HFD mandated that firefighters work this eight hour shift or have approved leave, just as any other work shift, or be subject to disciplinary action. In other words, HFD required firefighters to have approved leave available for the entire debt day but would not deduct the final eight hours of leave in an attempt to avoid the statutory obligation to pay overtime rates. Had HFD allowed the use of paid leave for these eight hours, it admits it would be obligated to compensate the firefighters at overtime rates (if the average hours exceeded 46.7 per week for the 72-day work cycle).

When Michael L. Spratt and Douglas Springer retired from HFD, the department claimed it had overpaid them for debit days they did not physically work and deducted the claimed overpayments from their termination checks. Springer's deductions were due to "riding out" accumulated holiday time on debit days. Spratt's deductions were due to vacation leave on debit days. Springer and Spratt sued, asserting that under section 142.0017, overtime pay includes authorized leave. The trial court awarded them damages and the court of appeals affirmed. __ S.W.3d __.

II. Discussion

This statutory construction case requires us to assess some of the numerous canons of construction we have developed over time to aid in divining the Legislature's intent in a statute. As the United States Supreme Court has observed,

> canons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.

Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992) (citations omitted). *See also Tex. Natural Res. Conservation Comm'n v. Lakeshore Util. Co.*, 164 S.W.3d 368, 378 (Tex. 2005) ("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."). If the meaning of the statute is not apparent from its language, we may examine not only the language of the specific section at issue but also the statute as a whole. *In re Office of the Attorney Gen.*, __ S.W.3d __, __ (Tex. 2013).

Section 142.0017(b) of the Local Government Code requires HFD to compensate firefighters at overtime rates for being required to work more than an average of 46.7 hours per week in a 72-day work cycle the firefighter. TEX. LOC. GOV'T CODE § 142.0017(b). Section 142.0017(e) specifies that the hours a firefighter is required to work includes the hours:

> (1) during which the fire fighter . . . is required to remain available for immediate call to duty by continuously remaining in contact with a fire department office by telephone or by radio; and
>
> (2) that are sick time, vacation time, meal time, holidays, compensatory time, death in the family leave, or *any other authorized leave*.

Id. § 142.0017(e) (emphasis added). The statute requires HFD to compensate firefighters for overtime at time-and-a-half rates. *Id*. § 142.0017(f). HFD requires firefighters to have approved leave if not physically present for debit days but does not pay them for the final eight hours of leave each debit day or deduct those eight hours from their leave accounts. Spratt and Springer assert that the Local Government Code does not grant HFD the authority to determine which hours a firefighter is required to work to qualify for overtime compensation. Regardless of whether this opaque procedure complied with other applicable state laws, the question this appeal presents is whether approved leave encompasses unpaid leave.

The Court appropriately begins its analysis with the cardinal canon of construction by acknowledging that the common meaning of leave is an "[e]xtended absence for which one has authorization."[1] This common meaning of the term leave does not exclude unpaid leave from its ambit. Because the common meaning of the term is clear, this should end the Court's inquiry.

Undeterred by the cardinal canon of construction, the Court resorts to a single lesser canon, *ejusdem generis*, in an attempt to create ambiguity in the term and then resolve that ambiguity in a manner inconsistent with the term's common meaning. The Court reasons that the types of specific leave preceding "other authorized leave" are types of paid leave, and that other authorized leave must necessarily refer only to types of paid leave. Even setting aside that the result of this canon violates our cardinal canon of common meaning, this interpretation also violates our canon to examine the

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[1] BLACK'S LAW DICTIONARY 973 (9th ed. 2009). *See also* THE AMERICAN HERITAGE COLLEGE DICTIONARY 773 (3d ed. 2000) (defining leave as "[o]fficial permission to be absent from work or duty"); THE OXFORD ILLUSTRATED DICTIONARY 481 (2d ed. 1975) (defining leave as "permission to be absent from duty").

statute as a whole. *Office of the Attorney Gen.*, __ S.W.3d at __. While section 142.0017(e) does not define "any other authorized leave," sections 142.0015(e-1) and (f-1) refer to "authorized leave, including attendance incentive leave, vacation leave, holiday leave, compensatory time off, jury duty, military leave, or leave because of a death in the family." TEX. LOC. GOV'T CODE § 142.0015(e), (e-1), (f-1). This list includes three additional types of authorized leave: incentive leave, jury duty, and military leave. *Id*. Section 143.072 defines military leave as a "leave of absence without pay." *Id*. § 143.072(a). Thus, in addressing compensation and leave for firefighters in Chapter 142, the Legislature has described "authorized leave" to include leave without pay, such as military leave. Both the common meaning of "any other authorized leave" and the context of the statute indicate that the term encompasses unpaid leave. Accordingly, section 142.0017 obligates HFD to pay the firefighters the overtime compensation they seek under their debit clock claim.

In response, the Court claims that examining the Legislature's use of the term authorized leave in section 142.0015 is unhelpful because section 142.0015 applies to less populous municipalities. __ S.W.3d __, __. But different sections within a statute necessarily address different matters. This does not negate our principle of examining the entire statute to ascertain the meaning of an undefined term. *See Office of the Attorney Gen.*, __ S.W.3d at __. If the Legislature intended the same term to mean two entirely different things within the same statute, it could have made that distinction clear by defining "any other authorized paid leave" in the statute at issue. It did not, and we must respect that choice. Recently, we examined the phrase "abuse or neglect" in section 161.001(1)(O) of the Family Code—the statute setting forth the grounds to involuntarily terminate parental rights. *In re E.C.R.*, __ S.W.3d __, __ (Tex. 2013). Because the termination

statute did not define abuse or neglect, we examined the use of that phrase in the Family Code's removal statutes and determined that abuse or neglect encompasses risk of abuse or neglect. *Id*. at __. The fact that termination and removal are distinct topics did not dissuade us from ascertaining the Legislature's intent from its use of the same phrase in different locations within the statute. Likewise, it should not so deter the Court here.

In conclusion, Chapter 142 of the Local Government Code requires HFD to compensate firefighters at overtime rates when their hours exceed certain statutory levels. This calculation includes time physically worked, time on call, and any approved leave. The plain meaning of the term leave is an approved absence and does not exclude unpaid leave. Our cardinal rule of construction dictates that our inquiry end there. Because HFD refused to compensate the firefighters at overtime rates for leave it approved but did not pay for, I would affirm the judgment of the court of appeals. Because the Court reverses this portion of the court of appeals' judgment and renders judgment that the firefighters take nothing on their overtime claim, I respectfully dissent.

_____

Eva M. Guzman
Justice

OPINION DELIVERED: June 28, 2013

IN THE SUPREME COURT OF TEXAS

NO. 11-0796

THE OFFICE OF THE ATTORNEY GENERAL OF TEXAS, PETITIONER,

v.

RICHARD LYNN SCHOLER, RESPONDENT

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

Argued December 6, 2012

CHIEF JUSTICE JEFFERSON delivered the opinion of the Court.

When a marriage ends in divorce, and there are children involved, a court frequently orders one parent to pay monthly child support. That was the case here. Years later, the parents agreed that the father's support obligation would cease if he voluntarily relinquished his parental rights. Although the father signed the necessary paperwork, the mother's attorney never filed it in court. The father argues that he relied on the attorney's promises that he would promptly initiate court proceedings to finalize the termination, and that the mother (and, consequently, the Office of the Attorney General) should be estopped from enforcing the support obligation now.

But court-ordered child support reflects a parent's duty to his child, not a debt to his former spouse. Except as provided by statute, the other parent's conduct cannot eliminate that duty.

Because estoppel is not a defense to a child support enforcement proceeding, we reverse the court of appeals' judgment and reinstate the trial court's judgment.

I. Background

In 1993, Richard Scholer and his wife, Denise Wilbourn, had a son, C.E.S., in Solano County, California. Scholer and Wilbourn ended their marriage the following year. The divorce decree awarded Wilbourn sole physical custody of C.E.S., gave Scholer visitation rights, and ordered Scholer to pay $450 in monthly child support.

Scholer maintains that he paid this amount directly to Wilbourn until November 1994, when he and Wilbourn verbally agreed to reduce the payments to $300. Soon thereafter, Wilbourn and C.E.S. moved to Texas. Scholer continued to send support payments to Wilbourn through December 1999. Eventually, Scholer also moved to Texas.

In July 2000, Scholer complained to Wilbourn that she had repeatedly blocked his attempts to maintain a relationship with his son. Scholer told Wilbourn that he wished to remain a part of C.E.S.'s life and intended to sue for shared custody. Alternatively, he offered to sever his relationship with C.E.S. if Wilbourn would agree that his obligation to pay child support would cease.

Several weeks later, attorney Michael B. Curtis wrote to Scholer on Wilbourn's behalf. The letter summarized Wilbourn's fear that C.E.S. would be harmed by continued contact with Scholer. Curtis inquired whether Scholer would be inclined to terminate his parental rights which would "also terminate any support obligation [he] may have in the future." Curtis enclosed a proposed affidavit to that effect.

Scholer signed a revised affidavit in September 2000, relinquishing his parental rights. It stipulated that Scholer declined to testify in any lawsuit related to the termination of his rights, and that he did not want to be notified of any related court proceedings. Scholer returned the signed affidavit to Curtis.

The affidavit was never filed in court. Wilbourn testified that she did not know that Scholer sent the affidavit to Curtis, as she broke ties with her attorney around the same time. Believing that his parental rights had been terminated, Scholer stopped paying child support. He did not attempt to contact Wilbourn or Curtis or the court to check the status of the termination. Wilbourn did not take any steps to collect child support from Scholer.

Nine years later, Scholer received a notice from the Office of the Attorney General of Texas informing him that he had failed to comply with the original California child support order and owed $81,450 in arrearages.[1] The OAG sought a court order to modify future child support payments and confirm support arrearages. Scholer denied that he owed the money, claiming that Wilbourn, and thus the OAG, were estopped from pursuing child support payments because Wilbourn led him to believe that his parental rights had been terminated nine years earlier.

The trial court rejected Scholer's estoppel defense. The court found that Scholer owed $77,875 plus interest. He was ordered to pay $493 per month for the arrears and an additional $522.83 per month to cover current child support, and to provide health insurance for C.E.S.

[1] Though Scholer produced proof of some of the payments to Wilbourn, he claims he was unable to obtain copies of all of the checks. Wilbourn agreed to give Scholer credit for the payments that he was able to prove with check copies that bore her signature. The arrears were later reduced accordingly.

The court of appeals reversed, reasoning that because the OAG was enforcing the child support order on the mother's behalf as her assignee, it was subject to all affirmative defenses that could be asserted by one private party against another, including estoppel. 352 S.W.3d 48, 52, 55. It instructed the trial court to conduct a hearing on Scholer's estoppel defense. *Id*. at 55. We granted the OAG's petition for review to address whether estoppel is an affirmative defense to a child support enforcement action. 55 Tex. Sup. Ct. J. 1171 (Aug. 17, 2012).

II. The OAG and the collection of child support.

Texas has adopted the Uniform Interstate Family Support Act (UIFSA),[2] which allows Texas courts to enforce support orders issued by other states, like the California order involved here. *See* TEX. FAM. CODE ch. 159. The OAG's role in the collection of child support payments derives from federal legislation. Title IV, Part D, of the Social Security Act requires each state to designate an agency to enforce child support orders. *See* 42 U.S.C. §§ 651–69B (1984). As we recently noted, "[t]he goal[s] of the Title IV-D child support enforcement program [are] to help . . . parents obtain child support for their children . . . [and] to enhance the well-being of children by assuring that assistance in receiving financial support is available through various mechanisms, including enforcement of child support obligations." *In re Office of Attorney Gen.*, __ S.W.3d __, __ n.4 (Tex. 2013).

The OAG is the designated IV-D agency in Texas and has the power to enforce child support orders and collect and distribute support payments. TEX. FAM. CODE §§ 231.001, .101(a)(5)–(6).

[2] Drafted and amended by The National Conference of Commissioners on Uniform State Laws, UIFSA was approved by the American Bar Association in 1993 and went into effect in 1996. Each state was required to adopt the required UIFSA provisions by January 1, 1998. 42 U.S.C. § 666(f).

Among its powers is the ability to seek a court order to withhold income from a child support obligor's disposable earnings. TEX. FAM. CODE §§ 102.007 (authorizing Title IV-D agencies to file suits for modification or motions to enforce child support orders), 158.006 (a court or a Title IV-D agency "shall order that income be withheld from [obligor's] disposable earnings"); *see also id.* §§ 231.001, .002, .101 (describing the powers, services, and duties of a Title IV-D agency, including enforcement, collection, and distribution of child support payments).

Though the OAG has general authority to initiate a suit on a parent's behalf, that authority does not explicitly make the OAG an assignee for purposes of collecting child support directly. Instead, the statute gives the OAG a limited power of assignment in certain cases, like this one.[3] *See* 42 U.S.C. §§ 654, 657; TEX. FAM. CODE § 231.104(a) ("[A]n application for or the receipt of financial assistance . . . constitutes an assignment to the Title IV-D agency of any rights to support from any other person that the applicant or recipient may have personally or for a child for whom the applicant or recipient is claiming assistance."); TEX. FAM. CODE § 231.104(b) ("An application for child support services is an assignment of support rights to enable the Title IV-D agency to establish and enforce child support and medical support obligations . . . .").

[3] The OAG acknowledged that it is "unclear" whether the right of assignment would be available to the government but for section 231.104.

III. Estoppel cannot be used as an affirmative defense in child support enforcement actions.

Estoppel, an equitable defense,[4] "arises where by fault of one, another has been induced to change his position for the worse." *Wirtz v. Sovereign Camp, W.O.W.*, 268 S.W. 438, 441 (Tex. 1925). The doctrine operates "to prevent injustice and protect those who have been misled." *Roberts v. Haltom City*, 543 S.W.2d 75, 80 (Tex. 1976); *Davis v. Allison*, 211 S.W. 980, 984 (Tex. 1919).

Scholer claims that Wilbourn led him to believe that both his parental rights and his obligation to pay child support had been terminated. Because Wilbourn, through her attorney, encouraged Scholer to relinquish his rights and, for years, made no attempt to inform him that the termination had not been finalized, Scholer now asserts that Wilbourn is to blame for her role in his failure to pay and that estoppel should bar her and the OAG, as assignee, from enforcing the support obligation. The OAG argues that the Family Code does not authorize an estoppel defense and that a trial court may not apply this equitable doctrine in a child support enforcement action. To resolve this question, we begin by examining the statute.

In 1995, the Legislature added section 157.008 to the Family Code. *See* Act of Apr. 20, 1995, 74th Leg., R.S., ch. 20, § 1, 1995 Tex. Gen. Laws 113, 177–78. Titled "Affirmative Defense to Motion for Enforcement of Child Support," the section provides a single defense to such motions: that the obligee voluntarily relinquished possession and control of the child to the obligor and the

[4] *See, e.g.*, *Ditta v. Conte*, 298 S.W.3d 187, 192 n.27 (Tex. 2009); *Mayer v. Ramsey*, 46 Tex. 371, 373–74 (Tex. 1876); *see also Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc.*, 467 U.S. 51, 59 (1984) ("Estoppel is an equitable doctrine invoked to avoid injustice in particular cases.").

obligor provided actual support to the child.[5] TEX. FAM. CODE § 157.008(a)–(b). Although an obligor may counterclaim or receive an offset for amounts actually paid, he has no other defenses to the claim. *Id.* § 157.008(d).

Before 1995, some of the provisions in section 157.008 were found in section 14.40 of the Family Code. That section provided that, in cases in which an obligor was held *in contempt* of a child support order, he or she could affirmatively plead that actual support had been provided because the custodial parent had voluntarily relinquished control of the child. *See* Act of Nov. 1, 1987, 70th Leg., 2d C.S., ch. 73, § 8, 1987 Tex. Gen. Laws 225, 230 (amended 1995) (current version at TEX. FAM. CODE § 157.008). The main difference between the two versions is in the statute's application—while the prior version limited the use of the affirmative defense to contempt allegations, the current statute expands the defense to all motions involving the enforcement of child support, including motions to confirm arrears, like the one before us today.

Sections 157.262 and 157.263 were also added to the statute in 1995. Section 157.263 requires that, in child support enforcement actions in which a movant "requests a money judgment for arrearages, the court shall confirm the amount of arrearages and render one cumulative money judgment." TEX. FAM. CODE § 157.263(a) (added by Act of Apr. 20, 1995, 74th Leg., R.S., ch. 20, § 1, 1995 Tex. Gen. Laws 113, 184). This section can be read in conjunction with section 157.262,[6]

[5] An obligor may also plead an affirmative defense to an allegation of contempt or a violation of a community service requirement that he pay child support. In such cases an obligor may plead that he could not provide the amount of support ordered, did not possess property that could be sold to raise the required funds, tried unsuccessfully to borrow the funds, and knew of no other source from which the money could be legally obtained. TEX. FAM. CODE § 157.008(c).

[6] Texas Family Code section 157.262 was repealed in 2011. Act of Apr. 20, 1995, 74th Leg., R.S., ch. 20, § 1, 1995 Tex. Gen. Laws 113, 184, *repealed by* Act of Sept. 1, 2011, 82d Leg., R.S., ch. 508, § 24, 2011 Tex. Gen. Laws 1264, 1269. The portions of the section related to the inability of courts to reduce or modify child support are now

which provided that "[e]xcept as provided by th[e] section, in a contempt proceeding or in rendering a money judgment, the court may not reduce or modify the amount of child support arrearages," but such arrearages "may be subject to a counterclaim or offset as provided by this subchapter." *Id.* § 157.262(a), (f). In section 157.262, the only exception to the provision prohibiting the modification or reduction of arrears was in the event of an abeyance of enforcement of arrears and the successful completion, by the obligor, of the court's terms.[7] *See id*. § 157.262(b)–(e). The only counterclaims and offsets were for monies paid by an obligor for actual support of a child during certain time periods and lump-sum monies received by the obligee from an obligor's disability payments.[8] *See id*. §§ 157.008(d), .009. Before the amendments, sections 157.262 and .263 were included in section 14.41, which placed substantially similar limits on a court's ability to confirm arrearages.[9]

Scholer—and the court of appeals—rely on decisions from our appellate courts that have recognized estoppel defenses in child support enforcement actions in contexts similar to that before

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codified in section 157.263 (b-1): "the court may not reduce or modify the amount of child support arrearages" but may only adjust said amount according to the counterclaims and offsets allowed by the statute. TEX. FAM. CODE § 157.263(b-1). The amendment applies to child support enforcement motions that were pending in trial court or filed on or after September 1, 2011. *See* Act of Sept. 1, 2011, 82d Leg., R.S., ch. 508, § 29, 2011 Tex. Gen. Laws 1264, 1270. The OAG filed this motion for enforcement in September 2009.

[7] The portions of the section related to abeyance of enforcement ((b)-(e)) were added in 2001, along with the phrase "[e]xcept as provided by this section" in subsection (a). *See* Act of Sept. 1, 2001, 77th Leg., R.S., ch. 392, § 3(a), 2001 Tex. Gen. Laws 719, 720.

[8] Section 157.009 was added in 2009 and provides for a credit for any disability-based lump-sum payments in addition to "any other credit or offset available to an obligor". *See* Act of June 19, 2009, 81st Leg., R.S., ch. 538, § 1, 2009 Tex. Gen. Laws 1242, 1242-43.

[9] Section 14.41 did not include an exception for abeyance of enforcement. *See* Act of Sept. 1, 1985, 69th Leg., R.S., ch. 232, § 9, 1985 Tex. Gen. Laws 1158, 1163, *amended by* Act of Apr. 20, 1995, 74th Leg., R.S., ch. 20, § 1, 1995 Tex. Gen. Laws 113, 184.

us today. For example, in *LaRue v. LaRue*, 832 S.W.2d 387 (Tex. App.—Tyler 1992, no writ), the father mistakenly believed that his parental rights had been terminated. At the mother's request, the father signed an affidavit relinquishing his parental rights and returned it to the mother's lawyer. Though the mother had initiated parental termination and related adoption proceedings in court, she decided not to follow through with the suit but neglected to inform the father. As a result, the father incurred six years of overdue child support payments. The court determined that the father had successfully proved estoppel. The court noted that although "estoppel is rarely asserted with success in child support cases, [that fact] does not foreclose its availability as a legitimate, effective defense in appropriate circumstances." *Id*. at 391.

Similarly, in *Kawazoe v. Davila*, 849 S.W.2d 906, 909 (Tex. App.—San Antonio 1993, no pet.), the court of appeals held that estoppel was available as a defense to a child support enforcement suit. In that case, the mother informed the father that she wished to terminate his parental rights so that her new husband could adopt their child. The father agreed and personally delivered the termination documents to the mother, who subsequently led him to believe that she had filed them in court and resolved the suit. The father was unaware that his rights were still intact until he was summoned to a child support contempt hearing thirteen years later. The court of appeals concluded that the father was entitled to assert estoppel as an affirmative defense. Citing *LaRue*, the court determined that the father was under no "duty to monitor the status of any court proceedings" since the mother and her attorney neglected to notify him of their intention to deviate from the planned termination. *Id*. at 909–10; *see also Hurry v. Hurry*, No. 14-96-00363-CV, 1997 WL 576375, at *3-4 (Tex. App.—Houston [14th Dist.] Sept. 18, 1997, pet. denied) (noting that there are

"narrow circumstances" in which estoppel has been successfully argued in child support enforcement cases, namely when written relinquishments of rights were signed and reasonably relied upon).

Indeed, many of our appellate courts have suggested that estoppel or quasi-estoppel may be appropriate defenses in a child support enforcement action[10]—several without finding that estoppel actually applied to the facts at issue.

The OAG argues that the current statute limits the defenses available to an obligor and prohibits a court from making discretionary alterations to arrears. The OAG reasons that because the only cases that are factually similar to this one—*LaRue* and *Kawazoe*—were decided before the legislative changes, those courts could not have contemplated the current statutory limits on affirmative defenses. Further, the statute limits a court's discretion in such cases, effectively requiring the court to act as a "mere scrivener" in confirming the arrearages and rendering

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[10] *See, e.g.*, *Hall v. Hall*, No. 09-06-206-CV, 2007 WL 2127133, at *3 (Tex. App.—Beaumont July 26, 2007, no pet.) (mem. op.) (holding that non-custodial parent was entitled to estoppel defense after custodial parent obtained a divorce and child support order without the father's knowledge and later promised him that divorce was "fake"); *In re A.L.G.*, 229 S.W.3d 783, 786-87 (Tex. App.—San Antonio 2007, no pet.) (holding that obligor established "the requisite elements to prove his affirmative defense of quasi-estoppel"—which do not include misrepresentation and reliance—after proving that mother voluntarily accepted day-care payments); *In re Marriage of Moon*, No. 07-03-0144-CV, 2004 WL 912429, at *2-3 (Tex. App.—Amarillo Apr. 29, 2004, no pet.) (mem. op.) (finding that although estoppel was available as a defense in other child support suits, non-custodial parent was not entitled to benefit of defense because he ignored circumstances that should have alerted him to fact that parental rights had not been terminated); *In re M.W.T.*, 12 S.W.3d 598, 603–04 (Tex. App.—San Antonio 2000, pet. denied) (finding that without false representations and reliance, non-custodial parent was unable to prove all elements of estoppel); *In re Moragas*, 972 S.W.2d 86, 91 (Tex. App.—Texarkana 1998, no pet.) (determining that non-custodial parent could not assert estoppel defense because he failed to prove he relied on custodial parent's silence about child support order); *Gawlik v. Gawlik*, 707 S.W.2d 256, 259 (Tex. App.—Corpus Christi 1986, no writ) (upholding the trial court's finding that party failed to pay child support, suggesting that estoppel can be a legitimate defense in child support enforcement actions); *Texas Dept. of Human Res. v. Allred*, 621 S.W.2d 661, 664 (Tex. Civ. App.—Waco 1981, writ dism'd) (rejecting the use of the doctrine of estoppel in that particular case, noting that it was "without merit"); *Houtchens v. Matthews*, 557 S.W.2d 581, 585–86 (Tex. Civ. App.—Fort Worth 1977, writ dism'd) (finding that elements of estoppel were not proved, but confirming the appropriateness of the defense in child support suits). *But see In re H.G.L.*, No. 14-08-00087-CV, 2009 WL 3817871, at *6 (Tex. App.—Houston [14th Dist.] Nov. 17, 2009, no pet.) (mem. op.) (holding that estoppel was not a defense in an action to reduce the amount of arrearages).

judgment.[11] The OAG argues that the cases on which Scholer and the court of appeals rely do not apply here. For at least two reasons, we agree with the OAG.

First, *Larue*, *Kawazoe*, and many (though not all) of these cases predate the 1995 statutory amendments. The statute now limits obligors to a single affirmative defense, and a court may not adjust arrearage amounts outside of the statutorily mandated exceptions, offsets, and counterclaims. Because courts are prohibited from making additional adjustments, affirmative defenses that are not included in the statute, like estoppel, are also prohibited because they would require courts to make discretionary determinations. *Cf. Chenault v. Banks*, 296 S.W.3d 186, 190 (Tex. App.—Houston [14th Dist] 2009, no pet.) (holding that "in a proceeding to confirm child support arrearages, the trial court's child support calculations must be based on the payment evidence presented, not the trial court's assessment of what is fair or reasonable"). In child support enforcement actions, courts may evaluate evidence only to consider the listed factors and defenses, and nothing more. *See* TEX. FAM. CODE §§ 157.008, .263(b).

Second, the Legislature's restriction on affirmative defenses after 1995 reflects a rationale existing even before then. A parent's duty of support, although often characterized monetarily and used with terms like "arrearages," is not a debt owed to the other parent. For that reason, estoppel would be inappropriate here. That doctrine protects a party who is harmed by relying on the promises or actions of another. In such situations, the harmed party, who might otherwise be at fault, is excused from performance or payment of a debt. But in cases involving child support, the

[11] *See Williams v. Patton*, 821 S.W.2d 141, 153 (Tex. 1991) (Phillips, C.J., dissenting) (noting that the statute prohibits a trial court's independent judgment or discretion in determining arrearages, instead envisioning that a judge will "act[] as a mere scrivener").

assertion of the defense would compromise the welfare of a child who is at the mercy of his parents' choices. Each parent owes an obligation to provide child support. Viewed this way, the question is not whether Scholer owes Wilbourn a debt that vanishes because of Wilbourn's actions. It is whether the parents, regardless of their quarrels, iniquities, or mutual agreements, must nevertheless satisfy their duty to the child.

The Family Code characterizes child support as a duty rather than a debt. *See, e.g.*, TEX. FAM. CODE §§ 154.006 (describing circumstances under which "duty" of support may be terminated); .013 (requiring continuation of "duty" of support after death of obligee), .128 (detailing guidelines for calculating "duty" of support for children in multiple households). This concept also has a rich history in our jurisprudence. We have held that "[t]he obligation which the law imposes . . . on parents to support their children is not considered a 'debt' . . . but a legal duty arising out of the status of the parties." *Ex parte Hall*, 854 S.W.2d 656, 658 (Tex. 1993); *see Adair v. Martin*, 595 S.W.2d 513, 515 (Tex. 1980) (rejecting the idea that child support can be characterized as "debt," even if it can be reduced to judgment and enforced); *Cunningham v. Cunningham*, 40 S.W.2d 46, 49 (Tex. 1931) (holding that child support is "a duty, natural and legal" that is not to be treated as a debt).

The child's welfare underlies child support enforcement suits, and providing monetary support is part of a parent's contribution to that welfare. As a result, the parents' actions, either collectively or alone, cannot affect the support duty, except as provided by statute. For example, the Family Code requires parents to obtain court approval, conditioned on the child's best interest, before they can enforceably agree to modify child support. TEX. FAM. CODE § 154.124; *Williams*

v. Patton, 821 S.W.2d 141, 143 (Tex. 1991) (noting that "the legislature has . . . prohibited self-help by the obligor and obligee in prospectively modifying court-ordered child support without court approval"). Courts may not condition the payment of child support on whether one parent allows the other to have access to the child. TEX. FAM. CODE § 154.011. Underlying such provisions is the recognition that "[i]t is a strong, long-standing policy of this state to protect the interests of its children, and this is the policy [supporting] the enforcement of child support obligations." *Williams*, 821 S.W.2d at 145. Such proceedings reflect "the reality that *the child* is frequently the one who has been harmed by nonpayment and it is *the child's interests* which are ultimately sought to be protected." *Id*. at 145 (emphasis added).

Because payment of child support reflects a parent's duty to his child, furthering the child's welfare and best interests, estoppel is not an affirmative defense to a child support enforcement action. A parent who owes that duty must diligently satisfy it. If he is displeased with access, he may ask the court to modify or enforce the visitation order, or to hold the custodial parent in contempt for violating it. *See* TEX. FAM. CODE §§ 156.001, 157.001(a)–(b). If he is unable to pay, he may seek a modification of the support order. *See id*. § 156.401. If he believes his rights and his support obligations have been terminated, he should ensure a court order reflects that. *See id*. § 161.206; *cf. In re E.R.*, 385 S.W.3d 552, 555 (Tex. 2012) (recognizing that "a parent must remain vigilant with respect to her child's welfare"). But except for the very narrow circumstance recognized by law—the obligee's relinquishment of possession and the obligor's provision of

support[12]—he may not rely on the other parent's actions to extinguish his support duty. To the extent other cases hold differently, we disapprove of them.

IV. Conclusion

We reverse the court of appeals' judgment and reinstate the trial court's judgment. TEX. R. APP. P. 60.2(c).

Wallace B. Jefferson
Chief Justice

OPINION DELIVERED: June 28, 2013

[12] TEX. FAM. CODE § 157.008(a).

IN THE SUPREME COURT OF TEXAS

NO. 11-0818

FORD MOTOR COMPANY, ET AL.,
PETITIONERS,

v.

STEWART, COX, AND HATCHER, P.C. AND
TURNER & ASSOCIATES, P.A.,
RESPONDENTS

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

PER CURIAM

This appeal arises from a dispute over the trial court's sua sponte appointment of a guardian ad litem and subsequent fee award to the guardian ad litem in connection with a personal injury settlement between a minor-plaintiff and Ford Motor Company. Because the trial court should have removed the guardian ad litem after it became clear that the next friend did not have interests adverse to the minor, the guardian ad litem's services were no longer necessary under Rule 173 of the Texas Rules of Civil Procedure. Therefore, the trial court abused its discretion when it awarded the guardian ad litem compensation for the rendition of unnecessary, non-compensable services. Accordingly, we reverse the court of appeals' judgment in part, and remand the case to the trial court for further proceedings consistent with this opinion.

In 1999, I.F. was severely injured after being ejected from a minivan during a one-car rollover accident. I.F.'s father was killed in the accident. Theresa Richardson, I.F.'s mother, was not involved in the accident.[1] Richardson, as I.F.'s next friend, sued Ford and Bridgestone/Firestone North American Tire, L.L.C. in district court in Orange County. A district judge sitting in Montgomery County was assigned as the pretrial judge for this case and other similar cases.[2] *See* TEX. R. JUD. ADMIN. 11 (providing for the assignment of a pretrial judge in cases that involve material questions of fact and law in common with another case pending in another court in another county). In 2003, Firestone and I.F. reached a settlement and presented the proposed settlement to the regular judge for approval. Upon approving the Firestone settlement, the regular judge found that no guardian ad litem appointment was necessary because there was no conflict of interest between Richardson and I.F. In late 2009, Ford reached a settlement with I.F. That settlement was jointly presented to the pretrial judge for approval. Acting on his own initiative, the pretrial judge appointed attorney John Milutin to represent I.F.'s interest in the settlement under Texas Rule of Civil Procedure 173. *See* TEX. R. CIV. P. 173.3(a) (providing that the trial court "may appoint a guardian ad litem on the motion of any party or on its own initiative").

Richardson, as next friend of I.F., initially challenged Milutin's appointment by filing an "Agreed Motion to Reconsider Appointment of Guardian Ad Litem," which included Richardson's

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[1] Richardson was divorced from I.F.'s father at the time of the accident and was neither an heir nor a representative of his estate.

[2] The trial court judge sitting in Orange County, where the case was originally filed and remained pending, is hereinafter referred to as the "regular judge." *See* TEX. R. JUD. ADMIN. 11.2(b).

affidavit in opposition to that appointment.[3] In the affidavit, Richardson testified that her interests were not adverse to I.F.'s because she made no claims in the lawsuit and had no financial interest in the settlement. Milutin responded to Richardson's motion by stating, in sum, that he had "inadequate information upon which to determine and advise the Court whether [Richardson] has an interest adverse to [I.F.]" due to the plaintiff's failure to provide him with information that he had requested regarding the settlement. The pretrial judge denied Richardson's motion to reconsider. Richardson, as next friend of I.F., then unsuccessfully sought mandamus relief from the order appointing Milutin as guardian ad litem. *In re Richardson*, No. 09-10-0032-CV, 2010 Tex. App. LEXIS 1758, at *1 (Tex. App.—Beaumont Mar. 11, 2010, orig. proceeding) (mem. op.).

Ultimately, the pretrial judge rendered a judgment that (1) approved the Ford settlement, (2) "reapproved" the 2003 Firestone settlement, subject to a reduction of attorney's fees from the forty percent previously approved in the Firestone Settlement to one-third, and (3) ordered Ford to pay $40,000.00 to Milutin in guardian ad litem fees and expenses. A divided court of appeals affirmed the pretrial judge's appointment of Milutin as guardian ad litem, finding that Richardson's obligation to pay her daughter's medical expenses coupled with her desire to pay the medical bills with proceeds from the settlement constituted the conflict necessitating the appointment of Milutin as

[3] The court of appeals stated that Ford "joined" Richardson's motion to reconsider. 350 S.W.3d 369, 377. Ford states in this Court, however, that it neither joined nor agreed to that motion, but simply told Richardson that it would not oppose it.

guardian ad litem. 350 S.W.3d 369, 377–78. The court of appeals also affirmed the ad litem fee award.[4] *Id.* at 381.

Ford argues that the trial court abused its discretion under Texas Rule of Civil Procedure 173 by appointing a guardian ad litem when there was no apparent conflict of interest between I.F. and Richardson. Ford also complains of the amount of the guardian ad litem's fee award and the taxing of the entire award against Ford.

We initially note that Ford preserved its issues surrounding the guardian ad litem fee award. Richardson and Ford initially filed a joint motion requesting that the pretrial judge approve Ford's proposed settlement, in which both parties notified the pretrial judge that a guardian ad litem appointment was unwarranted in this case. When Richardson challenged the guardian ad litem appointment by mandamus review, Ford filed a letter in that proceeding, averring that the appointment was "neither appropriate nor permitted." 2010 Tex. App. LEXIS 1758, at *8. More importantly, Ford objected to the fees at the settlement prove-up hearing, and the trial court overruled Ford's objections. *See* TEX. R. APP. P. 33.1(a); *see also Jocson v. Crabb*, 133 S.W.3d 268, 270 (Tex. 2004) (per curiam) ("The final fee hearing is an appropriate forum to assert any objections to the fee request and obtain a ruling.").

[4] The court of appeals dealt with two separate appeals in this case. I.F.'s attorneys also appealed the trial court's reduction of their fees associated with the 2003 Firestone settlement. 350 S.W.3d at 373. The court of appeals reversed the pretrial judge's order on that issue, holding that the pretrial judge abused his discretion by disregarding the regular judge's 2003 order that approved the Firestone settlement and the attorney's fees and expenses paid to I.F.'s attorneys from that settlement. *Id.* at 381. Richardson, as I.F.'s next friend, petitioned this Court for review as to that portion of the court of appeals' judgment, but we deny her petition. Thus, we address only the guardian ad litem issue presented by Ford's petition.

Texas Rule of Civil Procedure 173 governs the procedure for appointing and compensating a guardian ad litem. *See* TEX. R. CIV. P. 173. The trial court must appoint a guardian ad litem pursuant to Rule 173 when there appears to be a conflict of interest between the minor and next friend. TEX. R. CIV. P. 173.2. Once appointed, the guardian ad litem has a limited role in the litigation and may be compensated only for certain types of activities. *Ford Motor Co. v. Garcia*, 363 S.W.3d 573, 579 (Tex. 2012). "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." *Id.* at 577. The guardian ad litem's initial role is to "determine and advise the court whether a party's next friend . . . has an interest adverse to the party." TEX. R. CIV. P. 173.4(b). The trial court should remove the guardian ad litem when the evidence presented fails to confirm that a conflict of interest exists. *Cf. Brownsville-Valley Reg'l Med. Ctr. v. Gamez*, 894 S.W.2d 753, 755 (Tex. 1995) ("When the conflict of interest no longer exists, the trial court should remove the guardian ad litem."). Rule 173 authorizes the trial court to award an ad litem a reasonable fee for necessary services performed. TEX. R. CIV. P. 173.6. The trial court has no discretion to award a guardian ad litem compensation for services rendered after it has become clear that no conflict of interest exists, because such services would no longer be necessary under Rule 173. *See Garcia*, 363 S.W.3d at 582 ("Only those tasks directly and materially bearing on the conflict of interest between [the guardian] and [the ward] regarding division of the settlement were necessary."). We review the amount a guardian ad litem is awarded as compensation 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.* at 578.

In this case, Milutin was not specifically assigned any duties by the pretrial judge. The context of his appointment, however, indicates that Milutin was appointed for the limited purpose of determining and advising the pretrial judge as to whether there was a conflict of interest between I.F. and Richardson, and if so, whether the Ford settlement was in I.F.'s best interest. As to the initial conflict-of-interest determination, Richardson testified in her affidavit that she was not involved in the accident, she was not asserting any claims in this lawsuit on her own behalf, she was not an heir or representative of the estate of I.F.'s father, she had no financial interest in that estate's recovery, and she understood and agreed that she had no right to the proceeds of any settlement of the litigation. In Milutin's response, he primarily took issue with the regular judge's prior approval of the Firestone settlement in 2003 and the amount of attorney's fees awarded pursuant to the contingency fee agreement in that settlement. However, those issues have no bearing on the guardian ad litem's initial role in determining whether Richardson's interests were adverse to I.F.'s in the context of the Ford settlement. *See* TEX. R. CIV. P. 173 cmt. 3. Therefore, the pretrial judge should have removed Milutin after considering Richardson's affidavit, the circumstances surrounding Richardson's representation of I.F., and Milutin's response because there was no evidence that Richardson had an interest adverse to I.F. The court of appeals erred when it held otherwise. *See* 350 S.W.3d at 377–78 (concluding that Richardson's obligation as a parent to pay I.F's medical expenses presented a conflict of interest that required the appointment of a guardian ad litem under Rule 173). We hold that a parent's obligation to provide her child with medical care, standing alone, does not create a conflict of interest within the confines of Rule 173.

Because the pretrial judge should have removed Milutin at the time he considered Richardson's motion to reconsider and Milutin's response, we hold that any services rendered by Milutin after that time were not necessary and thus not compensable under Rule 173. *See* TEX. R. CIV. P. 173.6(a) (providing that a guardian ad litem may be compensated for necessary services performed). Therefore, the pretrial judge abused his discretion when he awarded compensation for Milutin's non-necessary services, which included Milutin's time spent defending his appointment in the mandamus proceeding. *See Garcia*, 363 S.W.3d at 582 (holding that a trial court abuses its discretion when it awards compensation for a guardian ad litem's non-necessary activities). While the evidence is legally insufficient to support the full amount awarded to Milutin, it is sufficient to show that he necessarily spent some amount of time initially advising the pretrial judge as to whether there was a conflict of interest between Richardson and I.F. Accordingly, we grant Ford's petition for review and, without hearing oral argument, reverse the court of appeals' judgment in part and remand the case to the pretrial judge to determine Milutin's fee award, consistent with this opinion. *See* TEX. R. APP. P. 59.1.

OPINION DELIVERED: January 25, 2013

IN THE SUPREME COURT OF TEXAS

NO. 11-0826

MICHAEL A. ZANCHI, M.D., MICHAEL A. ZANCHI, M.D., P.A., AND PARIS REGIONAL ANESTHESIA, P.A., PETITIONERS,

v.

REGINALD KEITH LANE, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JUAMEKA CYNARRA ROSS, DECEASED, ET AL., RESPONDENTS

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

Argued January 8, 2013

JUSTICE LEHRMANN delivered the opinion of the Court.

JUSTICE HECHT filed a concurring opinion.

"In a health care liability claim, a claimant shall, not later than the 120th day after the date the original petition was filed, serve on each party or the party's attorney one or more expert reports . . . ." TEX. CIV. PRAC. & REM. CODE § 74.351(a). Today we determine whether a claimant asserting a health care liability claim (HCLC) complies with section 74.351(a)'s mandate to serve an expert report on a "party" by serving the report on a defendant who has not yet been served with process. Because we construe the term "party" in section 74.351(a) to mean one named in a lawsuit, we hold that he does. We further hold that "service" of an expert report on such a defendant need

not comport with the service requirements in Rule 106 of the Texas Rules of Civil Procedure that apply specifically to service of citation. Accordingly, we affirm the judgment of the court of appeals.

I. Factual and Procedural Background

Juameka Cynarra Ross died after undergoing a splenectomy at Paris Regional Medical Center (the Hospital) in Paris, Texas. On April 21, 2010, Reginald Keith Lane, individually and as personal representative of Ross's estate, filed suit under the Texas Medical Liability Act (TMLA) against anesthesiologist Michael A. Zanchi, M.D., alleging that Zanchi's medical negligence resulted in Ross's death. It is undisputed by the parties that Zanchi was not served with process until September 16, 2010. Lane attributes this delay, at least in part, to Zanchi's conduct, arguing that Zanchi actively evaded service. In the meantime, however, Lane mailed the expert report and curriculum vitae of Jeffrey Wagner, M.D., to Zanchi at five different locations (including the Hospital) by certified mail on August 19, 2010, which was the statutory deadline for serving the report. Four of the mailings were returned unclaimed, but a Chuey Potter signed for the mailing sent to the Hospital. The record does not reflect Zanchi's relationship to Potter, and Zanchi has neither admitted nor denied receiving Wagner's report.

Zanchi filed a motion to dismiss the suit for failure to timely serve an expert report as required by section 74.351(a) of the Texas Civil Practice and Remedies Code. At the hearing on the motion to dismiss, Zanchi specifically argued that he was not a "party" to Lane's suit until he was served with process, so any transmittal of Wagner's report to him before the date on which he was served could not satisfy section 74.351(a). Zanchi did not file any objections to the substance of the expert report. The trial court denied Zanchi's motion to dismiss. The court of appeals, with one

justice concurring and one justice dissenting, affirmed, holding that "one is a 'party' if so named in a pleading, whether or not yet served [with process]." 349 S.W.3d 97, 100.

II. The Expert-Report Requirement and Applicable Legal Standards

In order to proceed with an HCLC, a claimant must comply with the expert-report requirement of the TMLA. *See* TEX. CIV. PRAC. & REM. CODE § 74.351; *Stockton v. Offenbach*, 336 S.W.3d 610, 614 (Tex. 2011). Section 74.351(a) provides that "[i]n a health care liability claim, a claimant shall, not later than the 120th day after the date the original petition was filed, serve on each party or the party's attorney one or more expert reports." TEX. CIV. PRAC. & REM. CODE § 74.351(a). Strict compliance with that provision is mandatory. *Stockton*, 336 S.W.3d at 614. If the claimant does not serve an expert report by the statutory deadline and the parties have not agreed to extend the deadline, the statute requires, with one exception not relevant here, dismissal of the claim with prejudice "on the motion of the affected physician or health care provider." TEX. CIV. PRAC. & REM. CODE § 74.351(b).

Matters of statutory construction are legal questions that we review de novo. *Tex. W. Oaks Hosp., LP v. Williams*, 371 S.W.3d 171, 177 (Tex. 2012). "The aim of statutory construction is to determine and give effect to the Legislature's intent, which is generally reflected in the statute's plain language." *CHCA Woman's Hosp., L.P. v. Lidji*, __ S.W.3d __, __ (Tex. 2013). A word's meaning cannot be determined in isolation, but must be drawn from the context in which it is used. *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 441 (Tex. 2011).

III. Discussion

A. The Meaning of "Party" under the TMLA

In his first issue, Zanchi argues that a defendant is not a "party" to an HCLC until he is served with process, waives service, or otherwise appears in a lawsuit. He contends that he did not become a "party" to this lawsuit until September 16, 2010, the day Lane served him with process. As a result, Zanchi argues, Lane did not comply with the requirement in section 74.351(a) that he serve the expert report on a "party" within 120 days of filing suit, and the trial court was required to dismiss Lane's suit. We disagree. We conclude that, in the context of the TMLA, the term "party" means one named in a lawsuit and that service of the expert report on Zanchi before he was served with process satisfied the TMLA's expert-report requirement.

The TMLA does not define the term "party," but provides that "[a]ny legal term or word of art used in this chapter, not otherwise defined in this chapter, shall have such meaning as is consistent with the common law." TEX. CIV. PRAC. & REM. CODE § 74.001(b). This Court has never directly addressed the meaning of the term "party" in the context of the TMLA's expert-report requirement. However, we have stated that "because [a health care provider] was *named in the original petition as a party to this suit*, the [claimants] were required to serve it with a report before the statutory period expired," indicating that one becomes a "party" to an HCLC when named in the lawsuit. *Gardner v. U.S. Imaging, Inc.*, 274 S.W.3d 669, 671 (Tex. 2008) (emphasis added). In addition, we have tacitly recognized in other contexts that one can be a "party" to a legal proceeding even though he is not served with process. *See, e.g.*, *In re E.R.*, 385 S.W.3d 552, 563 (Tex. 2012) ("If service is invalid, it is 'of no effect' and cannot establish the trial court's jurisdiction over a

party."); *Ross v. Nat'l Ctr. for the Emp't of the Disabled*, 197 S.W.3d 795, 796–98 (Tex. 2006) (holding that the "trial court had no jurisdiction either to enter judgment or to enforce it against a party who had neither been properly served nor appeared" and that "the court of appeals erred in finding that a party never served can challenge a default judgment only if he first complies with it"); *M.O. Dental Lab v. Rape*, 139 S.W.3d 671, 674 (Tex. 2004) (stating that the "remaining party was never served with citation"); *Caldwell v. Barnes*, 154 S.W.3d 93, 97 n.1 (Tex. 2004) ("A party who becomes aware of the proceedings without proper service of process has no duty to participate in them."). These cases confirm that a person can be a "party" to a lawsuit even though, not having been served with process, the person has no duty to participate in, and may not be bound by, the proceedings. We must presume that the Legislature was aware of our construction of the term in enacting the TMLA. *Tooke v. City of Mexia*, 197 S.W.3d 325, 361 (Tex. 2006).

Five courts of appeals have previously considered the question of when a defendant becomes a "party" under section 74.351(a), but, unlike the court of appeals here, they all determined that "party" means one who has been named in an HCLC and served with citation and a copy of the petition, accepted or waived such service, or made an appearance. *Key v. Muse*, 352 S.W.3d 857, 860–64 (Tex. App.—Dallas 2011, no pet.); *Carroll v. Humsi*, 342 S.W.3d 693, 701 (Tex. App.—Austin 2011, no pet.); *Dingler v. Tucker*, 301 S.W.3d 761, 766–68 (Tex. App.—Fort Worth 2009, pet. denied); *Carreras v. Zamora*, 294 S.W.3d 348, 350 (Tex. App.—Corpus Christi 2009, no pet.); *Yilmaz v. McGregor*, 265 S.W.3d 631, 640 (Tex. App.—Houston [1st Dist.] 2008, pet. denied). As explained by the court below, in espousing that definition of "party," those courts of appeals relied principally on *Mapco, Inc. v. Carter*, 817 S.W.2d 686 (Tex. 1991) (per curiam), for

the common-law formulation of that definition.[1] 349 S.W.3d at 101. Such reliance is misplaced. We recognized in *Mapco* that a party must be served, accept or waive service, or otherwise appear before judgment may be rendered against him. *Mapco*, 817 S.W.2d at 687. The concept of personal jurisdiction, however, is distinct from the concept of party status. Rendering judgment against a party who has not yet been served with process, accepted or waived service, or otherwise appeared raises due process concerns that are not implicated when serving a defendant with an expert report. *See Omni Capital v. Rudolf Wolff & Co.*, 484 U.S. 97, 103–04 (1987) (stating that, as a matter of due process, before a court may exercise personal jurisdiction over a defendant the procedural requirement of service of summons must be satisfied). Indeed, our interpretation of "party" does not prejudice the defendant; rather, it gives the defendant advance notice of the pending lawsuit and the alleged conduct at issue. Moreover, nowhere in *Mapco* did we even attempt to define the word party. Zanchi does not point to any other case law, and we can find none, holding that service of process is generally a prerequisite to "party" status.

Recognizing a person named in a filed pleading as a "party" is consistent with dictionary definitions of the term as well as the Texas Rules of Civil Procedure. Black's Law Dictionary defines "party" as "[o]ne by or against whom a lawsuit is brought <a party to the lawsuit>," BLACK'S LAW DICTIONARY 1231–32 (9th ed. 2009), and Webster's International Unabridged Dictionary defines party as "the plaintiff or defendant in a lawsuit," WEBSTER'S INT'L DICTIONARY UNABRIDGED 1648 (3d ed. 2002). Further, the pleading rules in the Texas Rules of Civil Procedure

[1] That is, these opinions either cite to *Mapco* or reference other opinions that themselves rely on *Mapco*.

refer to those named in petitions as "parties," supporting a conclusion that service of process is not a prerequisite to that designation. TEX. R. CIV. P. 79 (requiring that a petition list the "parties").

Not only does construing "party" to mean someone named in a lawsuit better comport with the common usage of the term, this construction is particularly persuasive under the TMLA, where "defendant"—a type of party—is statutorily defined as a "physician or health care provider against whom a health care liability claim is asserted," without regard to whether the physician or provider has been served. TEX. CIV. PRAC. & REM. CODE § 74.351(r)(4). This construction also makes sense given that the statutory period to serve an expert report runs from the date of filing the suit, not the date on which citation is served. *Id.* § 74.351(a); *see also Stockton*, 336 S.W.3d at 618–19 (explaining that the purpose of the TMLA would not be frustrated if the Legislature had calculated the expert report deadline from the date of a provider's service or appearance, but that the Legislature chose not to do so). Beginning the period for serving an expert report on the date of filing suggests that a "party" on which to serve the report exists on the date of filing.

Significantly, interpreting "party" to mean one named in the lawsuit best effectuates the purpose of the TMLA, which is "to identify and eliminate frivolous [HCLCs] expeditiously, while preserving those of potential merit." *Samlowski v. Wooten*, 332 S.W.3d 404, 410 (Tex. 2011) (citing Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.11(b)(1), (3), 2003 Tex. Gen. Laws 847, 884); *see also Leland v. Brandal*, 257 S.W.3d 204, 208 (Tex. 2008) (noting that in "section 74.351, the Legislature struck a careful balance between eradicating frivolous claims and preserving meritorious ones"). Defining "party" as one named in the lawsuit, then, does not affect the expert report deadline; it still falls on the 120th day after the original petition is filed. In turn, failure to meet that

deadline will result in dismissal of the claim under section 74.351(b). Accordingly, our interpretation ensures that meritorious claims remain viable, while frivolous claims are eliminated quickly, by requiring an expert report early in the proceeding.

We turn next to the implications of our interpretation on the objection provision of section 74.351(a), which states that a defendant "whose conduct is implicated in a report must file and serve any objection to the sufficiency of the report not later than the 21st day after the date it was served, failing which all objections are waived." TEX. CIV. PRAC. & REM. CODE § 74.351(a). Zanchi argues that interpreting "party" as one named in the lawsuit could create a scenario in which a defendant physician is required to file and serve his objections before he is served with process or otherwise brought under the court's jurisdiction. The court of appeals held that the objection provision is not implicated until the defendant has an obligation to take part in the proceedings and that, as a result, the twenty-one-day objection period does not begin to run until the defendant is served with process. 349 S.W.3d at 102–03. We agree. *See, e.g.*, *Ross*, 197 S.W.3d at 798 ("While diligence is required from properly served parties or those who have appeared, . . . those not properly served have no duty to act, diligently or otherwise."); *Caldwell*, 154 S.W.3d at 97 n.1 (noting that a party has no duty to participate in a proceeding until served with process). While the statute does not expressly provide for tolling the objection period, neither does it expressly insert a 120-day deadline for service of process in an HCLC, which is the practical effect of Zanchi's interpretation. Because the statute does not appear to contemplate the exact factual scenario presented here, neither party's

interpretation is without its shortcomings,[2] but the construction we adopt here best fits the common usage of the term "party," does the least damage to the statutory language, and best comports with the statute's purpose. *See Gardner*, 274 S.W.3d at 671 (holding, in the default judgment context, that the defendant's failure to appear after proper service of citation tolled the 120-day time period for serving an expert report until the defendant made an appearance).

While we agree with the court of appeals' majority opinion that Zanchi's twenty-one-day period for objecting to the report did not begin to run until he was served with process, we also agree with the concurring opinion that Zanchi's opportunity to raise any objections to the substance of the expert report has passed. *See* 349 S.W.3d at 107. Zanchi could have objected within twenty-one days of service of process and, at the time he was served, had already had the expert report for over twenty-one days. He thus had ample opportunity to prepare his objections, but failed to raise them.[3]

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[2] By contrast, section 74.351(a) was recently amended to change the expert-report deadline to run from the date on which the defendant's answer is filed, rather than from the date on which the petition is filed. Act of May 26, 2013, 83d Leg., R.S., ch. 870, § 2, __ Tex. Gen. Laws __, __. The amendment also changes the defendant's deadline to object to the report to twenty-one days after the later of the date the report is served or the date the defendant's answer is filed. *Id.* Specifically, the amended statute provides:

> In a health care liability claim, a claimant shall, not later than the 120th day after the date each defendant's original answer is filed, serve on that party or the party's attorney one or more expert reports . . . . Each defendant physician or health care provider whose conduct is implicated in a report must file and serve any objection to the sufficiency of the report not later than the later of the 21st day after the date the report is served or the 21st day after the date the defendant's answer is filed, failing which all objections are waived.

Id. The amendment does not take effect until September 1, 2013, and thus does not affect this case. *Id.* at ___. However, we note that, under the amended statute, a claimant asserting a health care liability claim will never be required to serve an expert report before the defendant is served with process, waives service, or otherwise appears in the lawsuit.

[3] Neither claimants nor defendants are prejudiced under our interpretation of "party." A claimant with a meritorious claim will not be deprived of his day in court based on a technicality or the gamesmanship of the defendant, and a defendant will always have at least twenty-one days to formulate his objections.

B. Method of Service of Expert Report

In Zanchi's second issue, he argues that in order to "serve" an expert report on a defendant who has not yet been served with process, the claimant must comply with the service-of-citation requirements under Texas Rule of Civil Procedure 106. We disagree. Rule 106 by its terms applies solely to service of citation. TEX. R. CIV. P. 106. If the Legislature had intended to require a claimant to serve an expert report in accordance with Rule 106, it clearly knew how to do so. *See, e.g.*, TEX. CODE CRIM. PROC. art. 59.04(b) (requiring that, to institute civil forfeiture proceedings, the state's attorney "shall cause certified copies of the notice to be served . . . in the same manner as provided for the service of process by citation in civil cases"). We need not decide whether service in a manner other than that authorized by Rule 21a satisfies the TMLA's requirement to "serve" an expert report because, here, Zanchi does not dispute either that Lane sent the expert report on the statutory deadline, via certified mail,[4] or that Zanchi actually received the expert report.[5] *See* TEX. R. CIV. P. 21a.

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[4] Rule 21a of the Texas Rules of Civil Procedure authorizes service by one of four methods of delivery: (1) in person, by agent, or by courier receipted delivery; (2) by certified or registered mail to the party's last known address; (3) by telephonic document transfer to the recipient's current telecopier number; or (4) by such other manner as the court in its discretion may direct. TEX. R. CIV. P. 21a; *see also Stockton*, 336 S.W.3d at 615. Several courts of appeals have interpreted the word "serve" in section 74.351(a) to require compliance with Rule 21a. *See, e.g.*, *Breiten v. Shatery*, 365 S.W.3d 829, 832 (Tex. App.—El Paso 2012, no pet.); *Nexion Health at Beechnut, Inc. v. Paul*, 335 S.W.3d 716, 718 (Tex. App.—Houston [14th Dist.] 2011, no pet.); *Univ. of Tex. Health Sci. Ctr. at Houston v. Gutierrez*, 237 S.W.3d 869, 872 (Tex. App.—Houston [1st Dist.] 2007, pet. denied); *Herrera v. Seton Nw. Hosp.*, 212 S.W.3d 452, 459 (Tex. App.—Austin 2006, no pet.); *Kendrick v. Garcia*, 171 S.W.3d 698, 703–04 (Tex. App.—Eastland 2005, pet. denied). Zanchi assumes that, if Rule 106 does not apply, then Rule 21a does.

[5] Zanchi generally states that it is "questionable whether the [expert] report was 'served' on Zanchi under Rule 21a." Without more detail, this argument is not preserved.

IV. Conclusion

For the foregoing reasons, we conclude that, under section 74.351(a) of the TMLA, a physician or health care provider against whom an HCLC is asserted is a "party" who may be served with an expert report regardless of whether he has been served with process. We further hold that an expert report need not be "served" in compliance with the formal requirements of Rule 106 that apply specifically to service of citation. Accordingly, we affirm the judgment of the court of appeals.

_____

Debra H. Lehrmann
Justice

OPINION DELIVERED: August 30, 2013

IN THE SUPREME COURT OF TEXAS

NO. 11-0826

MICHAEL A. ZANCHI, M.D., MICHAEL A. ZANCHI, M.D., P.A., AND PARIS REGIONAL ANESTHESIA, P.A., PETITIONERS,

v.

REGINALD KEITH LANE, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JUAMEKA CYNARRA ROSS, DECEASED, ET AL., RESPONDENTS

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

JUSTICE HECHT, concurring.

Section 74.351(a) of the Texas Civil Practice and Remedies Code requires that a health care liability claimant "shall, not later than the 120th day after the date the original petition was filed, serve on each party or the party's attorney one or more expert reports . . . for each physician or health care provider against whom a liability claim is asserted."[1] Otherwise, the claim against that physician or health care provider must be dismissed.[2] Respondents delivered their expert report to petitioners within 120 days of filing suit, but petitioners contend they were not *parties* during that

[1] TEX. CIV. PRAC. & REM. CODE § 74.351(a). This section was amended by Act of May 26, 2013, 83rd Leg. R.S., ch. 870, § 2, 2013 Tex. Gen. Laws ___ [House Bill 658]; this action was commenced before the effective date of this amendment and so is governed by preexisting law. *Id.* at § 3(b).

[2] *Id.* § 74.351(b).

period because they were not served with citation until later, and thus respondents failed to serve "each party or the party's attorney" by the deadline. The Court disagrees.

I join the Court's opinion with this reservation: resolution of the issue cannot turn on the meaning of "party" in the abstract. Sometimes "party" is used to include a person who is named as a defendant in the plaintiff's pleadings but never becomes a formal participant by service, waiver, or appearance.[3] Sometimes the word refers only to actual participants.[4] Sometimes non-participants are treated as if they were parties.[5] The dictionary definitions of "party" — "[o]ne by or against whom a lawsuit is brought",[6] "litigant"[7] — do not suggest whether the person must be, or need not be, an actual, formal participant in a case. In the end, nothing supports the Court's conclusion that "construing 'party' to mean someone named in a lawsuit better comport[s] with the common usage

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[3] *E.g. Caldwell v. Barnes*, 154 S.W.3d 93, 97 n.1 (Tex. 2004) ("A party who becomes aware of the proceedings without proper service of process has no duty to participate in them."); TEX. R. CIV. P. 79 ("The petition shall state the names of the parties . . . .").

[4] Generally, the discovery rules use "party" to refer only to participants in the lawsuit. *See* TEX. R. CIV. P. 190-205. *See also* TEX. CIV. PRAC. & REM. CODE § 37.006 (specifying who must be made parties when declaratory relief is sought)*; cf. Presidio Indep. Sch. Dist. v. Scott*, 309 S.W.3d 927, 931 (Tex. 2010) (narrowly construing "parties" who must agree to venue in Travis County for an administrative appeal to exclude commission, under TEX. EDUC. CODE § 21.307(a)(2), which must be made a party on that appeal under another subsection).

[5] *In re Lumbermens Mut. Cas. Co*., 184 S.W.3d 718, 722-725 (Tex. 2006) ("Because one who is virtually represented is already deemed to be a party, theoretically it is not required to intervene in order to appeal." (citation and internal quotation marks omitted)); *Motor Vehicle Bd. of Tex. Dep't of Transp. v. El Paso Indep. Auto. Dealers Ass'n, Inc.,* 1 S.W.3d 108, 110 (Tex. 1999) (per curiam) (an appellant, though not a party of record in the trial court, may be deemed a party with a right to appeal under the doctrine of virtual representation).

[6] BLACK'S LAW DICTIONARY 1231, 1232 (9th ed. 2009).

[7] WEBSTER'S UNABRIDGED DICTIONARY 1648 (3d ed. 2002).

of the term",[8] a conclusion rejected by five courts of appeals, all trying to follow this Court's precedents.

Nor do other provisions of the Medical Liability Act shed any light on the matter. The one the Court cites, and the only one I see, is Section 74.351(r)(4), which defines "defendant" as someone "against whom a health care liability claim is asserted."[9] Since a "party" entitled to an expert report is a defendant, one can argue that the Legislature had in mind someone against whom a claim has been asserted, though not necessarily served. But one can just as easily argue that if the Legislature had meant for the expert report deadline to apply to anyone against whom a claim is asserted without being served, it would have used "defendant" in Section 74.351(a). By using "party", the argument would go, the Legislature must have intended something different — someone actually in the lawsuit and not merely named as a defendant. If one of these arguments is stronger than the other, it is hard to see which is which.

Only as a last resort does the Court look for guidance to the purpose of the expert report requirement and deadline, which is "to identify and eliminate frivolous health care liability claims expeditiously, while preserving those of potential merit."[10] If "party" in Section 74.351(a) is read to mean only a defendant who has been served, has waived service, or has appeared, then in the situation before us, the claim must be dismissed, not because it is frivolous — the claimants have

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[8] *Ante* at ___.

[9] TEX. CIV. PRAC. & REM. CODE § 74.351(r)(4).

[10] *Samlowski v. Wooten*, 332 S.W.3d 404, 410 (Tex. 2011) (citing Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.11(b)(1), (3), 2003 Tex. Gen. Laws 847, 884).

an expert report showing their claim has merit — but because the defendants are hard to find. Petitioners' construction of Section 74.351(a) is contradicted, not by the better meaning of "party", if one could be determined, but by the Legislature's stated purpose in enacting the expert report requirement. We have said:

> The cardinal rule in statutory interpretation and construction is to seek out the legislative intent from a general view of the enactment as a whole, and, once the intent has been ascertained, to construe the statute so as to give effect to the purpose of the Legislature. It is recognized that a statute is to be construed with reference to its manifest object, and if the language is susceptible of two constructions, one of which will carry out and the other defeat such manifest object, it should receive the former construction.[11]

"Party" must be interpreted to include a person named but not served, not because that meaning is better in some abstract sense, but because that interpretation is the one that avoids defeating the very statute we are construing.

An interpretation of Section 74.351(a) that results in the dismissal of claims without regard to the merits must be rejected for another reason. "It must be remembered that there are constitutional limitations upon the power of courts to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause, and those limitations constrain the Legislature no less in requiring dismissal."[12] In Section 74.351(a), the Legislature has in effect authorized a presumption that a claim lacks merit and should be dismissed if the claimant cannot provide a supporting expert report within 120 days after filing suit. While that presumption may not violate

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[11] *Citizens Bank of Bryan v. First State Bank*, 580 S.W.2d 344, 348 (Tex. 1979) (internal citations omitted) (cited in ANTONIN SCALIA & BRYAN A.GARNER, READING LAW 63 (Thomson/West 2012)).

[12] *Scoresby v. Santillan*, 346 S.W.3d 546, 554 (Tex. 2011) (footnote and internal quotation marks, brackets, and ellipses omitted).

Due Process or Open Courts, the same could not be said for a presumption of no merit based on a claimant's inability to find the defendant within the same time period. Section 74.351(a) need not, and therefore should not, be interpreted to create a potentially constitutionally infirm presumption.[13]

Appellate courts should apply Section 74.351 consistent with the Legislature's purpose as expressly stated in the Medical Liability Act. Justice Carter's admonition in his concurring opinion in the court of appeals is worth repeating:

> The Legislature determined that expert reports must be filed in order to avoid costly, unnecessary, and unmerited legal proceedings, but unfortunately, in this case, that goal has not been accomplished. Here, a thirty-one-page detailed report from a board-certified anesthesiologist was served within 120 days from the filing of the original petition. Instead of engaging in expensive and time-consuming trial and appellate litigation attempting to establish that the simple words "party" and "serve" have abstruse meanings, these parties should be preparing for and trying their case.[14]

Nathan L. Hecht
Justice

Opinion delivered: August 30, 2013

[13] *Stockton v. Offenbach*, 336 S.W.3d 610, 618 (Tex. 2011) ("We presume that when enacting legislation, the Legislature intends to comply with the state and federal constitutions, and we are obligated to avoid constitutional problems if possible." (citation and internal quotation marks omitted)).

[14] 349 S.W.3d 97, 107 (Carter, J., concurring).

IN THE SUPREME COURT OF TEXAS

NO. 11-0830

EL PASO COUNTY HOSPITAL DISTRICT D/B/A R.E. THOMASON GENERAL HOSPITAL, ET AL., PETITIONERS

v.

TEXAS HEALTH AND HUMAN SERVICES COMMISSION AND THOMAS SUEHS, EXECUTIVE COMMISSIONER, RESPONDENTS

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

Argued February 6, 2013

JUSTICE DEVINE delivered the opinion of the Court.

JUSTICE BOYD did not participate in the decision.

This appeal raises two questions about an earlier appeal and opinion from this Court. *See El Paso Cnty. Hosp. Dist. v. Tex. Health & Human Servs. Comm'n*, 247 S.W.3d 709 (Tex. 2008). The earlier appeal concerned a suit by fourteen Texas hospitals against the Texas Health and Human Services Commission and its Executive Commissioner (collectively "HHSC"), which challenged a "cutoff date" used by HHSC to cap the collection of data used to calculate Medicaid reimbursement rates for inpatient services. In that suit, the hospitals asserted two claims for declaratory relief under section 2001.038 of the Administrative Procedure Act ("APA"). *Id.* at 711.

First, they claimed that the cutoff date was an invalid "rule" because it was not adopted via the APA's formal rule-making procedures. Second, they argued that the part of the agency's appeal rule, which HHSC applied to deny them administrative relief from the cutoff date's effect on their rates, was inapplicable. This Court agreed that the cutoff date was an invalid rule and that, as a result, the appeal rule, as interpreted by HHSC to deny the hospitals' administrative appeals, did not apply. *Id*. We declared the cutoff-date rule invalid and enjoined its enforcement. *Id*. at 715–16.

We further remanded the cause to the district court where the hospitals argued that our judgment, enjoining the enforcement of the cutoff-date rule, should apply retroactively to provide them a basis to reopen their earlier administrative appeals and to seek reimbursement for the underpayment of past Medicaid claims calculated under the invalid cutoff-date rule. HHSC responded that the injunction should only operate prospectively because the earlier administrative proceedings were concluded before the Court's injunction and could not be reopened under agency rules. The district court agreed with the hospitals; the court of appeals agreed with HHSC. The court of appeals reversed the district court's judgment, in part, concluding that our 2008 opinion and judgment did not purport to reopen past rate determinations or closed administrative proceedings. 351 S.W.3d 460, 488 (Tex. App.–Austin 2011). We agree and affirm the court of appeals' judgment.

I

When a Texas hospital provides inpatient services to a Medicaid beneficiary, HHSC reimburses the hospital with Medicaid funds. 1 TEX. ADMIN. CODE § 355.8063 (2004) (Tex. Health & Human Servs. Comm'n, Reimbursement Methodology for Inpatient Hospital Services)

(hereinafter, "Former Rule § 355.8063").[1] Since 1986, HHSC (or its predecessor) has determined the amount of reimbursement through a "prospective payment system." *Id*. § 355.8063(a); 11 TEX. REG. 2988 (1986). Under this system, HHSC calculates the payment rates in advance and then uses those rates to pay reimbursement claims submitted over the next several years, until the rates are recalculated. This rate-calculation process is tied to the state fiscal year ("FY"), which runs from September 1 through August 31. *See* TEX. GOV'T CODE § 316.071; *see also El Paso Cnty. Hosp. Dist*., 247 S.W.3d at 713. The process provides for these rates to be recalculated or rebased every three years. Former Rule § 355.8063(a), (b)(5), (h).

According to HHSC, the rate-calculation process has historically taken around ten months to complete. As part of this process, HHSC first collects two sets of data from a prior fiscal year (the "base year"): (1) data from reimbursement claims submitted by all Texas hospitals for treating Medicaid patients admitted in that year, and (2) data from the reported costs of treating those patients. *Id*. § 355.8063(b)(5). HHSC then inputs that data in a formula that yields each hospital's "standard dollar amount" ("SDA"), which approximates that hospital's average cost for treating an average Medicaid case in the base year. *Id*. § 355.8063(a), (b)(4), (c). All hospitals are then sorted into "payment divisions," each of which is a group of hospitals whose individual SDAs fall within a certain range of each other. *Id*. § 355.8063(a). For each payment division, HHSC computes a weighted average of the individual SDAs of that division's hospitals, and that weighted average is the reimbursement rate for all hospitals in that division. *Id*. § 355.8063(b)(4), (c). Reimbursement

[1] The rule has since changed and its provisions moved to other sections, but this is the version relevant to this appeal.

for a particular service is determined by multiplying this weighted average reimbursement rate by a "relative weight," which reflects the complexity of the services. *Id*. § 355.8063(b), (c).

Before the rates become final, a hospital may seek to correct alleged errors in its individual SDA calculation via an administrative-appeal procedure. *Id*. § 355.8063(k). But an appeal cannot challenge the rate-calculation methodology itself. *Id*. § 355.8063(k)(2). If HHSC grants an appeal, it adjusts the hospital's SDA for the next fiscal year. *Id*. § 355.8063(k)(1)(A). In addition, if correcting an error at any time (not just in an appeal) changes a hospital's payment division—and thus, its rate—HHSC reprocesses the hospital's reimbursement claims that were paid with the wrong rate during the current fiscal year and pays them according to the corrected rate. *Id*. § 355.8063(c). But "[n]o corrections are made to payment rates for services provided in previous state fiscal years." *Id*.

When HHSC began using this prospective-payment system in 1986, it applied a cutoff date to end the data-collection stage in a rate recalculation. HHSC decided to cutoff the collection of claims data six months after the end of the base year (on February 28) to assure time for it to have the new rates in place by the start of the next fiscal year (beginning September 1). As a result, data from three to five percent of paid claims from the relevant base year were typically left out of a rate recalculation. HHSC imposed this cutoff date without adopting it as a rule under the APA's rule-making procedures. *El Paso Cnty. Hosp. Dist.,* 247 S.W.3d at 711.

In 2001, fourteen Texas hospitals[2] challenged HHSC's use of the cutoff date. They theorized that the cutoff date excluded data from their rate recalculations that, if included, would increase their rates.[3] To assert their challenge, the hospitals filed administrative appeals during the 2000–2001 rate recalculation, claiming that the cutoff date caused "data entry" errors. HHSC denied the appeals at the informal stage, ruling that the hospitals were not raising true data entry errors, which are appealable, but instead were contesting the rate-calculation methodology, which is not. Former Rule § 355.8063(k)(2). HHSC further denied the hospitals' requests to refer them to the next appeal step—formal administrative hearings. At the time there was no provision for judicial review of the denial decisions. *See* 351 S.W.3d at 466. In September 2001, the new rates went into effect for FY 2002. *El Paso Cnty. Hosp. Dist.*, 247 S.W.3d at 713.

In August 2002, the hospitals sued HHSC under section 2001.038 of the APA for declaratory and injunctive relief regarding two agency rules. First, they claimed the cutoff date was a "rule" under the APA and was thus invalid because it had not been adopted under the APA's procedures. Second, they claimed that the rule that barred administrative appeals challenging the rate

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[2] The fourteen plaintiff-hospitals included: El Paso County Hospital District d/b/a R. E. Thomason General Hospital, Conroe Hospital Corporation d/b/a Conroe Regional Medical Center; Bay Area Healthcare Group, Ltd. d/b/a Corpus Christi Medical Center; Sunbelt Regional Medical Center, Inc. d/b/a East Houston Regional Center; Brownsville-Valley Regional Medical Center d/b/a Valley Regional Medical Center; Columbia/St. David's Healthcare System, L.P. d/b/a North Austin Medical Center; El Paso Healthcare System, Ltd. d/b/a Las Palmas Medical Center and Del Sol Medical Center; HCA Health Services of Texas, Inc. d/b/a Rio Grande Regional Hospital; Methodist Healthcare System of San Antonio, Ltd. d/b/a Methodist Specialty & Transplant Hospital, Northeast Methodist Hospital, and Southwest Texas Methodist Hospital; and St. David's Medical Center and Round Rock Medical Center

[3] The theory ultimately proved true for five of the hospitals. The cutoff date, however, did not affect the rates of eight of the hospitals and adding the excluded data actually decreased the rate for one of the hospitals. *See* 351 S.W.3d at 472 & n.15. Ironically, the hospital that benefitted under the cutoff date was the El Paso County Hospital District, the lead plaintiff in the lawsuit and subsequent appeals.

methodology did not apply to their appeals challenging HHSC's use of the cutoff date. After a bench trial, the district court rendered judgment that the hospitals take nothing, and the court of appeals affirmed the judgment. *El Paso Cnty. Hosp. Dist.*, 161 S.W.3d at 587–88 (Tex. App.–Austin 2005). That decision was appealed to this Court. We granted review and issued two opinions.

Initially, we affirmed the court of appeals' judgment in part and reversed it in part. *El Paso Cnty. Hosp. Dist. v. Tex. Health & Human Servs. Comm'n*, 50 Tex. Sup. Ct. J. 1143 (Aug. 31, 2007), *withdrawn on motion for rehearing*, 247 S.W.3d at 711. We held the cutoff date was invalid because it was a rule that had not been adopted under the APA. We did not, however, immediately invalidate the cutoff date. We concluded instead that the cutoff should be left in place for a reasonable time, as per APA section 2001.040, while HHSC formally adopted it. *See* TEX. GOV'T CODE § 2001.040. We also concluded that HHSC properly denied the hospitals' administrative appeals.

On rehearing, the hospitals complained about our reliance on APA section 2001.040. That section, the hospitals argued, did not apply because it was enacted several years after HHSC began using the cutoff date to limit its data collection. The hospitals further argued that the relevant statute at the time stated simply that a rule was "not valid" if it were not adopted under the APA. *See* Act of Sept. 1, 1999, 76th Leg., R.S., ch. 558, § 3, 1999 Tex. Gen. Laws 3089, 3090, *codified as amended*,TEX. GOV'T CODE § 2001.035. This statute, unlike APA section 2001.040, did not make provision for the agency to bring its rule into compliance. *Cf.* Tex. Gov't Code § 2001.040. The hospitals also maintained that declaring the cutoff date "void" would "pave the way" for them "to seek retroactive adjustment of their reimbursement rates," which would result in adjustments to their reimbursements over the past six years based on those rates. That relief was needed, according to

the hospitals, because HHSC had not rebased during the intervening years but had instead continued to use the 2001 rate calculations with the cutoff date.

The hospitals also asked the Court to reconsider its declaration that HHSC properly applied its rules to deny the hospitals' administrative appeals. Those appeals, the hospitals added, would be the appropriate forum for recalculation of their reimbursement rates, including any retroactive adjustments for prior years.

HHSC, for its part, agreed that APA section 2001.040 did not apply and that, under the prior statute, the Court should declare the cutoff-date rule "invalid" immediately. HHSC also conceded that it continued to use the 2001 rate calculations because the Legislature had not funded the rebasing process. HHSC disputed, however, that the Court could grant, or that the hospitals could obtain, retroactive adjustment of their rates and reimbursements for prior years. HHSC further pointed out that the retroactivity issue was not relevant in any event because the hospitals were not seeking monetary reimbursement for past years in the case. In reply, the hospitals agreed that the issue of retroactive relief was not before the Court and was "properly reserved until such time as the Hospitals actually seek retroactive relief in a future proceeding."[4]

We granted the hospitals' motion for rehearing and issued a new opinion, removing the erroneous reliance on section 2001.040. *El Paso Cnty. Hosp. Dist.*, 247 S.W.3d at 711–16. As before, the Court declared the cutoff-date rule invalid, but we now rendered judgment "enjoining its enforcement." *Id*. at 714–15. Because the rule was not a valid part of the rate methodology, the

[4] *See infra* note 6.

Court also declared that the hospitals' administrative appeals challenged appealable data entry errors, thereby entitling them to "a review of individual claims data excluded by the . . . cutoff." *Id*. at 716. Retroactive relief for previous years was not mentioned, and the case was remanded to the district court for further proceedings.

The parties thereafter joined issue both in the district court and before the agency as to the implications of our judgment, particularly regarding reimbursement rates and payments from earlier years. In the district court, the hospitals filed a motion for entry of judgment that sought, in part, to explicitly require HHSC to recalculate the applicable reimbursement rates dating back to FY 2002. At the hospitals' urging, the district court signed a new judgment on March 9, 2009, enjoining HHSC from applying the cutoff date to the data used to calculate the hospitals' reimbursement rates for state fiscal years 2002 through 2009, and until such time as it lawfully implements a new rate.[5] The district court's judgment also provided that the hospitals were entitled to administrative appeals seeking recalculation of their rates under HHSC's rules. HHSC appealed. It complained that the district court's judgment granted more relief than our judgment to the extent the district court enjoined the agency from applying the cutoff date to calculate the hospitals' reimbursement rates for years predating this Court's mandate, that is, from FY 2002 through April 2008.

[5] By this time HHSC had adopted a new rule that included the cutoff date. 1 TEX. ADMIN. CODE § 355.8052(c)(4)(B) (2008). That rule was to apply to a new recalculation of all Texas hospitals' rates that the Legislature had ordered for FY 2009. General Appropriations Act, 80th Leg., R.S., ch. 1428, art. II, § 57(c), 2007 Tex. Gen. Laws 4913, 5130; 33 TEX. REG. 6362 (2008). Funding the recalculation, however, was dependent on the federal government approving a Medicaid reform waiver authorized by the Legislature. 33 TEX. REG. 10311 (2008). The reform waiver ultimately was not approved, and so the contingent rate recalculation for FY 2009 was not funded or implemented.

While HHSC pursued its appeal in the courts, the hospitals proceeded with their administrative appeals. Although the scope of these appeals remained at issue in the court of appeals, HHSC nevertheless commenced recalculating the hospitals' rates without the cutoff date. In HHSC's view, this work had to be done in any event because it believed that the district court's judgment tracked the relief granted in this Court, at least in part.

By letter dated March 24, 2009, the hospitals renewed their appeal-hearing requests, and their appeals were consolidated and set before an Administrative Law Judge (ALJ). By November 2009, HHSC had substantially completed recalculating the hospitals' rates without the cutoff date. As a result of this work, the rates for five of the fourteen hospitals increased, while the rates of the other hospitals did not change or decreased.

The ALJ held a hearing and issued her order in June 2010. The ALJ held that, under agency rules, HHSC could apply the increased rates to reimbursement claims from the five affected hospitals for the current fiscal year (2010) and going forward. The ALJ, however, excluded the hospitals' evidence on how the recalculation would affect their rates and reimbursements for FY 2002–2009 as irrelevant because agency rules did not authorize corrections to reimbursements for previous fiscal years.

The hospitals filed suit for review of the ALJ's order. That appeal remains pending in district court. *CHCA Conroe, L.P. v. Tex. Health & Human Servs. Comm'n*, No. D-1-GN-10-002350 (353rd Dist. Ct., Travis Cnty., Tex. July 8, 2010).

Meanwhile, the court of appeals continued its review of HHSC's appeal, which complained about the retrospective aspect of the district court's injunction and judgment. The problem with the

judgment, HHSC explained, was that it enjoined the agency from doing something it had already done. The hospitals maintained that the district court's judgment, and this Court's judgment for that matter, required HHSC to reprocess the hospitals' reimbursement claims from past years using rates computed without the cutoff date and, if the rates were higher, to pay the hospitals the difference above what they were already paid. That retroactive remedy, HHSC argued, exceeded the scope of this Court's previous declaratory judgment and was barred by both sovereign immunity and agency rules.

The court of appeals generally agreed. It reversed and vacated the district court's judgment to the extent it enjoined HHSC from applying the cutoff date for FY 2002–2007, but otherwise affirmed the judgment. 351 S.W.3d at 489. From that judgment, the hospitals appealed, complaining that the court of appeals erred in construing our 2008 judgment to grant only prospective relief. We granted the hospitals' petition for review to consider the scope of our prior judgment.

II

The hospitals contend that by declaring the cutoff-date rule invalid and enjoining its enforcement, we authorized them to seek retroactive adjustments for past fiscal years. HHSC responds that our opinion and judgment did no such thing. It submits that injunctions ordinarily operate prospectively unless the issuing court indicates otherwise and that we did not indicate otherwise. Moreover, HHSC argues that our injunction became enforceable by the district court only upon issuance of the Court's April 2008 mandate; consequently, HHSC concludes that the district court's injunction likewise should operate prospectively from the date of our mandate.

The hospitals' theory, however, is that our declaration of the cutoff date's invalidity effectively reopened past administrative proceedings, thereby establishing their right to seek reimbursement for past fiscal years. But the hospitals did not seek to establish that theory in this Court. In fact, they submitted that the Court should not address the issue.[6] And, although we concluded that, without the cutoff-date rule, the hospitals' complaints about omitted claims data would not be precluded by agency rule prohibiting a formal contest of HHSC's prospective payment methodology, we did not consider any retrospective implications. *El Paso Cnty. Hosp. Dist*., 247 S.W.3d at 715. We merely reasoned that the data omitted under the invalid cutoff would instead be in the nature of a "mechanical, mathematical, or data entry error" for which a formal appeal could be taken under agency rule. *Id*. at 716. Contrary to the hospitals' assertion, we did not decide that the hospitals could retroactively seek reimbursement for past fiscal years. That issue was instead joined in the district court and in the agency proceedings that followed our judgment.

The court of appeals similarly concludes that our invalidation of the cutoff date did not require HHSC to reprocess the hospitals' reimbursements for FY 2002–2007. 351 S.W.3d at

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[6] The hospitals' Reply to Response to Motion for Rehearing under the title, "The Parties Agree That the Issue of Retroactive Relief is Not Before This Court and Should Not Be Addressed By This Court," stated:

> In their Motion for Rehearing, the Hospitals asked the Court to render the same judgment that the Hospitals requested in their Petition for Review and Brief on the Merits, i.e., that the February 28 cutoff de declared "void and invalid" and that HHSC be "permanently enjoin[ed]" from enforcing it. Petitioners' Motion for Rehearing at 12. To emphasize the importance of obtaining this relief, the Hospitals presented authority demonstrating that a judgment declaring the February 28 cutoff void would create an avenue for the Hospitals to seek retroactive relief in a future administrative or court proceeding. *Id*. at 9. Notably, however, the Hospitals did *not* ask the Court to decide the retroactivity issue. *Id*. at 12. That issue is properly reserved until such time as the Hospitals actually seek retroactive relief in a future proceeding.

477–88. Moreover, the court notes that HHSC's rules prohibit the use of adjusted rates to correct past payments—that is, payments made in fiscal years before the adjustment occurred. *Id*. at 484–85. But the court reasons that the same rules might require correction of the hospitals' payments from FY 2008 (when this Court's mandate issued) forward. *Id*. at 484–86.

These rules, referred to herein as Former Rule § 355.8063, governed how the agency set and adjusted Medicaid reimbursement rates for hospitals during the time relevant to this appeal.[7] Although there were other components to the rates HHSC set under Former Rule § 355.8063, the one important to this appeal was a standard dollar amount (SDA) assigned to each hospital, an approximation of the hospital's costs for an average or "standard" Medicaid case. *See id*. § 355.8063(a), (b)(4), (c).

Under Former Rule § 355.8063, HHSC was to recalculate or "rebase" SDAs and reimbursement rates every three years. *See id*. § 355.8063(h), (i). This rebasing process correspondingly ran on a three-year cycle that was tied to the state fiscal year, which, as noted earlier, runs from September 1 through August 31. *See El Paso Cnty. Hosp. Dist.*, 247 S.W.3d at 713. The first year of the three-year cycle was designated as the "base year," a "12-consecutive month period of claims data selected by [HHSC] or its designee . . . ." Former Rule § 355.8063(b)(5); *see also El Paso Cnty. Hosp. Dist.*, 247 S.W.3d at 712. Following the end of the base year (FY 1), HHSC would, during the second year (FY 2), compile cost data from Medicaid claims arising from hospital admissions made during FY 1 and, based on this data, determine new SDAs, reimbursement rates,

[7] *See supra* note 1.

and relative weights. *See* Former Rule § 355.8063(n); *El Paso Cnty. Hosp. Dist.*, 247 S.W.3d at 712. These new rates would then take effect at the beginning of the third year (September 1 of FY 3) and remain effective for another three-year period, during which the same rebasing process was to be repeated. *See* Former Rule § 355.8063(n); *El Paso Cnty. Hosp. Dist.*, 247 S.W.3d at 712. In the interim between rebasings, HHSC was to make annual cost-of-living adjustments to the rates. *See* Former Rule § 355.8063(n)(2).

Before the rates became final, Former Rule § 355.8063 provided hospitals an administrative appeal process through which they could challenge perceived "mechanical, mathematical, and data entry errors in computing the hospital's base year claims data" and obtain adjustments before the new rates became effective. *See id*. § 355.8063(k). The rule, however, explicitly barred such appeals with respect to "the prospective payment methodology used by HHSC," including "the payment division methodologies[.]" *Id*. § 355.8063(k)(2). Under this administrative appeal process or appeal rule, a hospital claiming that HHSC made "a mechanical, mathematical, and data entry error in computing the hospital's base year claims data" could submit to HHSC, within sixty days after the hospital received initial notification of its SDA and payment division (which would occur during the second year of the three-year rebasing process), "a specific written request for review and appropriate specific documentation supporting its contention that there has been [such] error . . . ." *Id.* § 355.8063(k)(1)(A). HHSC then had to "conduct the review as quickly as possible and notify the hospital of the results." *Id.*; *see also El Paso Cnty. Hosp. Dist.*, 247 S.W.3d at 715 (observing that HHSC termed this procedure an "informal review"). "If the hospital [was] dissatisfied with the results of the review," the appeal rule further provided, "the hospital [could] request a formal

hearing" before the State Office of Administrative Hearings (SOAH) under the contested-case procedures of the APA. Former Rule § 355.8063(k)(1)(A); *see also El Paso Cnty. Hosp. Dist.*, 247 S.W.3d at 715.

The appeal rule further provided that if the "review or appeal" ultimately determined that an adjustment to the hospital's SDA or payment division was warranted, the timing of that adjustment would depend on when that review or appeal was completed:

> [I]f the review or appeal is completed at least 60 days before the beginning of the next prospective year, any adjustment required after completion of the review or appeal is applied to that next prospective year. If the review or appeal is not completed at least 60 days before the beginning of the next prospective year, any adjustment required after the completion of the review or appeal is applied only to the subsequent prospective year. The base year claims data used by [HHSC] pending the review or appeal is the base year claims data established by [HHSC] or is designee.

Former Rule § 355.8063(k)(1)(A). In context, "the beginning of the next prospective year" referred to September 1, the first day of the ensuing state fiscal year. The sixtieth day prior to that date is July 3. Thus, the appeal rule contemplated that if the review or appeal had not concluded by July 3 of the second year of the three-year rebasing cycle, the new SDAs and reimbursement rates—although derived from disputed data—would nonetheless take effect on the following September 1, as scheduled, pending the outcome of the review or appeal. If the review or appeal later determined that adjustments were required, those adjustments would be "applied only to the subsequent prospective year." *Id.*

In addition to the rule's appeal provision, Former Rule § 355.8063 also provided for retrospective correction of certain errors in reimbursement rates that had already been implemented.

And, within certain limitations, it allowed for reconciliation of paid reimbursement amounts with the amounts to which the hospital would be entitled under the rates as corrected. This error-correction rule provided:

> When [HHSC] or its designee determines that [it] has made an error that, if corrected, would result in the [SDA] of the provider for which the error was made changing to a new payment division, either higher or lower, [HHSC] or its designee moves the provider into the correct payment division, and . . . reprocesses claims paid using the initial, incorrect [SDA] that was in effect before the current state fiscal year by using the existing [SDA] in which the provider was moved.

Id. § 355.8063(c). The error-correction rule, however, emphasized that "[t]he correction of this error condition only applies to the current state fiscal year payments," and "[n]o corrections are made to payment rates for services provided in previous state fiscal years." *Id*.

As HHSC argues and the court of appeals found, Former Rule § 355.8063's appeal and error-correction provisions applied to the hospitals' administrative appeals. Under the appeal rule, again, any "adjustment" to reimbursement rates resulting from recalculation of the FY 2000 base-year data was to apply either to (1) "the next prospective year," if the "review or appeal is completed at least 60 days before the beginning of the next prospective year," or else (2) "only to the subsequent prospective year." Former Rule § 355.8063(k)(1)(A). As for the error-correction rule, while HHSC would be required to "move[] the provider into the correct payment division, and . . . reprocess[] claims" using the correct reimbursement rate if it determines there has been an error impacting a hospital's rates, "[t]he correction of this error condition only applies to the current state fiscal year payments," and "[n]o corrections are made to payment rates for services provided in previous state fiscal years." *Id*. § 355.8063(c).

In light of these limitations on the remedies available under Former Rule § 355.8063, the court of appeals observed that whether the hospitals could obtain adjustments to Medicaid payments dating back to FY 2002 would ultimately turn on the interpretation of the terms "next prospective year" and "current state fiscal year"; that is, whether the relevant year to which these terms refer is determined by the time the dispute began or by the time the adjustment is actually determined. This rule-application question, the court of appeals recognized, was for it to decide, as it was not an issue this Court considered in the previous appeal. *See El Paso Cnty. Hosp. Dist.*, 247 S.W.3d at 713–16.

The court then looked to the agency's interpretation of "next prospective year" and "current state fiscal year," noting the guiding principle of deference to an agency's interpretation of its own rules unless plainly erroneous or inconsistent with the rule's text. 351 S.W.3d at 485 (citing *Public Util. Comm'n v. Gulf States Utils. Co.*, 809 S.W.2d 201, 207 (Tex. 1991)). Under the agency's interpretation, the terms refer to the time at which the rate or payment adjustments are made rather than the time at which the proceeding or dispute originated. The court of appeals concluded

> that construing "next prospective year" to mean the year beginning immediately after the present point in time, not some earlier one, and "current state fiscal year" to mean the year that includes the present point in time, not some earlier one, [was neither] plainly erroneous or inconsistent with the ordinary meaning of these words and phrases.

Id. This led the court to conclude that the data entry errors excluded by the February 28 cutoff, as contemplated by our previous judgment, "did not provide the Hospitals a remedy with respect to the reimbursement rates applicable during FY 2002 through 2007, due to the limitations of Former Rule § 355.8063." *Id*. We agree that our prior opinion and judgment did not create a remedy for the hospitals' past reimbursement claims. Moreover, the hospitals do not challenge these rules or the

court of appeals' reliance thereon except to the extent they view our procedural invalidation of the cutoff rule as superseding the effect of these duly adopted agency rules.

III

Apart from the assumed retroactive effect of our prior declaratory judgment, the hospitals contend that our injunction required HHSC immediately to commence recalculating rates without the cutoff date and to make adjustments for the affected hospitals prospectively, that is, for FY 2008 and forward. Their assumption is that our judgement "enjoining [the cutoff-date rule's] enforcement" not only prevented HHSC from applying the rule when it gathered data to recalculate the hospitals' reimbursement rates, but also affirmatively required that recalculation itself. They argue, then, that whenever HHSC paid an individual reimbursement claim, it was enforcing the cutoff date because the rate it applied to pay that claim was based on the 2001 calculations that used data collected under the cutoff-date rule. The hospitals therefore assert that HHSC is in contempt of our injunction because it has not reimbursed the five hospitals affected by the invalid cutoff-date rule for FY 2008 and FY 2009.

The court of appeals concluded that HHSC was not in contempt of our injunction. 351 S.W.3d at 488 (noting that the agency "had already agreed to recalculate the applicable reimbursement rates in accordance with the supreme court's judgment"). The court also concluded that our opinion, which declared that the agency's appeal rule did not prohibit the "review of individual claims data excluded by the February 28 cutoff," *El Paso Cnty. Dist. Hosp.*, 247 S.W.3d at 716, "provide[d] the Hospitals a remedy with respect to rates in FY 2008 forward by virtue of the error-correction rule." 351 S.W.3d at 485. But apart from holding the hospital's contempt claims

moot, the court expressed no opinion whether the hospitals possessed any other remedy with respect to FY 2008 or FY 2009. *Id*. at 489.

HHSC similarly maintains that it has complied with our previous judgment "enjoining the [cutoff-date rule's] enforcement." *El Paso Cnty. Hosp. Dist.*, 247 S.W.3d at 715. Because the cutoff-date rule is, as this Court described, a "data collection method," *id*. at 711, HHSC submits that it "enforces" the rule when it collects data to be used in a rate calculation. The Court's injunction thus prevented HHSC from applying the cutoff date when collecting the data for the administrative appeals that the Court held the hospitals were entitled to under agency rules. *Id*. at 716. HHSC asserts that the Court's injunction did not require it to immediately recalculate the hospitals' reimbursement rates but rather required that it recalculate the hospitals' rates in future administrative proceedings without using the cutoff date.[8]

HHSC further argues that the hospitals' interpretation of the injunction as requiring the immediate recalculation of the hospitals' rates is unreasonable because it renders the Court's opinion and judgment about the administrative appeals meaningless. In other words, if our injunction, of its own accord, required HHSC to recalculate the hospitals' rates immediately, there was no reason for the Court to hold that the hospitals were entitled to proceed with administrative appeals, where their

[8] HHSC submits that the Court's injunction further prevented it from using the cutoff date when it gathered data to compute all Texas hospitals' rates in the recalculation initially planned and funded by the Legislature for FY 2009. To comply, HHSC promulgating the cutoff date in a formal rule to cure the defect that prompted the injunction. Although the FY 2009 recalculation ultimately was not funded or implemented, HHSC submits that it again complied with the Court's injunction by promulgating the cutoff date in the rules that governed the statewide recalculations implemented in FY 2011 and FY 2012. 1 TEX. ADMIN. CODE § 355.8052(c)(4)(B) (2010); 1 TEX. ADMIN. CODE § 355.8052(c)(5)(B) (2011).

claims data could be reviewed, and their rates recalculated, in that process. See *El Paso Cnty. Hosp. Dist.*, 247 S.W.3d at 716. We agree.

* * *

In the previous appeal, we declared the agency's cutoff date for the collection of Medicaid data invalid because it was a "rule" under the APA that had not been properly adopted, and we enjoined the agency from continuing to use it. *Id*. at 715. We further concluded that the cutoff-date rule could not be used to deny the hospitals a right to appeal under agency rule that allowed an appeal for data entry errors—but not for methodology complaints—because the hospitals were entitled to a formal review with respect to individual claims data excluded by the invalid cutoff rule. *Id*. at 716. We did not decide whether the hospitals could reopen past agency proceedings or obtain relief for past years. Nor did we expressly order the agency to recalculate these hospitals' rates, although that relief was available to the hospitals under the agency's error-correction rules. We accordingly agree with the court of appeals' interpretation and application of our judgment in the previous appeal, and its judgment is therefore affirmed.

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John P. Devine
Justice

Opinion delivered: May 17, 2013

IN THE SUPREME COURT OF TEXAS

NO. 11-0834

EL DORADO LAND COMPANY, L.P., PETITIONER,

v.

CITY OF MCKINNEY, RESPONDENT

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

Argued January 9, 2013

JUSTICE DEVINE delivered the opinion of the Court.

The issue in this inverse condemnation lawsuit is whether a reversionary interest, consisting of the grantor's right to purchase real property on the occurrence of a future event, is a sufficient property interest to support an inverse condemnation claim. The trial court concluded it was not and dismissed the case. The court of appeals affirmed the trial court's judgment, holding that the grantor's retained right was not a compensable property interest under the Takings Clause of the Texas Constitution. 349 S.W.3d 215, 216, 218 (Tex. App.—Dallas 2011) (citing TEX. CONST. art I, § 17). Because we conclude that the reversionary interest here is a compensable property interest, we reverse and remand to the trial court.

I

In 1999, El Dorado Land Company sold several acres of land to the City of McKinney for use as a park. El Dorado's special warranty deed provided that the conveyance was "subject to the requirement and restriction that the property shall be used only as a Community Park." If the City decided not to use the property for that purpose, the deed further granted El Dorado the right to purchase the property. The deed labeled this right an option and set the option's price at the amount the City paid or the property's current market value, whichever was less. El Dorado also had the right to inspect the property and to close on the purchase within ninety days after inspection.

Ten years after acquiring the property, the City built a public library on part of the land. The City did not offer to sell the property to El Dorado or otherwise give notice before building the library. After learning about the library, El Dorado notified the City by letter that it intended to exercise its option to purchase. El Dorado's letter further asked the City within ten days to acknowledge its obligations under the deed and to suggest an acceptable closing date.

After the City failed to acknowledge El Dorado's rights under the deed, El Dorado sued for inverse condemnation. The City responded with a plea to the jurisdiction. In its plea, the City argued that El Dorado's claim did not involve a compensable taking of property but a mere breach of contract for which the City's governmental immunity had not been waived. The trial court agreed, sustaining the City's plea and dismissing El Dorado's lawsuit. The court of appeals similarly agreed and affirmed the trial court's judgment. 349 S.W.3d 216.

II

The dispute here continues over the nature of El Dorado's interest in this land. El Dorado argues that its right to purchase this property is a real property interest, in the nature of a reversionary interest, and more particularly described as a right of reentry. The City, on the other hand, contends that El Dorado's option is not a real property interest but a mere contract right. As such, the City argues that the option is unenforceable against it absent an express waiver of the City's governmental immunity.[1] Because the Legislature has not chosen to waive governmental immunity for this particular type of contract claim,[2] the City concludes that the court of appeals correctly affirmed the dismissal of El Dorado's claim.

The court of appeals similarly reasoned that the deed restriction and option were merely contract rights that were not compensable against a governmental entity under the Texas Constitution. *See* 349 S.W.3d at 218 (observing that inverse condemnation claims have "traditionally involved interests in real property and not the alleged taking of property interests created under contract"). The court accordingly "reject[ed] El Dorado's argument that, pursuant to the deed provision, it held a reversionary interest or the 'possibility of reverter' in the property." *Id*.

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[1] *See, e.g.*, *Gen. Servs. Comm'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 597 (Tex. 2001) (noting "that there is but one route to the courthouse for breach-of-contract claims against the State, and that route is through the Legislature").

[2] The Legislature has waived a municipality's immunity to suit for contract claims involving goods and services. TEX. LOC. GOV'T CODE §§ 271.151(2), (3)(A), 271.152.

While we agree that the deed did not create a possibility of reverter, we disagree that El Dorado did not retain another type of reversionary interest in the property.

El Dorado refers to its reversionary interest as a right of reentry. A right of reentry is a "future interest created in the transferor that [may] become possessory upon the termination of a fee simple subject to a condition subsequent." RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 25.2 cmt. b (hereafter RESTATEMENT (THIRD) OF PROPERTY); *see also Davis v. Vidal*, 151 S.W. 290, 292–93 (Tex. 1912) (describing a right of reentry as "a contingent reversionary interest in the premises resulting from the conveyance of an estate upon a condition subsequent where there has been an infraction of such condition").

Under the deed, El Dorado's possessory interest was contingent on the property's use. If the City violated the deed restriction, El Dorado retained the power to terminate the City's estate.[3] The deed referred to this power or right as an option, but it effectively functioned as a power of termination, or as El Dorado labels it, a right of reentry. El Dorado's deed conveyed a defeasible estate ("a fee simple subject to a condition subsequent")[4] to the City with El Dorado retaining a conditional future interest—the power to terminate the City's defeasible estate on the occurrence of

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[3] This power, referred to in the deed as the option to purchase, is also known at common law by other names, such as a right of entry for condition broken, a right of reentry for breach of condition subsequent, or a power of termination. *See* 3 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 20.01[1] (2000) ("The term 'power of termination' is used by the Restatement and by some courts, but most courts and most lawyers employ the term 'right of entry for condition broken.'"); *see also* 34 TEX. JUR. 3D *Estates* § 8 at 546 (2010) (noting that "a future interest" may be "characterized as a right of reentry for breach of condition subsequent or, in other words, an estate subject to a power of termination").

[4] RESTATEMENT (THIRD) OF PROPERTY § 25.2 cmt. b.

a condition subsequent.[5] We have previously equated this right to an estate or interest in land. *Davis*, 151 S.W. at 293; *see also* RESTATEMENT OF PROPERTY § 153(1)(a) & cmt. a (noting that the term future interest includes an interest in land which "may become a present interest" and is "sufficiently broad to include . . . powers of termination").

Contrary to the court of appeals, we conclude that El Dorado retained a reversionary interest in the property. We likewise disagree with the court of appeals' analysis of El Dorado's claim as a contract right dependent on a statutory waiver of the City's governmental immunity. A statutory waiver of immunity is unnecessary for a takings claim because the Texas Constitution waives "governmental immunity for the taking, damaging or destruction of property for public use." *Steele v. City of Houston*, 603 S.W.2d 786, 791 (Tex. 1980).

El Dorado's claim is that the City took or destroyed its reversionary interest in the property by refusing either to convey the property or to condemn El Dorado's interest. The issue then is whether El Dorado's reversionary interest can support a takings claim under the Texas Constitution. TEX. CONST. art. I § 17. El Dorado submits that it can under our decision in *Leeco Gas & Oil Co. v. Nueces County*, 736 S.W.2d 629 (Tex. 1987).

III

Leeco, like this case, involved a restricted conveyance of land to a governmental entity that later sought to avoid the deed restriction. The land in that case was donated to Nueces County for

[5] *See* RESTATEMENT OF PROPERTY § 155 (defining a power of termination as "the future interest created in the transferor . . . by a transfer of either an estate in land or an analogous interest in a thing other than land, subject to a condition subsequent").

use as a park, and the deed included a restrictive covenant requiring that use. *Leeco*, 736 S.W.2d at 630. The grantor retained a reversionary interest, described as a possibility of reverter,[6] in the event the land was not used as a park. *Id*.

Nueces County subsequently decided to use the land for another purpose and sought to condemn the grantor's reversionary interest. Although the land was worth millions of dollars, the trial court awarded only nominal damages for the grantor's reversionary interest, and the court of appeals affirmed that award. *Id.* We reversed and remanded, concluding that the grantor's reversionary interest was worth more than nominal damages. *Id.* at 631–32.

Relying on the Restatement of Property, we observed that a possibility of reverter was a protected property interest, the value of which depended upon the imminence of possession. *Id.* We explained that a nominal valuation would be appropriate for the government taking such property only "when the event upon which the possessory estate in fee simple defeasible is to end is not probable within a reasonably short period of time." *Id.* at 631. Conversely, we explained that nominal damages would be inappropriate if the defeasible event was reasonably certain to occur in the near future or had already occurred. *Id.* Under those circumstances, we said the compensable value of the reversionary interest should be measured by the amount "the value of the unrestricted fee exceeds the value of the restricted fee." *Id.* at 631–32. *Leeco* thus recognizes that a future interest in real property is compensable under the Takings Clause, TEX. CONST. art. I, § 17, and that

[6] A possibility of reverter is a term of art for a future interest retained by a grantor that conveys a determinable fee; "it is the grantor's right to fee ownership in the real property reverting to him if the condition terminating the determinable fee occurs." *Luckel v. White*, 819 S.W.2d 459, 464 (Tex. 1991).

the owner of such an interest is entitled to a condemnation award. *Id.* at 631 (citing RESTATEMENT OF PROPERTY § 53).

The court of appeals' opinion does not directly address *Leeco*, but arguably attempts to distinguish the decision by observing that the deed in this case did not include a possibility of reverter. 349 S.W.3d at 218. While we agree it did not, as previously explained, we do not accept the court's further conclusion that El Dorado's deed did not create a reversionary interest. *See id.* (rejecting El Dorado's argument that "it held a reversionary interest or the 'possibility of reverter' in the property"). As El Dorado argues, the deed restriction and option created in El Dorado a right of reentry, which is a reversionary interest, albeit of a different type than the possibility of reverter reserved in *Leeco*.

The City argues that *Leeco* is distinguishable on this ground because a possibility of reverter is materially different from the right or option reserved by El Dorado. At oral argument, the City elaborated on the distinction, explaining that Leeco's reversionary interest was different because it was self-executing, whereas the right retained by El Dorado was not. While we agree that Leeco's possibility of reverter and El Dorado's right of reentry are different types of reversionary interests, it is not apparent why their technical differences make one a compensable property interest and the other a worthless right. In both, the termination of the possessory estate rests on the occurrence of a condition subsequent imposed upon the conveyance. That a right of reentry requires its holder to make an election does not make it any less a property right, particularly where as here the holder has made the required election.

Historically, the law divided future interests into five types: (1) remainders, (2) executory interests, (3) reversions, (4) possibilities of reverter, and (5) rights of entry. RESTATEMENT (THIRD) OF PROPERTY § 25.2 cmt. a. Remainders and executory interests are future interests created in persons other than the grantor. 3 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 20.01[2] (2000). Reversions, possibilities of reverter, and rights of entry are interests that remain with the grantor. *Id*.; *see also* RESTATEMENT (THIRD) OF PROPERTY § 25.2 cmt. b (noting their classification "as reversionary future interests, because they were retained by the transferor"). Collectively, the types of future interests that remain with the grantor are reversionary interests[7] and may be viewed "as claims to property that the grantor never gave away." POWELL ON REAL PROPERTY § 20.02[1].

The latest Restatement dispenses with the historical parsing of future interests, recognizing only reversions and remainders. RESTATEMENT (THIRD) OF PROPERTY § 25.2. It thus abandons distinctions that previously differentiated a possibility of reverter from a right of entry because, in its view, no legal consequences attach to such distinctions. *See id*. § 25.2 cmt. a ("Today, no legal consequences depend upon placing a future interest in one category or another.").

We likewise see no reason to distinguish between the reversionary interest in *Leeco* and the one in this case. Under Texas law, the possibility of reverter and the right of reentry are both freely

[7] The distinctions between reversionary interests rest largely on the form of the conveyance. Thus, a "reversion" is "a future interest retained by the transferor that could become possessory upon the termination of a life estate or a term of years"; a "possibility of reverter" is "a future interest retained by the transferor that could become possessory upon the termination of a fee simple determinable"; and a "right of entry" is "a future interest created in the transferor that could become possesory upon the termination of a fee simple subject to a condition subsequent." RESTATEMENT (THIRD) OF PROPERTY § 25.2 cmt. b.

assignable like other property interests. *James v. Dalhart Consol. Indep. Sch. Dist.*, 254 S.W.2d 826, 829 (Tex. Civ. App.—Amarillo 1952, writ ref'd). And, although the earlier Restatement individually identified automatic reversions and other interests, like El Dorado's power of termination or right of reentry, it nevertheless grouped them as reversionary interests. *See* RESTATEMENT OF PROPERTY § 153 cmt. a. Simply put, both the possiblity of reverter and the right of reentry are future interests in real property. *See* LEWIS M. SIMES & ALLAN F. SMITH, THE LAW OF FUTURE INTERESTS § 1 (2d ed. 1956) (defining a future interest as "an interest in land or other things in which the privilege of possession or of enjoyment is future and not present"). And *Leeco* recognizes that a future interest in real property is compensable under the Takings Clause. 736 S.W.2d at 631–32 (citing RESTATEMENT OF PROPERTY § 53). We accordingly reject the City's argument that *Leeco* is distinguishable merely because it involved a different type of reversionary interest.

The City next argues that *Leeco* is distinguishable because of public policy concerns unique to that case. The park land in *Leeco* was donated to the county, whereas the land in this case was sold, at least in part, to the City for use as a park.[8] In *Leeco*, we lamented about the unfairness of permitting the government to avoid the restrictions attached to a gift by paying nominal damages and suggested in passing that the failure to recognize Leeco's reversionary interest as a compensable property interest under the Takings Clause might adversely affect future donations. *Leeco*, 736 S.W.2d at 631. The City submits that this public policy concern is not implicated here because it

[8] A city ordinance applicable to El Dorado's residential development required it to donate about fifteen acres for park purposes. In negotiations with El Dorado, the City was able to purchase an adjoining seventeen acre tract. Both tracts were included in a single deed to the City.

paid El Dorado for the land. In the final analysis, however, the viability of the takings claim in *Leeco* did not turn on the donor's benevolence but, instead, on the reservation the donor included in the deed. The Restatement makes no distinction between gifts and sales, and it is not apparent why the compensable nature of a future interest should rest on donative intent rather than the donor's intent to retain a contingent future interest in the property conveyed.

Finally, the City argues that *Leeco* is procedurally distinguishable because the county initiated the condemnation proceedings, whereas in this case El Dorado commenced an inverse condemnation case. The City suggests that we merely assumed that Leeco's reversionary interest was compensable because no one disputed it. But had we not viewed Leeco's future interest as a vested compensable property interest, there would have been no point to our taking the case. We would have simply let the award of nominal damages stand. Moreover, the procedural distinctions between condemnation and inverse condemnation cases are generally immaterial. *See City of Dallas v. Stewart*, 361 S.W.3d 562, 567 (Tex. 2012) (noting that although the actions differ based on who initiates, rules of evidence and measure of damages to property are "substantially similar" in both kinds of cases).

When private property is taken for a public purpose, our constitution requires that the government compensate the owner. TEX. CONST. art I, § 17. A condemnation proceeding is the formal process by which that compensation is determined. But when the government takes private property without paying for it, the owner must bring suit for inverse condemnation. *Westgate, Ltd. v. State*, 843 S.W.2d 448, 452 (Tex. 1992). The action is termed "inverse" because it is initiated by

the private property owner instead of the government, but its purpose and procedure are generally no different. *Stewart*, 361 S.W.3d at 567.

* * *

In summary, we conclude that the reversionary interest retained by El Dorado in its deed to the City is a property interest capable of being taken by condemnation. We express no opinion, however, on whether a taking has occurred in this case. We reverse and remand to the trial court for it to determine whether the City violated its deed restrictions by building a public library on a part of the land dedicated for use as a community park and, if so, to what extent the City has taken El Dorado's interest in the restricted property.

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John P. Devine
Justice

Opinion Delivered: March 29, 2013

IN THE SUPREME COURT OF TEXAS

NO. 11-0891

IN RE CARRIE DEAN, RELATOR

ON PETITION FOR WRIT OF MANDAMUS

CHIEF JUSTICE JEFFERSON delivered the opinion of the Court.

JUSTICE LEHRMANN delivered a concurring opinion.

JUSTICE GREEN did not participate in the decision.

Motivated in part to prioritize "home state jurisdiction" in child custody proceedings, Texas adopted the Uniform Child Custody Jurisdiction and Enforcement Act. *See Powell v. Stover*, 165 S.W.3d 322 (Tex. 2005). Forty-eight other states, the District of Columbia, Guam, and the United States Virgin Islands have done the same.[1]

The Act encourages national uniformity in child custody disputes and addresses the increasing mobility of American families. *See Powell*, 165 S.W.3d at 326. Previously, state courts modified custody determinations each time a child moved from one state to another, and those orders

[1] Massachusetts and Puerto Rico recently introduced the UCCJEA to their legislatures for proposed adoption. *Child Custody Jurisdiction and Enforcement Act*, UNIFORM LAW COMMISSION, http://www.uniformlaws.org/Act.aspx?title=Child%20Custody%20Jurisdiction%20and%20Enforcement%20Act (all Internet material as visited Dec. 19, 2012, and copy available in Clerk of Court's case file). *See also* 39 GUAM CODE § 39101 et seq.

often conflicted. To minimize these conflicts, the Act provides guidance on how to determine which state has jurisdiction over all subsequent child custody proceedings.[2] The Act makes the child's "home state" the primary factor in this equation. *See* UNIF. CHILD CUSTODY JUR. & ENF. ACT Prefatory Note, 9 U.L.A. 650–51 (1997) (stating that the Act sought to "eliminate the inconsistent state interpretations" and "prioritize[] home state jurisdiction in [s]ection 201" when child custody determinations are involved). It "establish[es] clear bases" for a court to "tak[e] jurisdiction and . . . discourage[s] competing child custody orders" among different states.[3]

We consider today whether a Texas court has jurisdiction over a custody determination involving a child who was born in New Mexico and has lived there all his life. Because New Mexico, not Texas, is the child's home state, and because we find no other "exclusive, continuing jurisdiction[al]" bases under the Act, *see* TEX. FAM. CODE § 152.202, the Texas court improperly assumed jurisdiction. We also think the New Mexico trial court erroneously ceded jurisdiction to Texas. Until the New Mexico appellate court addresses that matter, and because jurisdiction must reside somewhere in the interim, we lift our stay and order the Texas trial court to confer immediately with the New Mexico Court of Appeals, where the case is currently pending. *See* TEX.

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[2] The Act distinguishes between child custody "determinations" and "proceedings." A child custody determination "means a judgment, decree, or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child. The term includes a permanent, temporary, initial, and modification order." UNIF. CHILD CUSTODY JUR. & ENF. ACT § 102(3), 9 U.L.A. 658 (1997). A child custody proceeding "means a proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue . . . [and] includes a proceeding for divorce, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights, and protection from domestic violence, in which the issue may appear." *Id.* § 102(4). Therefore, Richard's original petition for *divorce* may also be characterized as a "child custody proceeding" under the UCCJEA.

[3] *Child Custody Jurisdiction and Enforcement Act Summary*, UNIFORM LAW COMMISSION, http://www.uniformlaws.org/ActSummary.aspx?title=Child Custody Jurisdiction and Enforcement Act.

FAM. CODE § 152.201(a) (explaining "home state jurisdiction"); *see also id.* § 152.110(b) ("A court of this state may communicate with a court in another state concerning a proceeding arising under this chapter."). Accordingly, we conditionally grant relief.

* * *

Richard Hompesch, III, and Carrie Dean were married in September 2010, and lived together in Irving. The couple separated nineteen days after their wedding. Two months later Carrie, who was pregnant with Richard's child, moved to New Mexico without notifying Richard.

In February 2011, Richard filed for divorce in Dallas County and sought orders concerning the upcoming birth of their child. Carrie was personally served with process in Albuquerque, New Mexico. She gave birth to a son, J.S.D., in New Mexico, and subsequently answered the Texas case. J.S.D. has resided in New Mexico with Carrie continuously since his birth. After learning of J.S.D.'s birth, Richard amended his petition to request shared custody and sought Carrie's compelled return to Dallas with J.S.D.

Carrie then petitioned a New Mexico court to adjudicate custody pursuant to the New Mexico Child Custody Jurisdiction and Enforcement Act.[4] Carrie alleged that the New Mexico court, and not Texas, had jurisdiction because New Mexico was J.S.D.'s "home state." *See* N.M. STAT. § 40-10A-201(a) (setting forth substantively identical bases for "home state jurisdiction" to those found in Texas Family Code section 152.201(a)). She simultaneously sought dismissal of the Texas proceeding.

[4] New Mexico adopted the UCCJEA in 2001, and its provisions relevant to this case are substantially the same as those of the Texas Act. *See Child Custody Jurisdiction and Enforcement Act: UCCJEA Adoptions*, UNIFORM LAW COMMISSION, http://uniformlaws.org/Shared/docs/UCCJEAadoptions.pdf; *see also* N.M. STAT. § 40-10A-101 et seq.

The Texas and New Mexico trial courts, along with both parties' counsel, conferred in late August 2011.[5] *See* N.M. STAT. § 40-10A-110(a) (providing that "[a] court of this state may communicate with a court in another state concerning a proceeding arising under the Uniform Child-Custody Jurisdiction and Enforcement Act"); TEX. FAM. CODE § 152.110(b) (same). The New Mexico trial judge concluded that New Mexico was J.S.D.'s home state because he was born there. J.S.D. had never lived anywhere else. Even though the New Mexico court did not find that New Mexico was an inconvenient forum, or that the parties had engaged in unjustifiable conduct—the two bases on which a home state may decline jurisdiction[6]—the New Mexico court deferred to the Texas court to "make the first call."

The Texas associate judge concluded that Texas had jurisdiction over the proceedings because Richard filed his divorce petition in Texas first. Based on that decision, and even though it thought that "New Mexico does have jurisdiction . . . [and is J.S.D.'s] home state," the New Mexico court dismissed Carrie's pending custody suit without prejudice. It noted that Carrie's custody suit could be "refiled if in fact—somewhere along the line it's discovered that Texas doesn't have jurisdiction."

When the New Mexico trial court dismissed the case, the Texas district court adopted the associate judge's recommendations, which appointed Richard and Carrie as J.S.D.'s Temporary Joint

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[5] Pursuant to sections 201.005(a) and 201.007(a) of the Texas Family Code, the Texas district court associate judge conducted the conference with the New Mexico trial court. *See* TEX. FAM. CODE §§ 201.005(a), .007(a) (providing that a district judge "may refer to an associate judge any aspect of a suit over which the court has jurisdiction under this title" and enumerating an associate judge's powers).

[6] UNIF. CHILD CUSTODY JUR. & ENF. ACT §§ 201(a), 207, 208, 9 U.L.A. 671, 682–84 (1997) (emphases added); *see also* N.M. STAT. §§ 40-10A-201(a), -207, -208; TEX. FAM. CODE §§ 152.201(a), .207, .208.

Managing Conservators, granted Carrie the right to establish J.S.D.'s residence in either Dallas or Albuquerque during pending appeals, and set forth guidelines for both parents' access to J.S.D.

Carrie appealed the New Mexico trial court's dismissal order to the New Mexico Court of Appeals. Earlier this year, that court issued two proposed summary dispositions[7] proposing to hold that New Mexico is J.S.D.'s home state with exclusive jurisdiction over custody and visitation.[8] Carrie's New Mexico appeal has since moved to the court's general calendar, where it remains pending. *See* N.M.R.A. Rule 12-210(B), (D) (describing general and summary calendar processes).

After unsuccessfully seeking mandamus relief from the court of appeals in the Texas case, ___ S.W.3d ___, Carrie petitioned this Court for a writ of mandamus. She concurrently sought a stay of the Texas trial court's order, which we granted. We must decide whether the Texas court properly assumed jurisdiction over the custody determination. Richard makes a number of arguments based on his desire to be involved with Carrie's prenatal care and J.S.D.'s birth. Because Carrie has already given birth to J.S.D., we limit our discussion to proceedings involving his custody.

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[7] When a case is placed on the summary calendar, the appellate court issues a proposed disposition and states the basis for its proposal. The parties then have twenty days from the date of service of the notice of proposed disposition to file memoranda as to why the disposition should or should not be made. After reviewing any filed memoranda, "the appellate court will either reassign the case to a nonsummary calendar, issue another notice of proposed summary disposition or proceed to decide the case by opinion or order." N.M.R.A. Rule 12-210(D).

[8] *See* New Mexico Court of Appeals' second proposed summary disposition holding, in relevant part, that:

> New Mexico is [J.S.D.'s] "home state" and, as such, New Mexico has exclusive and paramount jurisdiction over the custody and visitation issues relating to [J.S.D.]. [T]he district court erred in ceding jurisdiction to Texas and dismissing the case. [The court] propose[s] to reject [Richard's] request for a stay pending the Texas Supreme Court decision, and . . . again propose[s] to reverse the district court and remand for the district court to proceed to exercise its jurisdiction and determine the custody and visitation issues relating to [J.S.D.].

The Act, as adopted by Texas and New Mexico, states that a court has jurisdiction to make an initial child custody determination only if:

> (1) this State is the home State of the child on the date of the commencement of the proceeding . . .
>
> (2) a court of another State does not have jurisdiction under paragraph (1), or a court of the home State of the child has declined to exercise jurisdiction *on the ground that this State is the more appropriate forum under Section 207*[9] *and 208*,[10] and:
>
> (A) the child and the child's parents, or the child and at least one parent . . . have a significant connection with this State other than mere physical presence; and
>
> (B) substantial evidence is available in this State concerning the child's care, protection, training, and personal relationships;
>
> (3) all courts having jurisdiction under paragraph (1) or (2) have declined to exercise jurisdiction *on the ground that a court of this State is the more appropriate forum to determine the custody of the child* under Section 207 or 208; or
>
> (4) no court of any other State would have jurisdiction under the criteria specified in paragraph (1), (2), or (3).

UNIF. CHILD CUSTODY JUR. & ENF. ACT § 201(a), 9 U.L.A. 671 (1997) (emphases added); *see also* N.M. STAT. § 40-10A-201(a); TEX. FAM. CODE § 152.201(a).

These four grounds provide "the exclusive jurisdictional basis for [a Texas court to] mak[e] a child custody determination." TEX. FAM. CODE § 152.201(b). So, unless a court finds that it has jurisdiction under one of the four enumerated grounds, it cannot exercise jurisdiction over a child

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[9] UNIF. CHILD CUSTODY JUR. & ENF. ACT § 207, 9 U.L.A. 682 (1997) ("Inconvenient Forum") (allowing a court of this State with jurisdiction to make a child-custody determination under this Act to "decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another State is a more appropriate forum").

[10] UNIF. CHILD CUSTODY JUR. & ENF. ACT § 208, 9 U.L.A. 683–84 (1997) ("Jurisdiction Declined by Reason of Conduct") (allowing a court to decline jurisdiction upon a finding that "a person seeking to invoke its jurisdiction has engaged in unjustifiable conduct" in certain situations).

custody determination. Furthermore, the drafters made clear that one of the Act's primary purposes was to prioritize the child's home state. *See* UNIF. CHILD CUSTODY JUR. & ENF. ACT Prefatory Note, 9 U.L.A. 649–51 (1997). "Home state" means:

> [T]he State in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding. *In the case of a child less than six months of age, the term means the State in which the child lived from birth with any of the persons mentioned.*

See UNIF. CHILD CUSTODY JUR. & ENF. ACT § 102(7), 9 U.L.A. 658 (1997) (emphasis added); *see also* N.M. STAT. § 40-10A-102(7); TEX. FAM. CODE § 152.102(7).

Section 152.201(a) of the Texas Family Code codified section 201(a) of the Act. The Texas Act also codified the Act's "home state" definition, which gives concrete guidance for instances in which a party sues for custody of a child when the child at issue is less than six months old. *See* TEX. FAM. CODE § 152.102(7). Once the home state is correctly identified, jurisdiction in that state's courts is exclusive unless that state properly cedes jurisdiction based on circumstances the statute prescribes.[11] *See* TEX. FAM. CODE §§ 152.201(b), .202(a) ("Subsection [152.201](a) is the exclusive jurisdictional basis for making a child custody determination by a court of this state" and "a court of this state which has made a child custody determination consistent with [s]ection 152.201 . . . has exclusive continuing jurisdiction over the determination.").

Although the home state cannot be determined before a child is born, it was ascertainable when Carrie filed the New Mexico case and when the Texas and New Mexico courts conferred.

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[11] For example, judicial findings of unjustifiable conduct by a parent seeking to affect jurisdiction under the statute according to section 208 might result in another state having jurisdiction. *See* UNIF. CHILD CUSTODY JUR. & ENF. ACT § 208, 9 U.L.A. 683–84 (1997).

New Mexico is J.S.D.'s home state—he was born there and has lived there ever since. When the Texas and New Mexico courts discussed the matter, the New Mexico court had not yet declined jurisdiction under the Act, and the Texas court should not have assumed it at that time. Instead, the two courts should have conducted a more complete examination of which state had jurisdiction under the Act to decide custody issues after J.S.D.'s birth.

Whether the Texas divorce action was filed first is irrelevant in determining jurisdiction over custody matters, as the two proceedings involve different inquiries. *See, e.g.*, *Seligman-Hargis v. Hargis*, 186 S.W.3d 582 (Tex. App.—Dallas 2006, no pet.) (holding that trial court's jurisdiction to hear divorce action did not automatically give it authority to decide child custody issues as well); *see also Boots v. Lopez*, 6 S.W.3d 292 (Tex. App.—Houston [14th Dist.] 1999, pet. denied) (stating that trial court's jurisdiction to resolve certain issues in divorce action may be limited when it lacks jurisdiction under the Uniform Child Custody Jurisdiction Act). Jurisdiction over custody determinations is governed by the Act, regardless of whether there is an ongoing divorce. *See, e.g., Arnold v. Price*, 365 S.W.3d 455 (Tex. App.—Fort Worth 2011, no pet.) (holding that California, not Texas, was "home state" for child born in California who resided in California from birth until divorce trial, regardless of father's filing for divorce and custody in Texas prior to child's birth); *Waltenburg v. Waltenburg*, 270 S.W.3d 308 (Tex. App.—Dallas 2008, no pet.) (holding that Texas, not Arizona, was child's "home state" immediately upon birth in Texas when child remained in Texas with mother after birth until filing of petition, regardless of father's filing for divorce in Arizona prior to child's birth). That is not to say the divorce proceedings are irrelevant, as they may influence a home state's decision about its forum's convenience. *See, e.g.*, UNIF. CHILD CUSTODY

JUR. & ENF. ACT §§ 201(a), 207, 9 U.L.A. 671, 682–83 (1997) (permitting home state to decline jurisdiction if it is an inconvenient forum). But one state may have jurisdiction over custody even if the divorce is decided by another state's court. *See* TEX. FAM. CODE § 6.308(a) (stating that a court "may" exercise jurisdiction over portions of a divorce action for which it has authority, not that it must); *see also Boots*, 6 S.W.3d at 294 (noting that "the language of the statute is discretionary, not mandatory" and that "it was within the trial court's discretion whether to exercise partial jurisdiction").

* * *

Richard contends that if section 152.201(a) gives New Mexico exclusive jurisdiction, it is unconstitutional. He argues that section 152.201(a) violates the separation of powers doctrine and the open courts provision of the Texas Constitution, as well as the Texas Equal Rights Amendment and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. We find these arguments unpersuasive.

The separation of powers doctrine prohibits one branch of government from exercising a power belonging inherently to another. *See* TEX. CONST. art. II, § 1; *see also Gen. Servs. Comm'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 600 (Tex. 2001); *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993). The doctrine is violated "'only when the functioning of the judicial process in a field constitutionally committed to the control of the courts is interfered with by the executive or legislative branches.'" *Little-Tex Insulation Co.*, 39 S.W.3d at 600 (quoting *State Bd. of Ins. v. Betts*, 308 S.W.2d 846, 851–52 (Tex. 1958)). The Texas Constitution provides that "[d]istrict court jurisdiction consists of exclusive, appellate, and original jurisdiction of all actions

. . . except in cases where *exclusive . . . jurisdiction may be conferred by this Constitution or other law* on some other court." TEX. CONST. art. V, § 8 (emphasis added).

Richard argues that because section 152.201(a) states that a Texas court has jurisdiction "only if" one of the four statutory scenarios exists, the Legislature has, in essence, prevented the Texas district court from making custody determinations before a child is born. We disagree.

By enacting section 152.201(a), the Legislature did not encroach upon the judiciary's power to interpret laws, nor did it decide whether the Texas trial court had jurisdiction. These determinations, still within the province of the courts, are simply subject to a rationally based policy that appreciates the multi-state arena in which custody determinations often occur. Section 152.201(a) does not violate the separation of powers doctrine.

Richard also contends that section 152.201(a) violates the open courts provision of the Texas Constitution,[12] which provides, "[a]ll courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law." TEX. CONST. art. I, § 13. But the right to a remedy by due course of law does not require that the remedy be available *in Texas*.

To establish an open courts violation, Richard must show that (1) he has a well-recognized common law cause of action that is being restricted and (2) the restriction is unreasonable or

[12] Richard alleges that section 152.201(a) "violates his remedy by [d]ue [c]ourse of [l]aw" based on the open courts provision under article I, section 13 of our Constitution—not section 19 which addresses due course of law in the context of deprivation of life, liberty, property, privileges, or immunities. *Compare* TEX. CONST. art. I, § 13 (open courts), *with* § 19 ("life, liberty, property, privileges or immunities"). While we have recognized that the open courts provision is a due process guarantee, *see Sax v. Votteler*, 648 S.W.2d 661, 664 (Tex. 1983), Richard's arguments here do not rely on section 19 due process; our discussion here addresses Richard's "due course of law" challenge, specifically in the open courts doctrine context.

arbitrary when balanced against the statute's basis and purpose. *Owens Corning v. Carter*, 997 S.W.2d 560, 573 (Tex. 1999).

Even assuming that Richard can satisfy the first requirement, he has not established the second. In *Sax*, we concluded that a statute "effectively abolishe[d] a minor's right to bring [her] well-established common law cause of action *without providing a reasonable alternative*" and thus violated article I, section 13 of the Texas Constitution. *Sax v. Votteler*, 648 S.W.2d 661, 667 (Tex. 1983) (emphasis added). A statute that otherwise withdraws such common law remedies will be "'sustained only when it is reasonable in substituting other remedies . . . [but will] not [be] sustained when it is arbitrary or unreasonable.'" *Id.* at 665 (quoting *Lebohm v. City of Galveston*, 275 S.W.2d 951, 955 (Tex. 1955)).

Here, Richard argues that if New Mexico is J.S.D.'s home state, the Act deprives him of a remedy *in Texas*. While this is true, requiring Richard to pursue his custody claim in New Mexico rather than Texas preserves a reasonable alternative. Richard may pursue his custody claims in New Mexico, and he has neither pleaded nor proved that New Mexico is an inadequate forum. Section 152.201(a) does not violate the open courts provision of the Texas Constitution.

Lastly, section 152.201(a) violates neither Richard's equal protection rights under the Texas Equal Rights Amendment nor the Fourteenth Amendment to the United States Constitution. The Texas Equal Rights Amendment provides that "[e]quality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin." TEX. CONST. art. I, § 3a. Richard asserts that the home state rule violates this provision because a woman controls where she lives prior to giving birth, and that denies the father the right to participate in prenatal decisions. We have

already determined that this contention is not before us, as Carrie has already given birth. But Richard also complains that "home state jurisdiction" unconstitutionally deprives him of immediate post-birth involvement.

We have applied a three-step evaluation to determine whether the Amendment has been violated. *See Bell v. Low Income Women of Texas*, 95 S.W.3d 253, 257–64 (Tex. 2002). First, we consider whether equality under the law has been denied. *Id.* at 257. If it has, we must determine whether equality was denied "*because of* a person's membership in a protected class." *Id.* (emphasis added). If so, "the challenged action cannot stand unless it is narrowly tailored to serve a compelling governmental interest." *Id.*

Richard has not shown that he is denied equality under the law. Section 152.201(a) is a procedural mechanism for determining jurisdiction. The statute defines home state to establish where the proceedings should take place, without a bias for either parent. The *place of birth* is not the relevant consideration. Instead, we look to "the State in which the child lived *from* birth with [a parent or person acting as a parent]." UNIF. CHILD CUSTODY JUR. & ENF. ACT § 102(7), 9 U.L.A. 658 (1997) (emphasis added). Residence is determinative, and it favors neither women nor men. A child could live "from birth" with his father or his mother, and sections 152.102(7) and 152.201(a) would apply with equal force in either scenario.

For the same reasons, we conclude that the statute does not violate Richard's equal protection rights under the Fourteenth Amendment to the United States Constitution.[13] Allowing the New

[13] Some commentators suggest that the Texas Equal Rights Amendment may afford even broader rights than the federal Fourteenth Amendment. *See, e.g.*, Linda J. Wharton, *State Equal Rights Amendments Revisited: Evaluating Their Effectiveness in Advancing Protection Against Sex Discrimination*, 36 RUTGERS L.J. 1201, 1203 (2005) (noting

Mexico court to exercise jurisdiction as provided in each state's adopted UCCJEA does not deny Richard equality under the law.[14]

* * *

The New Mexico trial court concluded, correctly, that it had jurisdiction over the custody dispute because New Mexico is J.S.D.'s home state. Yet the New Mexico trial court deferred to Texas. We do not understand the basis for that deferral. As applied to the facts here, the Act would have allowed Texas to exercise jurisdiction only if New Mexico had declined jurisdiction "on the ground that [Texas] . . . is the more appropriate forum . . . under Section 152.207 or 152.208." *See* TEX. FAM. CODE § 152.201(a)(3). But New Mexico's declination was not based on section 207 (inconvenient forum) or section 208 (jurisdiction declined by reason of conduct). *See id.* §§ 152.207–.208. In fact, the New Mexico trial judge emphasized that its decision to decline jurisdiction "was not based upon any finding of unjustifiable conduct or bad acts by either party." Rather, the New Mexico court dismissed the case solely because "Texas has determined it will

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that "many state courts are interpreting state constitutions as independent, and often broader, sources of protection for individual liberties . . . that go[] well beyond the protection afforded under the Federal Constitution"); *see also* William Wayne Kilgarlin & Banks Tarver, *The Equal Rights Amendment: Governmental Action and Individual Liberty*, 68 TEX. L. REV. 1545, 1559, 1570 (1990) (noting, for instance, that "a wider range of private activities can be attacked under the E[qual] R[ights] A[mendment] than under the [F]ourteenth [A]mendment" and "state constitutional guarantees may confer broader rights").

[14] Richard's challenge under the federal Constitution's Equal Protection Clause also claims that section 152.201(a) violates his fundamental right concerning "the care, custody, and control of [J.S.D.]" under *Troxel v. Granville*, 530 U.S. 57 (2000) (plurality opinion). But aside from his cursory argument that "the UCCJEA deprives him of meaningful participation in the child-custody proceedings by unilaterally choosing [J.S.D.'s] 'home state'," Richard cites no authority for his proposition that a parent's opportunity to choose a "home state" for custody proceedings is a fundamental right. New Mexico is simply the forum in which Richard may litigate for custody.

exercise jurisdiction." We appreciate that trial court's effort to avoid an interstate conflict, but we do not believe the Act allows deferral on that basis.

As it now stands, the New Mexico trial court has jurisdiction, but it has dismissed the case. We anticipate that the New Mexico Court of Appeals, consistent with its reasoning in its proposed summary disposition, will remand the case to the New Mexico trial court, but that has yet to occur. Although the action is pending in the Texas court, we have stayed its proceedings while we decide the merits. During this intolerable interregnum, Carrie, Richard, and J.S.D., seemingly, have nowhere to turn.

There is an answer. We noted in *Powell*[15] that the Act delineates the proper procedure when custody proceedings have been filed in different states:

> If the [Texas] court determines that a child custody proceeding has been commenced in a court in another state having jurisdiction substantially in accordance with this chapter, the [Texas] court . . . shall stay its proceeding and communicate with the court of the other state. *If the court of the state having jurisdiction substantially in accordance with this chapter does not determine that the [Texas] court . . . is a more appropriate forum, the [Texas] court . . . shall dismiss the proceeding.*

TEX. FAM. CODE § 152.206(b) (emphasis added); *see also* N.M. STAT. § 40-10A-206(b) (same). We have determined that the Texas court erred in denying the exclusivity of the New Mexico trial court's jurisdiction. Likewise, the New Mexico Court of Appeals has preliminarily determined that the New Mexico trial court erred in deferring to Texas.

Given the New Mexico court's dismissal and the Texas court's erroneous retention, the appropriate course is for the Texas trial court to confer as soon as possible with the New Mexico

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[15] *Powell*, 165 S.W.3d at 328 (quoting TEX. FAM. CODE § 152.206(b)).

Court of Appeals. Accordingly, without hearing oral argument, TEX. R. APP. P. 52.8(c), we lift our stay and order the Texas court to communicate promptly with the New Mexico Court of Appeals. *See* TEX. FAM. CODE § 152.206(b); *see also Powell*, 165 S.W.3d at 328. Unless that court "decline[s] to exercise jurisdiction on the ground that [Texas] is the more appropriate forum to determine [J.S.D.'s] custody . . . under Section 207 or 208," the trial court shall dismiss the child custody portion of the case. *See* UNIF. CHILD CUSTODY JUR. & ENF. ACT § 201(a)(3), 9 U.L.A. 671 (1997); *see also* N.M. STAT. § 40-10A-201(a)(3); TEX. FAM. CODE § 152.201(a)(3). We are confident the trial court will comply, and our writ will issue only if it does not.

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Wallace B. Jefferson
Chief Justice

OPINION DELIVERED: December 21, 2012

IN THE SUPREME COURT OF TEXAS

NO. 11-0891

IN RE CARRIE DEAN, RELATOR

ON PETITION FOR WRIT OF MANDAMUS

JUSTICE LEHRMANN, concurring.

While I agree with the Court's reasoning and join its opinion, I write separately to emphasize that the New Mexico court may decline jurisdiction if it determines that New Mexico is an inconvenient forum. *See* N.M. STAT. § 40-10A-207(a) ("A court of this state which has jurisdiction under the [Act] to make a child-custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum."). Because the divorce suit is pending in Texas, which has personal jurisdiction over both parties, child support and property issues may be litigated here even if New Mexico has jurisdiction over custody matters. Additionally, while New Mexico courts would have *in rem* jurisdiction to grant a divorce, those courts may lack personal jurisdiction over Richard for support and property matters incident to that divorce, a matter we cannot ascertain from the limited record before us. Litigating custody in one state and divorce in another is inefficient and expensive, and the New Mexico court may conclude on that basis that Texas is the more convenient forum. Consequently, that court may decline jurisdiction under the Act. *See id.*

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Debra H. Lehrmann
Justice

OPINION DELIVERED: December 21, 2012

IN THE SUPREME COURT OF TEXAS

NO. 11-0903

IN RE NALLE PLASTICS FAMILY LIMITED PARTNERSHIP, RELATOR

ON PETITION FOR WRIT OF MANDAMUS

Argued November 7, 2012

CHIEF JUSTICE JEFFERSON delivered the opinion of the Court.

To suspend enforcement of a money judgment pending appeal, a judgment debtor must post security equaling the sum of compensatory damages awarded in the judgment, interest for the estimated duration of the appeal, and costs awarded in the judgment.[1] We are asked to decide whether that amount includes attorney's fees incurred in the prosecution or defense of the claim. Because we conclude that it does not, we conditionally grant relief.

I. Background

Porter, Rogers, Dahlman, & Gordon, P.C., a law firm, sued Nalle Plastics Family Limited Partnership for breach of contract, alleging that Nalle failed to pay its legal fees. A jury found that Nalle breached the agreement, resulting in $132,661 in damages. The jury also awarded Porter $150,000 as a reasonable fee for the necessary services of its attorneys in collecting the amount Nalle

[1] *See* TEX. CIV. PRAC. & REM. CODE § 52.006(a); TEX. R. APP. P. 24.2(a)(1).

owed. The trial court signed a judgment awarding Porter "actual damages . . . in the amount of . . . $132,661.00," "attorney's fees . . . in the amount of . . . $150,000," pre- and post-judgment interest, and "costs of court."

To suspend enforcement of the judgment pending appeal, Nalle deposited a cashier's check with the trial court. Nalle's deposit included $132,661 for the breach of contract damages, as well as pre- and post-judgment interest, and court costs.[2] Porter complained that the judgment had not been properly superseded because Nalle's deposit did not include attorney's fees, which Porter asserted are compensatory damages or costs. The trial court agreed and ordered Nalle to supplement the deposit to cover the fee award.

Nalle sought appellate relief. *See* TEX. R. APP. P. 24.4(a). The court of appeals denied Nalle's motion, reasoning that attorney's fees should be included in supersedeas bonds, deposits, and securities for two main reasons. First, the Legislature intended that judgment creditors be protected during the pendency of an appeal. ___ S.W.3d ___, ___. Second, the statute's 2003 amendments, which relaxed some of the burdens on the judgment debtor, did not override the statute's fundamental purpose. *Id.* at __. Because the amendment did not explicitly exclude attorney's fees, the court of appeals presumed that the Legislature intended to include attorney's fees in supersedeas amounts. *Id*. The court held that attorney's fees are both compensatory damages and costs for the purpose of suspending enforcement of a judgment. *Id.* at __.

[2] Nalle's original deposit also included damages awarded to The Lee Firm, another law firm that was a party in the underlying suit. Nalle and The Lee Firm reached a settlement following the initial deposit.

Nalle deposited the additional amount and sought mandamus relief from this Court. *See* TEX. R. APP. P. 24.4(a). We set the case for argument, 55 Tex. Sup. Ct. J. 757 (June 8, 2012), and now conditionally grant relief.

II. The Statute

As part of House Bill 4, a 2003 comprehensive tort reform measure, the Legislature enacted Civil Practice and Remedies Code section 52.006. Before then, appeal bonds were regulated solely by the Texas Rules of Appellate Procedure, which required a party to post security covering the entire judgment, regardless of amount, plus costs and interest for the estimated duration of the appeal. Former TEX. R. APP. P. 24.2(a)(1) (eff. Sept. 1, 1997) (amended Aug. 29, 2003 and Sept. 10, 2003, eff. Sept. 1, 2003; amended Mar. 10, 2008 and Aug. 20, 2008, eff. Sept. 1, 2008). If the judgment was not fully superseded, the creditor could execute on the judgment.

House Bill 4 "reflect[ed] a new balance between the judgment creditor's right in the judgment and the dissipation of the judgment debtor's assets during the appeal against the judgment debtor's right to meaningful and easier access to appellate review." Elaine A. Carlson, *Reshuffling the Deck: Enforcing and Superseding Civil Judgments on Appeal after House Bill 4*, 46 S. TEX. L. REV. 1035, 1038 (2005). Judgment debtors must now post appeal bonds "equal [to] the sum of . . . the amount of compensatory damages awarded in the judgment[,] . . . interest for the estimated duration of the appeal[,] and . . . costs awarded in the judgment." TEX. CIV. PRAC. & REM. CODE § 52.006(a). The amendment also capped security at the lesser of fifty percent of the judgment debtor's net worth, or $25 million. *Id.* § 52.006(b)(2). A trial court must reduce the amount of security if a judgment debtor shows he is likely to suffer substantial economic harm—a less onerous

burden than the previous standard, which required a showing both of irreparable harm to the debtor and that a lesser amount would not substantially impair a judgment creditor's ability to recover under the judgment after appellate remedies were exhausted. *Compare id*. §§ 52.006(b)(1), (c), *with* former TEX. R. APP. P. 24.2(b). We amended the procedural rules to conform to the new law. *See* TEX. R. APP. P. 24, amended Aug. 29, 2003, eff. Sept. 1, 2003.

III. Conflict Among the Courts of Appeals

We have not yet addressed whether attorney's fees should be considered either compensatory damages or costs when calculating supersedeas amounts. The courts of appeals are divided on the issue.

In *Fairways Offshore Exploration, Inc. v. Patterson Services, Inc.*, 355 S.W.3d 296 (Tex. App.—Houston [1st Dist.] 2011, no pet.), Patterson prevailed in its breach-of-contract suit against Fairways. As in this case, the parties disputed whether fees incurred while prosecuting the claim were compensatory damages. The court relied on the meaning of "compensatory damages" found in Black's Law Dictionary—"'damages sufficient in amount to indemnify the injured person for the loss suffered'"—to conclude that the term included attorney's fees. *Id.* at 301 (quoting BLACK'S LAW DICTIONARY 445 (9th ed. 2009)). The court reasoned that because the jury awarded Patterson attorney's fees to compensate it for the money spent "to obtain relief against Fairways, [then attorney's fees] fit within the common meaning of 'compensatory damages.'" *Id.* It concluded that Civil Practice and Remedies Code chapter 41's "compensatory damages" definition did not apply to questions of appellate security under chapter 52. *Id*. at 302 (observing that "the definitions employed in [c]hapter 41 are expressly prescribed to apply to that chapter only, not to section

52.006"). Finally, the court noted that if the Legislature wanted to exclude attorney's fees, it could have used the term "actual damages" rather than the more encompassing "compensatory damages" to describe what must be included to secure a money judgment. *Id.* at 302-03.

Likewise, in *Corral-Lerma v. Border Demolition & Environmental, Inc.,* No. 08-11-00134-CV, 2012 WL 1943763 (Tex. App.—El Paso May 30, 2012, orig. proceeding [mand. pending]), the court held that attorney's fees must be superseded. The court followed the *Fairways* court's reasoning, noting that attorney's fees should be considered compensatory damages, as defined in Black's Law Dictionary, because those fees "compensate[] or indemnif[y] a defendant for the legal expense he incurs in successfully defending against a claim made against him." *Id.* at *5. Additionally, any definitions found in other chapters of the Civil Practice and Remedies Code, specifically from chapter 41, should not apply. *Id.* at *3-5. Because chapter 41 is expressly inapplicable to certain cases, the court reasoned, looking to chapter 41's damages definition for a global answer to the attorney's fee issue would "create[] confusion in what should be a fairly straightforward matter." *Id*. at *5.

In *Clearview Properties, L.P. v. Property Texas SC One Corp.*, 228 S.W.3d 262, 264 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (per curiam), the court reasoned that attorney's fees "are in the nature of costs . . . [and] should be considered part of the 'costs awarded in the judgment.'" The court also recognized that the parties' contract provided for attorney's fees "as compensation." *Id.* The court held that "[w]hether, under the facts of this case, the attorney's fees awards are in the nature of costs or damages, neither Rule 24, nor section 41.001, precludes the trial court from setting an amount . . . to secure this award." *Id*.

Conversely, other courts of appeals have found that attorney's fees should not be included in the amount required to suspend enforcement of a judgment. In *Shook v. Walden*, 304 S.W.3d 910, 922 (Tex. App.—Austin 2010, no pet.), the court reviewed House Bill 4 and concluded that the Legislature, desiring to make appeals more accessible to judgment debtors, did not intend for attorney's fees to be included in supersedeas bonds. Further, the court determined that the definitions of compensatory damages and costs and the treatment of attorney's fees found in other Code sections revealed the Legislature's intent to exclude attorney's fees from supersedeas amounts. *See id.* at 919-26.

Finally, in *PopCap Games, Inc. v. MumboJumbo, LLC,* 317 S.W.3d 913, 914 (Tex. App.—Dallas 2010, no pet.), the court followed *Shook*'s reasoning to hold "that section 52.006 does not require the superseding of attorney's fees."[3]

IV. Are attorney's fees compensatory damages?

A. Attorney's fees incurred in the prosecution or defense of a claim are not compensatory damages.

The court of appeals held that Porter's attorney's fees were "compensatory damages" because the fees "'represent[ed] . . . out-of-pocket losses that [the plaintiffs] incurred in prosecuting their breach of contract claims.'" ___ S.W.3d at ___ (quoting *Fairways*, 355 S.W.3d at 301). Chapter 52 does not define "compensatory damages." According to Black's Law Dictionary, the term means "damages sufficient in amount to indemnify the injured person for the loss suffered." BLACK'S LAW

[3] The same court affirmed its reasoning in *Imagine Automotive Group, Inc. v. Boardwalk Motor Cars, LLC,* 356 S.W.3d 716 (Tex. App.—Dallas 2011, no pet.). Again citing *Shook*, the court reasoned that there is a difference between damages awarded for an underlying claim and attorney's fees. *Id.* at 720. *Imagine*, however, addressed the Texas Theft Liability Act, not appeal bonds.

DICTIONARY 445 (9th ed. 2009). The dictionary notes that the phrase is interchangeable with "actual damages," defined as "[a]n amount awarded to a complainant to compensate for a proven injury or loss; damages that repay actual losses." *Id.* Conversely, "attorney's fees" are defined as "[t]he charge to a client for services performed for the client, such as an hourly fee, a flat fee, or a contingent fee." *Id.* at 148. While this shows that the terms have different meanings, it does not answer whether attorney's fees are included within "compensatory damages." The phrase's ordinary meaning, our precedent, and the relevant statutes, however, confirm that they are not.

Courts have long distinguished attorney's fees from damages. *See, e.g., Landa v. Obert*, 45 Tex. 539, 544-45 (Tex. 1876) (holding "that the decided weight of authority is against the proposition that the plaintiff has the right to claim his counsel fees . . . as a part of his damages"); *Wm. Cameron & Co. v. Am. Surety Co. of N.Y.*, 55 S.W.2d 1032, 1035 (Tex. Comm'n App. 1932) (noting that "[c]ounsel fees incurred in prosecuting a suit for or defending against a wrong are not

ordinarily recoverable as actual damages"). Numerous appellate court decisions,[4] including four from the court of appeals below,[5] confirm this distinction.

The Legislature also separates attorney's fees from damages. Texas follows the American Rule, which provides that there can be no recovery of attorney's fees unless authorized by contract or statute. *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 310-11 (Tex. 2006). In accordance with that rule, the Legislature specifically designates when attorney's fees may be recovered and, in doing so, distinguishes between fees and damages. Civil Practice and Remedies Code chapter 38, the primary statute governing such fees, allows a prevailing party to "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 (emphasis added).

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[4] *See, e.g., Haden v. David J. Sacks, P.C.*, 222 S.W.3d 580, 597 (Tex. App.—Houston [1st Dist.] 2007) ("Attorney's fees are ordinarily not recoverable, therefore, *as* actual damages in and of themselves.") (emphasis in original), *rev'd on other grounds*, 266 S.W.3d 447, 448 (Tex. 2008); *Melson v. Stemma Exploration & Prod. Co.*, 801 S.W.2d 601, 603 (Tex. App.—Dallas 1990, no writ) ("Attorney's fees incurred in prosecuting a suit for or defending against a wrong are not ordinarily recoverable as actual damages."); *Houghton v. Wholesale Elec. Supply*, 435 S.W.2d 216, 220 (Tex. Civ. App.—Waco 1968, writ ref'd n.r.e.) (same); *see also Carter v. Flowers*, No. 02-10-00226-CV, 2011 WL 4502203, at *4 n.30 (Tex. App.—Fort Worth Sept. 29, 2011, no pet.) (mem. op.) (noting that attorney's fees are not economic damages); *Southland Lloyds Ins. Co. v. Cantu*, No. 04-09-00705-CV, 2011 WL 1158244, at *13 n.7 (Tex. App.—San Antonio Mar. 30, 2011, pet. denied) ("[A]ttorney's fees are not economic damages."); *Shafer v. Gulliver*, No. 14-09-00646-CV, 2010 WL 4545164, at *11 (Tex. App.—Houston [14th Dist.] Nov. 12, 2010, no pet.) (mem. op.) ("The attorney's fees incurred by the Gullivers for prosecuting their breach of contract claim against the Shafers are not economic damages.").

[5] *See Northfield Ins. Co. v. Nabors Corp. Servs.*, No. 13-07-093-CV, 2009 WL 1546848, at *6 (Tex. App.—Corpus Christi May 29, 2009, no pet.) (mem. op.) (holding that "[a]ttorneys' [sic] fees are in the nature of costs, not damages"); *Intercontinental Grp. P'ship v. KB Home Lone Star, L.P.*, 295 S.W.3d 668, 675 (Tex. App.—Corpus Christi 2007) (mem. op.) (noting that attorney's fees are generally not considered damages), *rev'd*, 295 S.W.3d 650 (Tex. 2009); *Alma Grp., L.L.C. v. Palmer*, 143 S.W.3d 840, 845-46 (Tex. App.—Corpus Christi 2004, pet. denied) (holding that "attorney fees are in the nature of costs, not damages"); *City of San Benito v. Ebarb*, 88 S.W.3d 711, 723 n.15 (Tex. App.—Corpus Christi 2002, pet. denied) (holding that declaratory judgment action seeking attorney's fees against the state was not a suit for damages that would be barred by immunity).

To recover attorney's fees under this statute, a party must first prevail on the underlying claim *and* recover damages. *MBM Fin. Corp. v. Woodlands Operating Co., L.P.*, 292 S.W.3d 660, 666 (Tex. 2009). "The second requirement is implied from the statute's language: for a fee recovery to be 'in *addition* to the amount of a valid claim,' the claimant must recover some amount on that claim." *Id.* (emphasis in original); *see also Shook*, 304 S.W.3d at 922 (noting that the phrase "in addition to" suggests that the Legislature intended to differentiate between attorney's fees, damages awarded for a valid claim, and costs). Many of our decisions confirm this understanding.[6]

These cases demonstrate the difference between compensation owed for an underlying harm and fees that may be awarded for counsel's services. *See, e.g., Huff v. Fid. Union Life Ins. Co.*, 312 S.W.2d 493, 501 (Tex. 1958) (holding that "attorney's fees are not part of [a] demand or claim, but are in the nature of a penalty, or punishment for failure to pay a just debt"); *Sherrick v. Wyland*, 37 S.W. 345, 345 (Tex. Civ. App.—Houston 1896, no writ) (noting that "fees of counsel, incurred in prosecuting a suit for or defending against a wrong, are not ordinarily recoverable as actual damages,

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[6] *See, e.g., Ashford Partners, Ltd. v. ECO Res., Inc.,* 55 Tex. Sup. Ct. J. 572, 2012 WL 1370847 (Tex. Apr. 20, 2012) (holding that plaintiff was not entitled to recover attorney's fees under Chapter 38 because "to qualify for fees under the statute, a litigant must prevail on a breach of contract claim *and recover damages*") (emphasis added); *1/2 Price Checks Cashed v. United Auto. Ins. Co.*, 344 S.W.3d 378, 390 (Tex. 2011) (noting that "[a]ttorney's fees under section 38.001(8) are, in essence, an *additional* remedy so that a prevailing plaintiff may recoup the cost of trying a case and do not generally interrupt the measure of damages for a particular claim") (emphasis in original); *Mustang Pipeline Co. v. Driver Pipeline Co.*, 134 S.W.3d 195, 201 (Tex. 2004) (holding that plaintiff was not entitled to recover attorney's fees because it was not awarded damages on the underlying breach of contract claim); *Green Int'l, Inc. v. Solis*, 951 S.W.2d 384, 390 (Tex. 1997) (holding that in order to recover attorney's fees, "a party must (1) prevail on a cause of action for which attorney's fees are recoverable, and (2) recover damages"); *Intercontinental Grp. P'ship*, 295 S.W.3d at 653-56 (holding that a party could not recover attorney's fees because a jury determined that it was not entitled to compensation for its damages, and thus it had not prevailed on its breach of contract claim); *see also Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 603 (2001)(noting that 42 U.S.C. § 1988, which awarded attorney's fees to the "prevailing party," required that a party must have received some relief on the merits of the claim, even in the form of nominal damages, *before* being eligible for an award of attorney's fees) (emphasis added).

because they are not considered proximate results of such wrong"). We have previously said that "suits cannot be maintained solely for the attorney's fees; a client must gain something *before* attorney's fees can be awarded." *MBM Fin.*, 292 S.W.3d at 663 (emphasis added).

While attorney's fees for the prosecution or defense of a claim may be compensatory in that they help make a claimant whole, they are not, and have never been, damages. Not every amount, even if compensatory, can be considered damages. Like attorney's fees, court costs make a claimant whole, as does pre-judgment interest. Yet it is clear that neither costs nor interest qualify as compensatory damages. Otherwise, there would be no need to list those amounts separately in the supersedeas bond statute. *See* TEX. CIV. PRAC. & REM. CODE § 52.006(a) (security must be "equal [to] the sum of . . . the amount of compensatory damages awarded in the judgment[,] . . . interest for the estimated duration of the appeal[,] and . . . costs awarded in the judgment"); *see also Spradlin v. Jim Walter Homes, Inc.*, 34 S.W.3d 578, 580 (Tex. 2000) (noting that the Court gives effect to all words of a statute and does not treat any language as surplusage).

While chapter 52 does not define "compensatory damages," chapter 41 does. As the court of appeals noted, that definition does not explicitly include attorney's fees. *See* ___ S.W.3d at ___; *see also Shook*, 304 S.W.3d at 921 ("Although attorney's fees are frequently a substantial component of recoveries in civil cases, the [L]egislature never mentioned them in any of chapter 41's definitions."). The term includes "economic and noneconomic damages," and "does not include exemplary damages." *Id.* § 41.001(8). "Economic damages" are those "intended to compensate a claimant for actual economic or pecuniary loss." *Id.* § 41.001(4). "Noneconomic damages" are "damages awarded for the purpose of compensating a claimant for . . . nonpecuniary losses of any

kind other than exemplary damages." *Id.* § 41.001(12). "Exemplary damages" are "any damages awarded as a penalty or by way of punishment but not for compensatory purposes." *Id.* § 41.001(5).

Our courts of appeals disagree about whether chapter 41's compensatory damages definition governs here. Some note that the definitions explicitly apply only "[i]n this chapter," and that chapter 41 is itself inapplicable to certain statutory claims.[7] *See, e.g.*, *Corral-Lerma*, 2012 WL 1943763, at *4-5 (noting that relying on chapter 41's definitions would "create[] confusion," particularly when trying to define the same terms found in the statutory sections that chapter 41 explicitly excludes); *Fairways*, 355 S.W.3d at 302 (determining that "the definitions employed in Chapter 41 are expressly prescribed to apply to that chapter only"). Relying on chapter 41's definition, they contend, would lead to confusion in those cases not governed by that chapter.

Other courts note that chapter 41's provisions apply to "any action in which a claimant seeks damages relating to a cause of action." TEX. CIV. PRAC. & REM. CODE § 41.002(a). Like the changes to the supersedeas requirements, the Legislature enacted chapter 41's compensatory damages definition as part of House Bill 4, reflecting an intent that the same definition apply to both provisions. *See, e.g., Shook*, 304 S.W.3d at 920 ("We also observe that section 52.006 and chapter 41's definition of 'compensatory damages' have common origins in H.B. 4, and it is also significant that H.B. 4 broadened the scope of chapter 41 from solely an exemplary damages regulation to its current form.").

[7] Chapter 41 does not apply to the Texas Free Enterprise and Antitrust Act of 1983, the Human Resources Code chapter 36, the Insurance Code chapter 21, or to actions brought under the Deceptive Trade Practices–Consumer Protection Act (except as specifically provided in Section 17.50 of that Act). TEX. CIV. PRAC. & REM. CODE § 41.002(d).

We need not conclude that chapter 41's "compensatory damages" definition explicitly governs here. At the very least, it is consistent with our own conclusion based on the phrase's ordinary meaning and our precedent—that attorney's fees incurred in the prosecution or defense of a claim are not compensatory damages. *Cf. Tex. Dep't of Transp. v. Needham*, 82 S.W.3d 314, 318 (Tex. 2002) ("Statutory terms should be interpreted consistently in every part of an act.").

B. Some attorney's fees qualify as compensatory damages.

Nonetheless, we reject the idea that attorney's fees can *never* be considered compensatory damages. In this case, for example, Porter's underlying breach of contract suit against Nalle involved allegations of a failure to pay attorney's fees for prior representation. While attorney's fees incurred in prosecuting this claim are not compensatory damages, the fees comprising the breach-of-contract damages are. If the *underlying* suit concerns a claim for attorney's fees as an element of damages, as with Porter's claim for unpaid fees here, then those fees may properly be included in a judge or jury's compensatory damages award. *See, e.g., Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Research Corp.*, 299 S.W.3d 106, 111 (Tex. 2009) (holding that a party may recover damages for attorney's fees paid in the underlying suit).

V. Attorney's fees are not costs.

We must also consider whether attorney's fees are "costs," a term undefined by chapter 52. Both the old and new statutes require a judgment debtor to secure costs, although the new statute uses the slightly more specific phrase "costs awarded in the judgment." TEX. CIV. PRAC. & REM. CODE § 52.006(a). The court of appeals held that the word was ambiguous, because it could refer either to "court costs," defined by Black's Law Dictionary to include "'[t]he charges or fees taxed

by the court, such as filing fees, jury fees, courthouse fees, and reporter fees,'" or to "litigation costs," like "'[t]he expenses of litigation, prosecution, or other legal transaction, esp[ecially] those allowed in favor of one party against the other.'" ___ S.W.3d at ___ (quoting BLACK'S LAW DICTIONARY 398 (9th ed. 2009)). Because the court believed that "costs awarded in the judgment" could include litigation costs, it held that attorney's fees must be included in the supersedeas amount. *Id*.

We disagree that "costs awarded in the judgment" includes anything other than what it ordinarily means: court costs. *See Guitar Holding Co., L.P. v. Hudspeth Cnty. Underground Water Conservation Dist. No. 1*, 263 S.W.3d 910, 915 (Tex. 2008) ("Terms that are not otherwise defined are typically given their ordinary meaning."). "Costs," when used in legal proceedings, refer not just to any expense, but to those paid to courts or their officers—and costs generally do not include attorney's fees. As we have recognized for decades, "the term 'costs' is generally understood [to mean] the fees or compensation fixed by law collectible by the officers of court, witnesses, and such like items, and does not ordinarily include attorney's fees which are recoverable only by virtue of contract or statute." *Johnson v. Universal Life & Accident Ins. Co.*, 94 S.W.2d 1145, 1146 (Tex. 1936). Courts have long held that "attorney's fees, in this state, in view of our various statutes on the question of costs, cannot be classed as costs, and that the court would have no power to so declare such fees as costs, and to give judgment therefor." *McClelland v. McClelland*, 37 S.W. 350, 359 (Tex. Civ. App. 1896, writ ref'd). We have concluded, in the context of a tariff rule, that "[t]he

term 'costs' simply does not include attorney's fees." *Am. Airlines, Inc. v. Swest, Inc.*, 707 S.W.2d 545, 548 (Tex. 1986).[8]

This usage is buttressed by the way "costs" is used elsewhere in the Code. Civil Practice and Remedies Code chapter 38 differentiates between attorney's fees and costs. *See* TEX. CIV. PRAC. & REM. CODE § 38.001 (providing that "[a] person may recover reasonable attorney's fees . . . *in addition to the amount of a valid claim and costs*") (emphasis added). Similarly, section 31.007 authorizes a court to include in its judgment "all costs, including . . . fees of the clerk and service fees due the county; fees of the court reporter . . . ; masters, interpreters, and guardians ad litem . . . ; and such other costs and fees as may be permitted by these rules and state statutes." TEX. CIV. PRAC. & REM. CODE § 31.007(b).[9] In chapter 12, costs "include all court costs, attorney's fees, and related expenses of bringing the action," demonstrating that when the Legislature intended for attorney's fees to be considered costs, it specifically said so. *See* TEX. CIV. PRAC. & REM. CODE § 12.006(b). Our procedural rules permit a successful litigant to "recover of his adversary all costs incurred therein, except where otherwise provided." TEX. R. CIV. P. 131. This conception of costs is also reflected in the trial court's judgment, which held Nalle liable for "[c]osts of court," separate from, and in addition to, the attorney's fees award. If all of these "costs" included attorney's fees, there would be little left of the American Rule.

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[8] *See also Roadway Express, Inc. v. Piper*, 447 U.S. 752, 759 (1980) (noting that under the "'American rule' . . . attorney's fees ordinarily are not among the costs that a winning party may recover"); Carlson, *Reshuffling the Deck*, 46 S. TEX. L. REV. at 1090, n.319 (noting that "attorneys fees are [not] traditionally considered costs of court").

[9] *See also, e.g.*, TEX. CIV. PRAC. & REM. CODE § 6.002 (using "costs" and "court costs" interchangeably).

Some courts of appeals have relied on cases holding that attorney's fees are "in the nature of costs" to conclude that they must be superseded. *See, e.g.*, *Clearview*, 228 S.W.3d at 264 (noting that attorney's fees "are in the nature of costs . . . [and] should be considered part of the 'costs awarded in the judgment'").[10] Attorney's fees *are* like costs in that both may be taxed against a losing party. *See Huff*, 312 S.W.2d 493 at 501 ("[A]ttorney's fees, *while not costs*, partake of the nature of the costs of suit and are assessed in accordance with the judgment.") (emphasis added). But the statute requires security only for costs themselves, not everything similar to them.

Finally, the court of appeals' conclusion that "costs" might include "litigation costs" is inconsistent with the Legislature's use of the term "litigation costs" elsewhere in the Code. Chapter 42 defines litigation costs in the context of settlement procedures related to claims for monetary relief. *Id*. §§ 42.001-.002. The Code provides that litigation costs include reasonable attorney's fees and court costs. *Id*. § 42.001(5). This definition again demonstrates the Legislature's distinction between attorney's fees and court costs. Not only that, but the Legislature uses the defined term "litigation costs" when it refers to expenses that include both. *See also id.* §§ 42.004(e), (f) (distinguishing between litigation costs and fees and costs recoverable under another law). And chapter 42 also demonstrates that while "costs" and "court costs" are used interchangeably in other sections of the Code and in common usage, the same is not true for "costs" and "litigation costs."

[10] *See also Williams v. Compressor Eng'g Corp.*, 704 S.W.2d 469, 474 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.) (holding that "[a]ttorney's fees are in the nature of costs, not damages").

VI. Conclusion

Because attorney's fees are neither compensatory damages nor costs for purposes of suspending enforcement of a money judgment, we conditionally grant the writ and direct the trial court to vacate its order and refund any monies overpaid by Nalle. We are confident the trial court will comply, and our writ will issue only if it does not.

_____

Wallace B. Jefferson
Chief Justice

OPINION DELIVERED: May 17, 2013

IN THE SUPREME COURT OF TEXAS

NO. 11-0920

CTL/THOMPSON TEXAS, LLC, PETITIONER,

v.

STARWOOD HOMEOWNER'S ASSOCIATION, INC., RESPONDENT

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

PER CURIAM

Section 150.002 of the Texas Civil Practice and Remedies Code requires that in actions for damages arising from the provision of professional services by a licensed or registered architect, engineer, or surveyor, the plaintiff must file an affidavit attesting to the claim's merit. Section 150.002(e) states: "The plaintiff's failure to file the affidavit in accordance with this section shall result in dismissal of the complaint against the defendant. This dismissal may be with prejudice." The issue here is whether a defendant's appeal from a trial court's refusal to dismiss an action under Section 150.002(e) is mooted by the plaintiff's nonsuit. We hold it is not and consequently reverse the judgment of the court of appeals and remand the case to that court. ___ S.W.3d ___ (Tex. App.–Fort Worth 2011).

Respondent Starwood Homeowner's Association sued petitioner CTL/Thompson Texas for providing deficient geotechnical engineering services. Starwood attached to its petition an affidavit

that it believed complied with Section 150.002. CTL moved for dismissal with prejudice on the ground that the affidavit was deficient. The trial court denied CTL's motion, and CTL brought an interlocutory appeal. *See* TEX. CIV. PRAC. & REM. CODE § 150.002(f). But before the appeal could be decided, Starwood nonsuited its claims against CTL. The court of appeals held that the nonsuit mooted the appeal, depriving the court of jurisdiction. 352 S.W.3d 854, 856 (Tex. App.– Fort Worth 2011). CTL then brought a petition for review. Ordinarily, this Court has limited jurisdiction over interlocutory appeals. *See* TEX. GOV'T CODE § 22.225(b)(3). But we always have jurisdiction to determine whether the court of appeals had jurisdiction. *Austin State Hosp. v. Graham*, 347 S.W.3d 298, 300 (Tex. 2011); *Univ. of Tex. Sw. Med. Ctr. v. Margulis*, 11 S.W.3d 186, 187 (Tex. 2000) (per curiam).

A plaintiff has an absolute right to nonsuit a claim before resting its case-in-chief, but a nonsuit "shall not prejudice the right of an adverse party to be heard on a pending claim for affirmative relief," TEX. R. CIV. P. 162, such as a counterclaim, *Klein v. Dooley*, 949 S.W.2d 307, 307 (Tex. 1997) (per curiam), or a cross-claim, *N. E. Indep. Sch. Dist. v. Aldridge*, 400 S.W.2d 893, 897 (Tex. 1966). A motion for sanctions is a claim for affirmative relief that survives nonsuit if the nonsuit would defeat the purpose of sanctions. *Aetna Cas. & Sur. Co. v. Specia*, 849 S.W.2d 805, 806-807 (Tex. 1993). For example, a sanction excluding witnesses for failure to supplement discovery does not survive nonsuit because its purpose is fully served by protecting the fairness of the trial of the action in which it is imposed. *Id.* But a sanction for filing a frivolous lawsuit does survive nonsuit, else its imposition would rest completely in the plaintiff's hands, defeating its

purpose. *Scott & White Mem'l Hosp. v. Schexnider*, 940 S.W.2d 594, 596-597 (Tex. 1996) (per curiam).

In *Villafani v. Trejo*, 251 S.W.3d 466, 467 (Tex. 2008), a health care liability claim, the defendant asserted that the plaintiff's expert reports did not satisfy statutory requirements and moved for a dismissal with prejudice and attorney fees. The trial court denied the motion, and when the plaintiff nonsuited anyway, dismissed the action without prejudice. *Id.* The court of appeals held that the nonsuit mooted the defendant's appeal and dismissed it for want of jurisdiction. *Id.* We reversed. Dismissal with prejudice and attorney fees, we stated, were sanctions mandated by statute, the purpose of which is to deter claimants from filing meritless suits. *Id.* at 470. "Removing a defendant's ability to appeal a denial of a motion for sanctions after a nonsuit frustrates this purpose; a claimant could simply nonsuit a meritless claim and later re-file the claim with impunity." *Id.* Therefore, we concluded, the defendant's motion survived the nonsuit and its denial could be appealed. *Id.* at 471.

Section 150.002(e) dismissal is a sanction with the same purpose, to deter meritless claims and bring them quickly to an end. Nevertheless, Starwood argues that a motion to dismiss under Section 150.002(e) cannot survive a nonsuit because the nonsuit gives the movant all the relief the statute mandates — dismissal without prejudice. But Section 150.002(e) authorizes further relief — dismissal with prejudice — and while granting it is discretionary, the trial court cannot act "in an arbitrary or unreasonable manner without reference to guiding rules or principles." *Samlowski v. Wooten*, 332 S.W.3d 404, 410 (Tex. 2011). CTL moved for dismissal with prejudice, and if denial of that relief was an abuse of discretion, Starwood's nonsuit did not moot CTL's appeal.

Starwood argues that to allow a motion for dismissal with prejudice to survive a nonsuit would be inconsistent with *Univ. of Tex. Med. Branch at Galveston v. Estate of Darla Blackmon*, 195 S.W.3d 98 (Tex. 2006) (per curiam). There, we held that a plea to the jurisdiction based on sovereign immunity was not a claim for affirmative relief that survived nonsuit. *See id*. at 101. As Starwood notes, such a plea, if sustained, would result in a dismissal with prejudice if the plaintiff could not re-plead to avoid the jurisdictional bar, *Harris Cnty. v. Sykes*, 136 S.W.3d 635, 639 (Tex. 2004). But dismissal based on immunity is not a sanction to deter frivolous lawsuits; rather, it is simply a termination of the litigation on jurisdictional grounds. *Blackmon* is inapposite.

Like the statute in *Samlowski*, section 150.002(e) "provides no particular guidance on how the court should exercise its discretion," 332 S.W.3d at 410, in deciding whether to dismiss an action with prejudice rather than without. Therefore, "[g]uidance must come instead from the broader purposes" of the statute. *Id.* These matters remain for the court of appeals to consider.

Starwood's nonsuit did not moot CTL's appeal. Accordingly, we grant CTL's petition for review, and without hearing oral argument, TEX. R. APP. P. 59.1, reverse the judgment of the court of appeals and remand the case to that court.

Opinion delivered: January 25, 2013

IN THE SUPREME COURT OF TEXAS

NO. 11-0933

CITY OF BELLAIRE AND ROSA LARSON, PETITIONERS,

v.

ELBERT JOHNSON, RESPONDENT

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

PER CURIAM

The Texas Labor Code provides that "[r]ecovery of workers' compensation benefits is the exclusive remedy of an employee covered by workers' compensation insurance." TEX. LAB. CODE § 408.001(a).[1] In *Port Elevator-Brownsville, L.L.C. v. Casados*, 358 S.W.3d 238 (Tex. 2012), we held that, with certain exceptions not relevant in that case or this one, an employee cannot avoid this statutory bar by arguing that he was not covered under the specific terms of his employer's workers' compensation insurance policy.[2] To hold otherwise, we concluded, would be to violate the rule

[1] All statutory references are to the Texas Labor Code unless otherwise noted.

[2] We listed three exceptions that would allow private employers to "split" workforces for purposes of workers' compensation coverage: if the employer makes different elections for separate and distinct businesses; if the employer excludes a sole proprietor, partner, or corporate executive officer, as permitted by statute, TEX. LAB. CODE § 406.097; and if the employer leases employees under the Staff Leasing Services Act, *id.* § 91.042. *Port Elevator*, 358 S.W.3d at 242. Other exceptions could apply to governmental entities under their respective workers' compensation statutes. *See*, *e.g. id.*, TEX. LAB. CODE §§ 504.001(2) (defining "employee" for chapter applicable to political subdivision employees), 504.012 (allowing optional coverage for, *inter alia*, elected officials), 504.013 (allowing optional coverage for trustees and staff of self-insurance funds), and 504.014 (excluding, *inter alia*, persons paid on a piecework basis, or on a basis

"prevent[ing] an employer from splitting its workforce by choosing coverage for some employees but not coverage for all." *Id.* at 243. An employee cannot argue that his subscriber-employer has done what the law prohibits; rather, the employee is covered as a matter of law, and any dispute by the carrier over whether it agreed to provide such coverage under the policy's terms is with the employer. In this case, decided before *Port Elevator*, the court of appeals reached the opposite result. 352 S.W.3d 260 (Tex. App.–Houston [14th Dist.] 2011). We reverse and render.

Magnum Staffing Services, Inc. furnished workers for the City of Bellaire. One was Elbert Johnson. The City paid Magnum for its services, which in turn paid Johnson, based on the hours he reported to the City. The City set Johnson's work schedule, gave him his assignments, and supervised his work. Magnum had no role in overseeing Johnson's work. Magnum provided Johnson with workers' compensation coverage. Also, the City was required by Section 504.011 to provide workers' compensation coverage to its employees, defined by Section 504.001(2)(A) to include "a person in [its] service . . . who has been employed as provided by law."

Johnson lost an arm working on a garbage truck driven by Rosa Larson, an employee of the City, and sued the City and Larson. The City and Larson filed a plea to the jurisdiction and motion for summary judgment, asserting governmental immunity based in part on the exclusive remedy under Sections 408.001(a) and 504.002(a)(6). *See Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000) ("The absence of subject-matter jurisdiction may be raised by a plea to the jurisdiction, as well as by other procedural vehicles, such as a motion for summary judgment."

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other than by the hour, day, week, or month); *see also*, *e.g.*, *id.* §§ 501.001(5) (defining "employee" for chapter applicable to most state employees), and 501.024 (excluding, *inter alia*, independent contractors).

(footnote omitted)). The trial court dismissed the case. The court of appeals reversed and remanded, concluding that the exclusive remedy bar did not apply unless Johnson was *actually* covered, as distinct from being *legally required* to be covered, and the evidence did not establish that he was. Specifically, the City was self-insured under the Act with other entities, *see* § 504.011(3), subject to an interlocal agreement stating that "[s]tatutory worker's compensation benefits are provided for paid employees of the Employer Pool Member only." The court of appeals held that a fact question subsisted whether Johnson, who was paid by Magnum, was within the specific terms of the City's coverage. 352 S.W.3d at 265.

The undisputed evidence does establish as a matter of law that the City controlled the details of Johnson's work and thus, that Johnson was its employee. *Limestone Prods. Distrib. Inc. v. McNamara*, 71 S.W.3d 308, 312 (Tex. 2002) ("The test to determine whether a worker is an employee rather than an independent contractor is whether the employer has the right to control the progress, details, and methods of operations of the work."). The City's immunity from Johnson's suit would be waived by the Texas Tort Claims Act, TEX. CIV. PRAC. & REM. CODE § 101.021(1)(A) (waiving immunity from suit for injury from the operation of a motor-driven vehicle), but for the exclusive-remedy bar provided by the Texas Workers' Compensation Act, *id*. § 101.021(1)(B) (motor vehicle waiver applies only if the government employee operating the vehicle could be personally liable to the claimant according to Texas law). Thus, if the bar applies, immunity was not waived. *See Duhart v. State*, 610 S.W.2d 740, 743 (Tex. 1980) (explaining that the State, in adopting the Tort Claims Act and workers' compensation coverage for state employees, retained its immunity and provided its employees an alternative remedy through workers' compensation

coverage, citing *Lyons v. Texas A&M Univ.*, 545 S.W.2d 56 (Tex. Civ. App.–Houston [14th Dist.] 1976, writ ref'd n.r.e.)). The court of appeals in the present case would have applied the same rule here except for its conclusion that a fact question subsisted whether Johnson was actually covered by the City's workers' compensation insurance.

We disagree with the court of appeals that there is any issue whether Johnson was a "paid employee" of the City within the meaning of its interlocal agreement, the purpose of which was to provide the statutorily required workers' compensation coverage to its employees. Johnson was certainly paid, but he argues he was paid by Magnum, not the City. Because he was not paid by the City or by the hour, Johnson argues, he was not a "paid employee" under Section 504.011(3), and was excluded from compensation under Section 504.014 ("A person is not an employee and is not entitled to compensation . . . if the person . . . is paid . . . on a basis other than by the hour, day, week, month, or year . . . ."). But the evidence establishes as a matter of law that Johnson was paid by the City *through* Magnum, and on the basis of the hours he reported to the City. As a matter of law, the City provided Johnson workers' compensation coverage, and therefore his exclusive remedy was the compensation benefits to which he was entitled. The trial court correctly dismissed Johnson's action against the City, and also against Larson, *see* TEX. CIV. PRAC. & REM. CODE § 101.106(e) ("If a suit is filed under this chapter against both a governmental unit and any of its employees, the employees shall immediately be dismissed on the filing of a motion by the governmental unit.").

Accordingly, we grant the City's petition for review, and without hearing oral argument, TEX. R. APP. P. 59.1, reverse the judgment of the court of appeals and render judgment dismissing Johnson's claims against the City and Larson for want of jurisdiction.

Opinion delivered: June 7, 2013

IN THE SUPREME COURT OF TEXAS

NO. 11-0934

LIBERTY MUTUAL INSURANCE COMPANY, PETITIONER,

v.

RICKY ADCOCK, RESPONDENT,

v.

TEXAS DEPARTMENT OF INSURANCE, DIVISION OF WORKERS' COMPENSATION, RESPONDENT

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

Argued December 6, 2012

JUSTICE GUZMAN delivered the opinion of the Court, in which JUSTICE JOHNSON, JUSTICE WILLETT, JUSTICE LEHRMANN, JUSTICE BOYD, and JUSTICE DEVINE joined.

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

A fundamental constraint on the courts' role in statutory interpretation is that the Legislature enacts the laws of the state and the courts must find their intent in that language and not elsewhere. Under the guise of agency deference, an agency asks us to judicially engraft into the Texas Workers' Compensation Act a statutory procedure to re-open determinations of eligibility for permanent lifetime income benefits—a procedure the Legislature deliberately removed in 1989. The

Legislature's choice is clear, and it is not our province to override that determination. This is especially true because, as we held in *Texas Mutual Insurance Co. v. Ruttiger*, the Act is a comprehensive statutory scheme, and therefore precludes the application of claims and procedures not contained within the Act.[1] In light of the Act's comprehensive nature, we decline to judicially engraft into it a procedure the Legislature deliberately removed. Accordingly, we affirm the judgment of the court of appeals.

I. Background

In 1991, Ricky Adcock suffered a compensable injury to his right ankle. Though he underwent reconstructive surgery, he developed reflex sympathetic dystrophy in the injured ankle. In 1997, the appeals panel determined that Adcock was entitled to Lifetime Income Benefits (LIBs) because "the great weight and preponderance of the evidence is that the claimant has the total and permanent loss of use of his right hand at his wrist" in addition to the stipulated loss of use of Adcock's right foot. Liberty Mutual Insurance Company (Liberty), the workers' compensation carrier for Adcock's employer, did not seek judicial review of that decision.

Over a decade later, Liberty sought a new contested case hearing on Adcock's continuing eligibility for LIBs based on Liberty's belief that Adcock may have regained the use of his extremities. The hearing officer determined that Liberty could re-open the previous LIB determination but ultimately concluded Adcock remained entitled to LIBs based on his loss of use of his right hand and both feet. The appeals panel affirmed.

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[1] 381 S.W.3d 430, 451 (Tex. 2012).

Both parties sought judicial review. Adcock moved for summary judgment, contending the hearing officer lacked jurisdiction to re-open the previous LIB determination. The Texas Department of Insurance, Division of Workers' Compensation (the Division) subsequently intervened, asserting that it has jurisdiction to re-open LIB determinations.[2] The trial court granted Adcock's motion for summary judgment. The court of appeals affirmed, noting the Legislature had specifically removed the procedure to re-open LIB determinations in 1989 and the current Act only provides for ongoing review of temporary income benefits. 353 S.W.3d 246, 249–52.

II. Discussion

"Enforcing the law as written is a court's safest refuge in matters of statutory construction, and we should always refrain from rewriting text that lawmakers chose . . . ." *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 443 (Tex. 2009). We review issues of statutory construction *de novo*, and our primary objective in construing a statute is to ascertain and give effect to the Legislature's intent. *Molinet v. Kimbrell*, 356 S.W.3d 407, 411 (Tex. 2011). The plain meaning of the text, given the context of the statute as a whole, provides the best expression of legislative intent. *Id.*; *Ruttiger*, 381 S.W.3d at 454.

Although we have held that "when the Legislature expressly confers a power on an agency, it also impliedly intends that the agency have whatever powers are reasonably necessary to fulfill its express functions or duties," an agency has no authority to "exercise what is effectively a new power,

[2] In 2005, the Legislature abolished the Texas Workers' Compensation Commission and transferred its functions to the Texas Department of Insurance, Workers' Compensation Division. *See* Act of May 29, 2005, 70th Leg., R.S., ch. 265, § 8.001, 2005 Tex. Gen. Laws 469, 607–08.

or a power contradictory to the statute, on the theory such a the power is expedient for administrative purposes." *Pub. Util. Comm'n of Tex. v. City Pub. Serv. Bd. of San Antonio*, 53 S.W.3d 310, 316 (Tex. 2001).

The narrow question before us is whether the current version of the Act contains a procedure to re-open LIB determinations. Liberty and the Division assert that if an employee medically improves and no longer meets the statutory requirements for eligibility for LIBs, the Division has "necessarily implicit" authority to re-open the LIB determination. Adcock counters that the plain language of the statute indicates the LIB determination is permanent and offers no procedure to re-open it. We agree with Adcock.

A. Plain Language

Section 408.161(a) of the Texas Workers' Compensation Act (Act) states that "[l]ifetime income benefits are paid until the death of the employee for" loss of one foot at or above the ankle and one hand at or above the wrist. TEX. LAB. CODE § 408.161(a)(4). Moreover, "the total and permanent loss of use of a body part is the loss of that body part." *Id.* § 408.161(b). And importantly, the Act does not provide any procedure to re-open the LIB determination. *Id.* § 408.161. On the contrary, the Legislature's express mandate that LIBs "are paid until the death of the employee" manifests its intent to make LIB determinations permanent.[3] *Id.* § 408.161(a).

[3] The dissent concedes the statute no longer contains a procedure to re-open the LIB determination, indicating that "the Legislature cannot and need not envision every circumstance that may arise in the workers' compensation context" and that it "happened to leave a particular circumstance unaddressed." __ S.W.3d __, __ (Green, J., dissenting).

Liberty argues that the term "lifetime" in LIBs "pertains to the duration of a worker's eligibility for benefits; it does not determine entitlement." But the statute does not state that LIBs "may be paid" until the employee's death; rather, it mandates LIBs "are paid" until the employee's death. *Id.* Thus, when, as here, the Division has determined that an employee is eligible for LIBs, the plain language of the statute mandates that such benefits continue until the employee's death.

B. The Legislature's Comprehensive Benefits Scheme

We recently determined that "[t]he Act effectively eliminates the need for a judicially imposed cause of action outside the administrative processes and other remedies in the Act." *Ruttiger*, 381 S.W.3d at 451. "It is apparent that the Act prescribes detailed, [Division]-supervised, time-compressed processes for carriers to handle claims and for dispute resolution." *Id.* at 443. We observed: "[k]ey parts of the [workers' compensation] system are the amount and types of benefits, the delivery system 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." *Id.* at 450 (emphasis added). Further, we questioned "to what extent the judiciary will respect the Legislature's function of addressing the concerns and adjusting the rights of the parties in the workers' compensation system as part of its policy-making function." *Id.* In answering that question, we ultimately held that "[t]he Act effectively eliminates the need for a judicially imposed cause of action outside the administrative processes and other remedies in the Act." *Id.* at 451. In sum, the Legislature devised a comprehensive workers' compensation system, with specific benefits and procedures based on the

public policy of the State of Texas. We concluded in *Ruttiger* that the Court should not alter the Act's comprehensive scheme, and we reaffirm that principle today.

The Act's comprehensive framework requires that we respect the Legislature's choice to not include a procedure to re-open the LIB determination. Before its comprehensive reform of the workers' compensation system in 1989, the Legislature specifically incorporated such a procedure, providing that:

> [u]pon its own motion or upon the application of any person interested showing a change of condition, mistake, or fraud, *the Board at any time within the compensation period, may review any award or order, ending, diminishing or increasing compensation previously awarded*, within the maximum and minimum provided in this Law, or change or revoke its previous order denying compensation, sending immediately to the parties a copy of its subsequent order or award.

Act of May 20, 1931, 42d Leg., R.S., ch. 155, § 1, 1931 Tex. Gen. Laws 260. But the Legislature repealed this provision as part of its reform of the workers' compensation system in 1989. *See* Act effective Jan. 1, 1991, 71st Leg., 2d C.S., ch. 1, § 16.01(7), 1989 Tex. Gen. Laws 114; *see also Ruttiger*, 381 S.W.3d at 439 ("The key, and most controversial, reforms were in the areas of employee benefits and dispute resolution."). Because the Legislature specifically chose to remove the authority to re-open the permanent LIB determination as part of its reforms, we must credit that choice. *See Entergy*, 282 S.W.3d at 443 ("It is, of course, axiomatic that the deletion of language better indicates the Legislature's intent to remove its effect, rather than to preserve it.").

As part of its revised comprehensive scheme of the workers' compensation system, the Legislature established a dichotomy containing two distinct classes of income benefits: temporary benefits and permanent benefits. Temporary benefits are only paid as long as certain conditions

(*e.g.*, medical conditions) continue to exist, whereas permanent benefits continue until the occurrence of a statutory, terminating event (*e.g.*, death).

With respect to temporary benefits, the Act lays out specific procedures to re-open benefits determinations. For example, supplemental income benefits (SIBs), a form of temporary benefits, are based upon an employee's demonstration of an active effort to obtain employment. TEX. LAB. CODE § 408.1415(a). The Act expressly allows carriers to "request a benefit review conference to contest an employee's entitlement to supplemental income benefits or the amount of supplemental income benefits." *Id.* § 408.147(a). The Act also specifies the procedures for evaluating whether SIBs should end, allowing a medical evaluation once every twelve months, *id.* § 408.149(a), and permitting the Division to designate a doctor for a medical evaluation to determine if the employee's condition has sufficiently improved to allow him to return to work, *id.* § 408.151(b).

Similarly, temporary income benefits (TIBs)—another form of temporary benefits—are contingent on the employee's recovery. "An employee is entitled to temporary income benefits if the employee has a disability and has not attained maximum medical improvement." *Id.* § 408.101. "'Disability' means the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." *Id.* § 401.011(16). "If the report of a designated doctor indicates that an employee has reached maximum medical improvement or is otherwise able to return to work immediately, the insurance carrier may suspend or reduce the payment of temporary income benefits immediately." *Id.* § 408.0041(k). Because TIBs and SIBs are paid until the employee reaches statutorily sufficient medical improvement, eligibility determinations require periodic evaluation.

While temporary benefits require continuous monitoring to determine whether the employee has achieved the statutory level of improvement, permanent benefits require no such monitoring. This is because such benefits are permanent determinations, only terminating on the occurrence of a specific statutorily mandated life event. For example, death income benefits (DIBs) are paid to eligible beneficiaries when an injury to an employee results in death. *Id.* § 408.181(a). The statute sets out eligibility requirements for children, spouses, and parents. *Id.* § 408.182. Once eligible, benefits continue until the occurrence of some specific event, whether it be death, remarriage, or attaining a certain age. *Id.* § 408.183. There is no provision that allows a carrier to reassess DIBs after eligibility is established. Further, a carrier is permitted to pay DIBs through an annuity, thus removing the act of paying the benefits from the carrier's purview. *Id.* § 408.181(d). According to Division rules, such an annuity is not assignable by the beneficiary. 28 TEX. ADMIN. CODE § 132.16(d)(6). By authorizing use of a method providing a non-assignable right to payment, the Legislature indicated that the right to DIBs exists until the statutory contingency is met—with no procedure for further review.

Similarly, LIBs—like DIBs—are permanent income benefits. LIBs are paid upon the establishment of eligibility—here by the loss of use of two limbs—until the occurrence of a particular event: the death of the employee. TEX. LAB. CODE §§ 408.161(a)(4), (b). Unlike temporary benefits, the statute provides no express statutory procedure to re-open an eligibility determination for LIBs or to assess the medical improvement of the employee. In addition, LIBs, like DIBs may be paid through an annuity. *Id.* § 408.161(d). Such an annuity is likewise not assignable by the beneficiary. 28 TEX. ADMIN. CODE § 131.4(d)(5). As with DIBs, the Legislature

has authorized the use of a payment method that provides a non-assignable right to payment for the life of the obligation. Construing the Act in accordance with this dichotomy, the Legislature has established LIBs as a permanent right to benefits with no procedure to re-open that determination.

When the Legislature expresses its intent regarding a subject in one setting, but, as here, remains silent on that subject in another, we generally abide by the rule that such silence is intentional.[4] Thus, the Legislature's express provision of procedures for re-evaluating temporary benefit eligibility and the absence of such a procedure for permanent benefits indicates a deliberate choice, and we must respect the Legislature's prerogative to establish the rights and procedures in the workers' compensation system. Therefore, we decline Liberty's invitation to judicially engraft a procedure inconsistent with the dichotomy the Legislature constructed. *Ruttiger*, 381 S.W.3d at 450; *Entergy*, 282 S.W.3d at 443.[5]

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[4] *See In re Nalle Plastics Family Ltd. P'ship*, __ S.W.3d __, __, 2013 WL 2150717, at *7 (Tex. May 17, 2013) (holding that the Legislature's use of the word "costs" did not include attorney's fees as the definition of "litigation costs" elsewhere included both costs and attorney's fees); *Tex. Natural Res. Conservation Comm'n v. IT-DAVY*, 74 S.W.3d 849, 859 (Tex. 2002) ("[T]he Legislature knows how to clearly and unambiguously waive sovereign immunity from suit. . . . Here, neither section 5.351 nor 5.352 clearly and unambiguously waives the [Texas Natural Resource Conservation Commission]'s sovereign immunity from suit for breach-of-contract claims."); *Bally Total Fitness Corp. v. Jackson*, 53 S.W.3d 352, 358 (Tex. 2001) ("The Legislature could have added similar language to Section 51.014(a)(3) and permitted appeals from orders refusing to decertify a class, but did not."); *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 885 (Tex. 2000) ("Section 26.177(d) shows the Legislature knows how to provide a right of appeal to persons affected by a water quality plan or government action relating to a plan. Yet, the Legislature chose not to provide such a right to persons affected by section 26.179 plans or [Texas Natural Resource Conservation Commission] approval of plans.").

[5] Adcock also asserts that the doctrines of *res judicata* and collateral estoppel act to bar Liberty from re-litigating a previously determined issue. But because the statute grants no authority to re-open LIB determinations, these doctrines do not affect our analysis.

Liberty responds that if—as we hold today—the LIB determination is permanent, this will harm injured employees because they will not be able to obtain LIBs if their initial request is denied but their medical condition subsequently deteriorates. But the Legislature's scheme for payment of LIBs belies this argument. Specifically, section 408.081 states that "[a]n employee is entitled to timely and accurate income benefits as provided by this chapter," and further requires that income benefits be paid weekly without action by the commissioner. TEX. LAB. CODE §§ 408.081(a), (b). Section 408.161 indicates that LIBs are to be paid when the permanent loss of use of certain body parts occurs. *Id.* § 408.161. Thus, when viewed in context, the statute requires that carriers begin paying benefits to employees once eligibility is established. *See Ruttiger*, 381 S.W.3d at 454 ("legislative intent emanates from the Act as a whole"). There is no restriction on *when* such eligibility may be established. Rather, the statute contemplates that whenever a compensable injury leads to a qualifying permanent loss of use, eligibility occurs and the employee becomes entitled to permanent LIBs. This is in direct contrast to the termination of LIBs, which specifically occurs at the employee's death. TEX. LAB. CODE § 408.161(a).

C. Response to the Dissent

The dissent argues that: (1) despite the statute's failure to include a procedure to re-open the LIB determination, the Act's general definition of "impairment" implies such a procedure; (2) the Act also necessarily implies the authority of the Division to re-open the LIB determination; (3) our remand in *American Zurich Insurance Co. v. Samudio*, 370 S.W.3d 363 (Tex. 2012), requires us to allow the Division to re-open LIB determinations; and (4) the Legislature's framework credits the

Division as "being able to predict the future and knowing absolutely which claimants will always be entitled to" LIBs. These assertions, however, are unavailing.

To support its first argument, the dissent relies on the Act's general definition of "impairment" as "reasonably presumed to be permanent" to conclude that the finding of permanency is merely a prediction. TEX. LAB. CODE § 401.011(23). The dissent searches for support in our observation in *Insurance Co. of State of Pennsylvania v. Muro* that all injuries under section 408.161 result in impairments. 347 S.W.3d 268, 275 (Tex. 2011). But the dissent fails to consider that in *Muro*, we heavily relied on the fact that the Legislature's deletion of certain language in the Act indicated its intent to change the former law. *Id*. ("Because the Legislature chose both to retain the enumerated injuries and to repeal the 'other loss' clause, it clearly did not intend to continue the broader application of lifetime income benefits formerly recognized by some courts of appeals under the old-law's 'other loss' clause."). This generic definition of impairment does not re-inject into the Act an entire procedure for re-opening LIB determinations that the Legislature previously removed.

Additionally, the dissent contends that principles of agency deference necessarily imply the authority for the Division to re-open the LIB determination. *See R.R. Comm'n of Tex. v. Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 624 (Tex. 2011) ("We have long held that an agency's interpretation of a statute it is charged with enforcing is entitled to 'serious consideration,' so long as the construction is reasonable and does not conflict with the statute's language."). But such deference is in direct conflict with the "well-established principle that" administrative agencies "may exercise only those powers that the Legislature confers upon [them] in *clear and express language*, and cannot erect and exercise what really amounts to a new or additional power for the purpose of administrative expediency." *See Tex. Natural Res. Conservation*

Comm'n v. Lakeshore Util. Co., 164 S.W.3d 368, 377 (Tex. 2005) (emphasis added). Here, the Legislature deliberately removed the procedure for re-opening the LIB determination, and that deliberate silence neither creates ambiguity nor confers authority to an agency. *See id.*; *Entergy*, 282 S.W.3d at 443.

Further, the dissent's reliance on *Samudio* is misplaced. *Samudio* involved workers' compensation impairment income benefits. 370 S.W.3d at 365. The Act mandates that the Division assign an impairment rating determined in accordance with certain criteria. *Id*. at 368. In *Samudio*, although the carrier and employee agreed the employee was impaired, they disagreed on the extent of the impairment. *Id*. at 366. Because the Act mandated the Division assign a valid impairment rating but no valid impairment rating was before the Division, we remanded the claim to the Division to consider a valid impairment rating. *Id*. at 368. Thus, *Samudio* stands for the proposition that the Division must comply with the Act's mandates (which was to assign a valid impairment rating). In this case, the Act mandates that the carrier make payments until the employee's death because the Division determined Adcock is eligible for permanent LIBs. *See* TEX. LAB. CODE § 408.161. Re-opening that determination would not enforce the mandate—it would violate it. If the Legislature determines that the employers and employees of Texas are best served by allowing for re-opening LIB determinations, it may craft a review procedure in the statute—as it has done with temporary benefits and previously did with LIBs. This Court, however, must avoid such policy determinations.

Lastly, the dissent asserts that our construction of the comprehensive scheme requires the Division to predict with certainty which claimants will always be entitled to LIBs, a requirement that is unworkable because the future is unknowable. Yet common law and statutory claims, and their

procedures for recovering future damages, have long been a cornerstone of our court system. The question is not whether future damages are absolutely knowable but whether the plaintiff proved such damages within a reasonable degree of certainty. *See Columbia Med. Ctr. of Las Colinas, Inc. v. Hogue*, 271 S.W.3d 238, 247 (Tex. 2008). It is not grounds to re-open a judgment simply because a plaintiff incurred fewer future medical expenses than the judgment awarded. Here, the question is whether the Division could determine that an employee lost the use of two limbs. TEX. LAB. CODE §§ 408.161(a)(4), (b). The Division made that determination over a decade ago, and the record indicates no difficulty in doing so. The requirement that an injury be permanent is a familiar concept to the courts and the Legislature and does not yield absurd results.

III. Conclusion

We defer to the Legislature to craft statutes and we interpret them as written. The Legislature previously included a procedure to re-open LIB determinations—which it removed in 1989. Currently, the Legislature only allows temporary benefit determinations (not permanent benefit determinations like LIBs) to be re-opened. We will not judicially engraft into this comprehensive statute a procedure the Legislature deliberately removed. Accordingly, the Division had no jurisdiction to re-open Adcock's LIB determination, and we therefore affirm the judgment of the court of appeals.

Eva M. Guzman
Justice

OPINION DELIVERED: August 30, 2013

IN THE SUPREME COURT OF TEXAS

NO. 11-0934

LIBERTY MUTUAL INSURANCE COMPANY, PETITIONER,

v.

RICKY ADCOCK, RESPONDENT

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

JUSTICE GREEN, joined by CHIEF JUSTICE JEFFERSON and JUSTICE HECHT, dissenting.

The Court today holds that, once awarded, lifetime income benefits (LIBs) are irrevocable and must be paid for the rest of a claimant's life, even when it can be established at a later date that the claimant's injury is no longer total and permanent. While the Court's rationale makes sense for anatomical losses, it defies reason for functional losses. Advances in medicine and science offer previously unforeseen therapies and treatments that enable some persons who once seemed permanently injured to regain functionality. The Court says none of this matters, that the Legislature intended to foreclose any reopening of a finding of total and permanent loss of use, even when evidence would show that the claimant has recovered. Because I read the Labor Code's scheme governing income benefits as giving the Texas Department of Insurance, Division of Workers'

Compensation (the Division) jurisdiction to ensure that only claimants who meet the statutory eligibility criteria receive LIBs, I respectfully dissent.

I. Background

In March 1991, Ricky Adcock sustained on-the-job injuries to his right foot and his right hand. Six years later, he was awarded LIBs. Liberty Mutual, the worker's compensation insurance carrier for Adcock's employer, did not appeal that decision to the trial court and began issuing payments pursuant to the order.[1] More than ten years later, Liberty Mutual sought a new hearing, asserting that it had received video evidence of Adcock walking and handling objects, indicating that his condition had improved enough that he no longer had total and permanent functional loss of his ankle and hand, and he was therefore not entitled to LIBs. At a contested case hearing, the parties agreed on the following questions to be certified to the hearing officer:

> (1) Is [Adcock] entitled to lifetime income benefits (LIBs) as of this date based on total and permanent loss of use of his hands and legs?
>
> (2) As a result of the decision and order of Appeals Panel in Appeal No. 970981, does the Division have jurisdiction to determine continuing entitlement to lifetime income benefits (LIBs)?

The video evidence presented at the hearing clearly demonstrated that, at one time, Adcock could walk and handle objects. The hearing officer issued its decision and order, finding that it had jurisdiction to hear the case but that, despite the video evidence, Adcock remained entitled to LIBs. The appeals panel affirmed. Adcock appealed to the district court, arguing that the Division lacked

[1] If a party disputes the appeals panel decision, it "may seek judicial review by filing suit not later than the 45th day after the date on which the [D]ivision mailed the party the decision of the appeals panel." TEX. LAB. CODE § 410.252(a). "A decision of the appeals panel regarding benefits is final in the absence of a timely appeal for judicial review." *Id.* § 410.205(a).

jurisdiction to hear the case under section 408.161 of the Labor Code, and asserting res judicata and collateral estoppel.

II. The Division's Jurisdiction

The Court holds that jurisdiction to determine continuing eligibility for LIBs cannot be found in the plain language of the Act, and therefore our inquiry can go no further. I disagree. When construing a statute, "[w]e rely on the plain meaning of the text as expressing legislative intent unless a different meaning is . . . apparent from the context." *Tex. Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 635 (Tex. 2010). Additionally, we are not constrained to the text of the statute if "the plain meaning leads to absurd or nonsensical results." *Molinet v. Kimbrell*, 356 S.W.3d 407, 411 (Tex. 2011). I believe that disallowing the Division jurisdiction in these cases will lead to absurd and nonsensical results, which the Legislature did not intend.

A. The Statute Indicates Jurisdiction to Consider Continuing Eligibility to Receive LIBs

Section 408.161 of the Texas Labor Code provides that "[l]ifetime income benefits are paid until the death of the employee" when an impairment qualifies under the statute. TEX. LAB. CODE § 408.161(a). Additionally, "the total and permanent loss of use of a body part is the loss of that body part" for purposes of entitlement to LIBs. *Id.* § 408.161(b). The Division is charged with reviewing an employee's condition and awarding LIBs when the claimant is entitled to them. *See id.* § 402.00114 (providing that "the division shall: (1) regulate and administer the business of workers' compensation in this state; and (2) ensure that this title and other laws regarding workers' compensation are executed"); *see also id.* § 408.161 (establishing the requirements for entitlement to LIBs). As the Court explains, administrative agencies are creatures of the Legislature and,

therefore, may exercise only the powers the Legislature confers upon them in clear and express language. ___ S.W.3d at ___; *Tex. Natural Res. Conservation Comm'n v. Lakeshore Util. Co.*, 164 S.W.3d 368, 377–78 (Tex. 2005). As the Court also recognizes, however, "[w]hen the Legislature expressly confers power on an agency, it also impliedly intends that the agency have whatever powers are reasonably necessary to fulfill its express functions or duties." *Lakeshore Util. Co.*, 164 S.W.3d at 378. "In deciding whether an agency has acted within its powers, a court should also determine whether an agency's power is *implied in the statute*." *Id.* at 377–78 (emphasis added). We recently held in *American Zurich Insurance Co. v. Samudio*, 370 S.W.3d 363 (Tex. 2012), that the trial court had the power to remand an impairment rating decision to the Division even though "the statute [was] silent as to the court's power to remand" because the "regulatory scheme as a whole illustrate[d]" that was the Legislature's intent. 370 S.W.3d at 368. Likewise, the overall income benefit scheme indicates the Legislature's intent for the Division to have jurisdiction to consider continuing eligibility for LIBs.

We determine legislative intent by reading the statute as a whole and interpreting the legislation to give effect to the entire act and not just its isolated portions. *City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 25 (Tex. 2003). We may be "aided by the interpretive context provided by the surrounding statutory landscape." *LTTS Charter Sch., Inc. v. C2 Constr., Inc.*, 342 S.W.3d 73, 75 (Tex. 2011) (internal quotation marks omitted). The Division is charged with the duty to "administer and operate the workers' compensation system." TEX. LAB. CODE § 402.001(b). And it must "provide appropriate income benefits and medical benefits in a manner that is timely and cost-effective." *Id.* § 402.021(b)(3). As the Division is charged with the efficient and cost-

effective administration of benefits, it follows that the Legislature intended that the Division have the power to ensure that those who are permanently impaired receive just compensation and those whose impairments are not permanent do not receive a windfall. Without the implied power to determine continuing eligibility for LIBs, the Division could not ensure that income benefits are administered in a cost-effective way. It is unlikely that the Legislature would require the workers' compensation system and its carriers to allocate resources in such a way as to require the payment of lifetime benefits, often for decades, to workers who do not meet the statutory criteria.

Although we held in *Texas Mutual Insurance Co. v. Ruttiger*, 381 S.W.3d 430 (Tex. 2012), that a common law cause of action for breach of the duty of good faith and fair dealing against a workers' compensation insurance carrier "operate[d] outside the administrative processes and other remedies in the Act and [was] in tension with . . . the Act's goals or processes," *id.* at 450, here an action to determine continuing eligibility for LIBs is not in tension with the Act; rather, it is consistent with the Legislature's intent to give the Division the responsibility of properly administering benefits. I agree with the Court that the Legislature has enacted a comprehensive scheme for workers' compensation. ___ S.W.3d at ___. As discussed below, however, the Legislature cannot and need not envision every circumstance that may arise in the workers' compensation context. And the Court should not be required to order absurd results if the Legislature happened to leave a particular circumstance unaddressed. *See R.R. Comm'n v. Lone Star Gas Co.*, 844 S.W.2d 679, 689 (Tex. 1992) (noting that requiring the Legislature to anticipate all circumstances would defeat the purpose of delegation).

As Adcock and the Court point out, other income benefits in the Act, such as supplemental income benefits and temporary income benefits, have a cap on the length of time an employee may receive benefits, while an award of LIBs does not. *See* ___ S.W.3d at ___ (citing TEX. LAB. CODE §§ 408.0041(k), .011(16), .101, .1415(a), .147(a), .149(a), .151(b)). Adcock and the Court argue this is significant and indicates the Legislature's intent that LIBs be awarded until the claimant dies, regardless of whether his condition may have improved. But the Legislature's use of "lifetime" does not mean there can be no cap; rather, it denotes the maximum possible duration of the benefit—an employee is eligible to receive up to a lifetime's worth of benefits, but he is entitled to those benefits only if he meets the statutory condition. Section 408.161 provides that LIBs "are to be paid until the death of the employee *for*" the total and permanent loss, or loss of use, of statutorily specified body parts. TEX. LAB. CODE § 408.161(a) (emphasis added). The word "for" limits the required payment of LIBs, thus conditioning the entitlement to LIBs upon a total and permanent loss of, or loss of use of, those body parts. *Id.* § 408.161(a), (b). As long as an employee is still entitled to the LIBs by virtue of his condition, the award is indefinite. So, while the Legislature did not expressly provide for a review process of a grant of LIBs, the plain language of the statute signals the Legislature's intent to allow the Division to ensure that LIBs are paid only to those entitled to them and that those entitled to them are actually receiving the benefits.

The Court argues that because the provisions governing death income benefits (DIBs)—a form of permanent benefit that is paid to a deceased employee's beneficiaries until the occurrence of a specified event—contain no procedure for ensuring continuing eligibility, LIBs must likewise be paid in perpetuity with no mechanism for ensuring continuing eligibility. *See* ___ S.W.3d at ___

(citing TEX. LAB. CODE §§ 408.181(a), .181(d), .182, .183). But the Court misses a critical difference—death *is* permanent; loss of use may be, but only time will tell. DIBs are paid until triggering events that are sure to occur—either beneficiaries will reach a certain age, or they will die, for example. *See* TEX. LAB. CODE § 408.183. LIBs for anatomical losses work the same way—they *are* permanent, even when a claimant uses a prosthesis and is thus fully functional. LIBs for functional losses such as Adcock's are different, however. They are paid "for" the total and permanent loss of use of certain body parts—something that lacks the certainty of death and amputations.[2]

The Court holds, and I agree, that the Division has jurisdiction to later consider a claimant's eligibility for LIBs when LIBs have previously been denied. *See* ___ S.W.3d at ___. Just as the Act must be construed to impliedly allow an injured employee to subsequently establish eligibility for LIBs based upon a change of condition after LIBs were denied, the Act should also be construed to impliedly allow an insurance carrier to establish, based upon a change of condition, that eligibility no longer exists for a claimant receiving LIBs. The Legislature must have intended an effective and efficient exercise of the Division's power to award LIBs, including the power to assess LIB entitlement, whether previously awarded or previously denied, to determine if the statutory criteria for receipt of benefits are satisfied. *See Samudio*, 370 S.W.3d at 368–69 (explaining that the overall

[2] The Court also argues that because LIBs, like DIBs, can be paid through a non-assignable annuity, the Legislature must intend that there be no mechanism other than the claimant's death to end the payment of LIBs. ___ S.W.3d at ___. That the Legislature allows payment through an annuity for benefits that truly are permanent—DIBs and LIBs for anatomical losses—however, does not mean that the Legislature intends to foreclose a process to ensure that claimants receiving LIBs for functional losses are actually entitled to those benefits.

regulatory scheme suggested that the trial court had the authority to remand to the Division despite the lack of an express provision in the statute).

I recognize that we are to construe the Act liberally in favor of employees and not supply "by implication restrictions on an employee's rights." *In re Poly-Am., L.P.*, 262 S.W.3d 337, 350 (Tex. 2008) (orig. proceeding) (quoting *Kroger Co. v. Keng*, 23 S.W.3d 347, 349 (Tex. 2000)). However, the Legislature could not have intended that "liberally construing the statute" would include permitting employees who are not entitled to LIBs to receive them. Moreover, this interpretation does not act as a "restriction" on an employee's rights because an employee does not have a right to LIBs unless his or her injury qualifies under the statute. A contrary interpretation of section 408.161 would lead to nonsensical results. *See Kimbrell*, 356 S.W.3d at 411.

The Court holds that the words "total and permanent" and "death" foreclose the Division from evaluating a claimant's continuing eligibility to receive LIBs. ___ S.W.3d at ___, ___. But the determination that an injury is permanent can be "nothing more than a prediction" that the condition will continue indefinitely. *Hartford Accident & Indem. Co. v. McCardell*, 369 S.W.2d 331, 338 (Tex. 1963), *superseded by rule on other grounds as recognized in Bay Area Healthcare Grp., Ltd. v. McShane*, 239 S.W.3d 231, 235 (Tex. 2007); *cf. Schneider Nat'l Carriers, Inc. v. Bates*, 147 S.W.3d 264, 272 (Tex. 2004) (defining a permanent nuisance as an activity which is presumed to continue indefinitely). We have explained that the "injuries enumerated in section 408.161 all result in impairments," *Ins. Co. of State of Pa. v. Muro*, 347 S.W.3d 268, 275 (Tex. 2011), and "impairment" is defined in the Act to include an injury that "is reasonably presumed to be permanent," and therefore may change at a later time. TEX. LAB. CODE § 401.011(23)

("'Impairment' means any anatomic or functional abnormality or loss existing after maximum medical improvement that results from a compensable injury and is reasonably presumed to be permanent."). Although LIBs are awarded on a presumption that an impairment will continue indefinitely, with modern medicine and science we cannot preclude the possibility that a functional impairment may improve. The workers' compensation system and the individual carrier should not have to continue to pay LIBs in the rare and fortunate event that a LIB claimant's condition improves and the claimant no longer has total and permanent loss of use. I agree with Liberty Mutual and the Division that the Division must have jurisdiction to determine a claimant's continuing eligibility for LIBs when there is evidence that his or her impairments are no longer total and permanent.

B. The Division's Interpretation of the Statute Is Entitled to Serious Consideration

If a statute is ambiguous, "[c]onstruction of [that] 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." *Mid-Century Ins. Co. of Tex. v. Ademaj*, 243 S.W.3d 618, 623 (Tex. 2007) (internal quotation marks and citation omitted); *see R.R. Comm'n. v. Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 624 (Tex. 2011) ("We have stated this principle in differing ways, but our opinions consistently state that we should grant an administrative agency's interpretation of a statute it is charged with enforcing some deference."). In this case, both the hearing officer and the appeals panel held that the Division had jurisdiction to consider continuing eligibility to receive LIBs under section 408.161, and the Division has taken that position throughout these proceedings. The appeals panel reached a similar result in a decision the parties refer to as *Deep East Texas Self Insurance Fund*, Appeals Panel No. 020432-s,

2002 WL 971079 (Tex. Workers' Comp. Comm'n Apr. 10, 2002), in which an insurance carrier challenged the claimant's continuing entitlement to LIBs and sought to show that the claimant fraudulently obtained the award. *Id.* at *1–2. The appeals panel held that the Division had jurisdiction to consider a claimant's continuing entitlement to LIBs, but the court of appeals in this case disagreed with the appeals panel's reasoning in *Deep East Texas*, concluding that because the insurance company was claiming fraud, it should have sought a remedy under section 415.031. 353 S.W.3d 248, 252 (Tex. App.—Fort Worth 2011, pet. granted); *see* TEX. LAB. CODE § 415.031 (allowing any person to initiate administrative violation proceedings). Unlike *Deep East Texas*, however, Liberty Mutual does not contend that Adcock obtained his LIBs by fraud; it merely challenges his continuing eligibility for LIBs. As I have discussed, it is reasonable and does not contradict the plain language of the statute to construe section 408.161 as impliedly allowing the Division to have jurisdiction to determine eligibility for LIBs. Therefore, I see no reason that the Division's construction of the Act as conferring jurisdiction to determine Adcock's continuing eligibly for LIBs should not be afforded serious consideration.

The Court asserts that the Legislature knows how to provide for review of income benefit determinations, as it has done with temporary income benefits, and the lack of an express review provision in section 408.161 indicates the Legislature's intent to prohibit the Division from considering continuing eligibility to receive LIBs. ___ S.W.3d at ___. However, "[t]he Legislature is not required to set forth in detail all the provisions necessary to govern the agency in the performance of its functions." *Lone Star Gas Co.*, 844 S.W.2d at 689 (quoting *State v. Tex. Mun. Power Agency*, 565 S.W.2d 258, 273 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ dism'd))

(internal quotation marks omitted). Liberty Mutual asserted at oral argument that typically in LIB cases the functional loss of use of an appendage worsens over time, so a determination of a claimant's continuing eligibility for LIBs is not necessary. Just because the Legislature did not expressly provide for this unusual situation does not mean that it did not intend for the Division to possess the power to carry out its duties to effectively distribute workers' compensation benefits. *Cf. Samudio*, 370 S.W.3d at 368–69 (explaining that, despite the lack of an express provision in the Workers' Compensation Act, trial courts nevertheless have the authority to remand cases to the Division as evinced by the overall statutory scheme).

As the Court points out, article 8306, section 12d of the former Workers' Compensation Act gave the reviewing commission power "to review any award or order, ending, diminishing or increasing compensation previously awarded" based on "a change of condition, mistake or fraud," a provision that is absent from the current Act. Act of May 20, 1931, 42d Leg., R.S., ch. 155, § 1, art. 8306, 1931 Tex. Gen. Laws 260, 260–61, *repealed by* Act of Dec. 13, 1989, 71st Leg., 2d C.S., ch. 1, § 16.01(7), art. 8306, 1989 Tex. Gen. Laws 114, 114. The current Act provides for specific review within each particular type of benefit. *See* 353 S.W.3d at 250 (explaining the review systems for supplemental and temporary income benefits). The absence of a broad review provision does not necessarily indicate the Legislature's intent to deprive the Division of jurisdiction, as the Court contends. While the Legislature's omission of a provision from an old statute to a new may signal an intent to change the law, *see Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 443 (Tex. 2009), it may also signal a change in the statutory scheme, as is the case here. *See Jones v. Fowler*, 969 S.W.2d 429, 432–33 (Tex. 1998) (holding that the Legislature did not intend the deletion of a

statutory provision in the Family Code to be a substantive change in light of changes to the entire statutory scheme). Under the former statute, benefits were paid "predictively," meaning that they were set "at the time of adjudication based on a prediction of the injury's future impact on employment." *Tex. Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 516 (Tex. 1995). The current Act instead pays long-term benefits retrospectively, where "benefits are adjusted periodically over time based on actual lost wages for that period." *Id.* The Legislature did not merely amend the former statute and deliberately leave out the review provision; it significantly overhauled the entire workers' compensation system, including provisions for how claims are evaluated and benefits are awarded. *See id.* at 513. A difference in language, therefore, is less indicative of intent in this circumstance. I recognize that the Legislature knows how to provide for review, as it did so with the other compensation schemes. *See* 353 S.W.3d at 249–50. It follows then that the Legislature also knows how to expressly prohibit the Division from considering continuing eligibility for LIBs. It did not do so here. I believe that the Legislature intended for the Division to have jurisdiction to determine continuing eligibility for an award of LIBs.

The Court characterizes the issue in this case as one of re-opening a previous LIB adjudication. ___ S.W.3d ___, ___. I view Liberty Mutual's claims as seeking a new determination of Adcock's continuing eligibility to LIBs. As a new claim, as opposed to an appeal of the original LIB award, the Division's process for determining a claimant's continuing eligibility for LIBs should be the same as an original determination to grant or deny benefits. A claimant or insurance carrier may request a benefit review conference by giving notice to the other parties after attempting to resolve the dispute. *See* TEX. LAB. CODE §§ 410.023–.025; 28 TEX. ADMIN. CODE § 141.1. If the

parties cannot resolve their dispute at the benefit review conference or arbitration, the parties may proceed to a contested case hearing, where a Division hearing officer hears the dispute and makes a record of the proceedings. *See* TEX. LAB. CODE § 410.151. The parties may then appeal that decision to the Division's appeals panel. *See id.* § 410.202. Further, the Act provides the Division with the power to monitor carrier actions. *See id.* § 414.002(a). It lists numerous actions that constitute administrative violations by an insurance carrier, including a carrier's contest of a claim to benefits when evidence clearly indicates liability. *See id.* § 415.002. The Act allows for sanctioning and penalties when carriers violate such provisions of the Act, and therefore guards against potential harassing actions by carriers against claimants receiving LIBs. *See id.* § 415.021(a).[3] Because the Act already provides a procedure for contesting a claimant's current eligibility to benefits, there was no need for the Legislature to include a separate provision in the statute.

III. Conclusion

Section 408.161 awards LIBs for functional impairments that equate to a total and permanent loss of body parts and other serious life-altering injuries. It is impossible for the Division or anyone else to know whether loss of use will actually be total and permanent. When, by good fortune or advances in medical science, a claimant's impairments improve so that he no longer meets the

[3] Although not raised by the parties, I do not believe that section 410.209 of the Labor Code, which provides for reimbursement of funds to an insurance carrier who has overpaid a claimant, applies in cases such as this. *See id.* § 410.209. Liberty Mutual and the Division do not contend that Adcock was not entitled to LIBs in 1997, and thus they are not arguing that the Division should "revers[e] or modif[y]" that decision as is required to trigger potential reimbursement. *See id.* Rather, I view this is an entirely new determination of a claimant's current entitlement to LIBs and not an appeal of the original grant of LIBs.

statutory eligibility criteria for LIBs, he should not receive a windfall, as the Court would hold, merely because the Legislature failed to provide for this unique circumstance. Surely the Legislature did not intent such a nonsensical result. I would hold that the Division, which is charged with the effective administration of income benefits, has jurisdiction to consider a claimant's continuing eligibility to receive LIBs. I respectfully dissent.

_____

Paul W. Green
Justice

OPINION DELIVERED: August 30, 2013

IN THE SUPREME COURT OF TEXAS

NO. 11-0976

VILMA GRANADO, PETITIONER,

v.

PEDRO C. MEZA, RESPONDENT

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

PER CURIAM

In this appeal, the trial court confirmed arrearages of $500. The proffered support for this finding is: (1) a clerical error by the Office of the Attorney General (OAG) mistakenly reflecting that the child-support obligation ended 12 years early, and (2) a statement in the OAG's Child Support Disbursement Unit Payment Record (Payment Record) that the Record might not include payments made to local registries. The clerical error is no evidence of arrearages because the OAG could not modify this child-support obligation. And because the obligor testified that he only paid the OAG, the Payment Record's disclaimer that it might not include payments to local registries is no evidence of arrearages. Thus, while there is some evidence of arrearages, there is no evidence to support the trial court's $500 arrearage determination. Because a trial court's determination of child-support arrearages must be set aside if there is no evidence to support it, we reverse the judgment of the court of appeals and remand the case to the trial court.

Vilma Granado and Pedro Meza are the parents of P.L.D. In 1982, two years after P.L.D. was born, Granado filed suit to establish paternity. Meza filed no answer, and Granado obtained a default judgment (the Order) that established Meza's paternity and ordered child support of $60 per month to be paid "until [P.L.D.] . . . shall attain the age of eighteen." The Order also admonished Meza that direct payments "will be treated as gifts and he [would] not receive credit for such payments in satisfaction of the [Order]."

Meza testified that he first learned of this obligation some years after the Order, began making child-support payments after receiving notices from the OAG, and paid all amounts the OAG sought. He further testified that he made all payments through the OAG in Corpus Christi but was unsure whether another entity was involved. In 2002, the OAG closed Meza's case, erroneously concluding that the child-support obligation had ended when P.L.D. would have been only six years old. At trial, the Payment Record reflected Meza had paid a total of $5,143.76.

In February 2009, Granado sought to enforce the Order through child-support liens and a writ of withholding. Meza moved to stay enforcement of the liens and the writ. In response, Granado sought a determination of arrearages under Chapters 157 and 158 of the Family Code.

At trial, Granado called an OAG attorney who testified that the Payment Record was required to be a complete record of all of Meza's payments to the OAG. *See* TEX. FAM. CODE § 234.009(b) ("The record of child support payments maintained by the state disbursement unit is the official record of a payment received directly by that unit."). The attorney also testified that the OAG closed Meza's case because the OAG's internal file showed Meza owed less than $500 in arrearages in 2002. This figure, however, was based upon the child-support obligation ending on March 30, 1986,

12 years early. The record conclusively establishes the child-support obligation did not terminate until P.L.D. reached the age of 18. The only explanation offered for the clerical error was that Granado stopped receiving public assistance in March 1986 and this somehow generated the erroneous date. Meza, however, confirmed that the Order was never modified and admitted his total obligation was $11,250. In addition to Meza's own testimony that he only paid the OAG in Corpus Christi, Granado testified that Meza never paid child support directly to her, though direct payments would not offset the obligation under the express terms of the Order.

The trial court ultimately found Meza owed only $500 in arrearages. The court of appeals affirmed, concluding that the testimony that the OAG closed Meza's case because he owed less than $500 in arrearages supported the trial court's finding. 360 S.W.3d 613, 619.

Granado contends no evidence supports the trial court's $500 arrearage determination. We agree. Section 157.323(c) of the Family Code states that "[i]f arrearages are owed by the obligor, the court shall . . . render judgment against the obligor for the amount due, plus costs and reasonable attorney's fees." TEX. FAM. CODE § 157.323(c)(1). Similarly, section 158.309 states that upon hearing a motion to stay enforcement of a writ of withholding, "the court shall . . . render an order for income withholding that includes a determination of the amount of child support arrearages . . . ." *Id*. § 158.309(c).

In *Office of the Attorney General of Texas v. Burton*, we held that a determination of arrearages must be set aside if no evidence supports it. 369 S.W.3d 173, 175—76 (Tex. 2012). There, the parties agreed arrearages were owed but disagreed about the amount. *Id*. at 175. The movant failed to provide the trial court with information regarding an offset from social security

disability benefits paid to the child, and the trial court subsequently found no arrearages. *Id*. at 174–75. We reversed because no evidence supported the trial court's determination. *Id.* at 175.

Here, while there is some evidence of arrearages, as in *Burton*, there is no evidence to support the trial court's specific finding of $500 in arrearages. That finding was based on the OAG's clerical error reflecting the obligation ended 12 years early and a statement in the Payment Record indicating it could be inconclusive. Here, the OAG clerical error cannot serve as a basis for modifying the child-support obligation. *See Williams v. Patton*, 821 S.W.2d 141, 143–44 (Tex. 1991); TEX. FAM. CODE §§ 156.001, 156.401(b). Thus, the clerical error is no evidence supporting the trial court's determination of $500 in arrearages. *See Burton,* 369 S.W.3d at 175.

The court of appeals also relied on a statement in the Payment Record indicating the Record could be inconclusive because a local child-support registry may have records of other payments made by an obligor. 360 S.W.3d at 618. But Meza's own testimony that he only paid through the OAG in Corpus Christi negates any such possibility and is no evidence that Meza paid all but $500 of his obligation. Thus, while the record contains some evidence that arrearages exist, there is no evidence to support the trial court's determination of $500 in arrearages. *See Burton,* 369 S.W.3d at 175.

In sum, no evidence exists to support the trial court's determination of $500 in arrearages. Accordingly, we need not reach Granado's remaining issues. Without hearing oral argument, TEX. R. APP. P. 59.1, we grant the petition for review, reverse the court of appeals' judgment, and remand the case to the trial court for proceedings consistent with this opinion.

OPINION DELIVERED: April 19, 2013

IN THE SUPREME COURT OF TEXAS

NO. 12-0032

IN THE MATTER OF L.D.C., A CHILD

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

Argued January 10, 2013

JUSTICE HECHT delivered the opinion of the Court.

The question in this juvenile delinquency proceeding is whether the trial court committed reversible error by submitting elements of an offense to the jury disjunctively, allowing for a non-unanimous verdict. We answer no and therefore reverse the court of appeals' judgment[1] and render judgment for the State.

L.D.C., age 16, admitted that during a street party near a middle school, he fired five or six shots from an AK-47 rifle "in the air". A bullet fragment was later found in the sun visor of a vehicle parked nearby. Officer Martin heard the shots and drove up as L.D.C. and a friend, T.J., were running through a field behind the school. When Martin yelled "police" and ordered them to stop, one of the two turned and fired toward him and the row of houses behind him. Martin and T.J. testified it was L.D.C.; L.D.C. testified it was T.J. Martin returned fire, the rifle fell to the ground, and L.D.C. and T.J. continued running away. The two were found hiding outside the school.

[1] 357 S.W.3d 124 (Tex. App.–San Antonio 2011).

L.D.C. was charged with three criminal offenses: attempted capital murder (Count I), aggravated assault on a public servant (Count II), and deadly conduct (Count III). The jury answered "not true" to Count I and "true" to Counts II and III, assessing determinate sentences of forty years for Count II and ten years for Count III. Based on the verdict, the trial court committed L.D.C. to the Texas Youth Commission.[2] The court of appeals affirmed the aggravated assault adjudication but reversed on deadly conduct.[3] Only the State has petitioned for review. Thus, we are concerned only with L.D.C.'s adjudication for deadly conduct.

"A person commits [deadly conduct] if he knowingly discharges a firearm at or in the direction of . . . a habitation . . . or vehicle and is reckless as to whether the habitation . . . or vehicle is occupied."[4] "Jury verdicts [in cases under the Juvenile Justice Code] must be unanimous."[5] In criminal cases, in which the jury verdict must also be unanimous, "when a single crime can be committed in various ways, jurors need not agree upon the mode of commission."[6] Had the State alleged only that L.D.C. shot the rifle during the party, surrounded by both vehicles and habitations, the jury would not have been required to agree that he shot at one or the other. But the State alleged that L.D.C. shot the rifle on two occasions, first during the party, as L.D.C. admitted, "at and in the

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[2] L.D.C. tells us in his brief that he has since been transferred to the Texas Department of Criminal Justice. Brief for Respondent ii.

[3] 357 S.W.3d at 133.

[4] TEX. PENAL CODE § 22.05(b).

[5] TEX. FAM. CODE § 54.03(c).

[6] *Francis v. State*, 36 S.W.3d 121, 124 (Tex. Crim. App. 2000) (quoting *Schad v. Arizona*, 501 U.S. 624, 649 (1991) (Scalia, J., concurring)).

direction of a vehicle" while being "reckless as to whether [it] was . . . occupied", and later in the field, toward Martin and a row of homes, which L.D.C. denied. The trial court instructed the jury they could find that L.D.C. engaged in deadly conduct if, with the requisite intent and recklessness, he shot either toward a vehicle, apparently referring to the first shooting, or toward a habitation, referring to the second. While the jury did not have to agree on how an offense was committed, it had to agree "on the same act for a conviction", not "mere[ly] . . . on a violation of a statute".[7] The court did not instruct the jury that they had to be unanimous in finding that L.D.C. committed an offense either in shooting at a vehicle (during the party), or in shooting at a habitation (in the field), or both. Theoretically, at least, the jury could agree that L.D.C. committed deadly conduct even though only some believed it occurred during the party and the rest believed it occurred in the field. The court of appeals concluded that the disjunctive jury instruction was error:

> [T]he jury convicted [L.D.C.] of the offense of deadly conduct by choosing between disjunctive paragraphs in the jury charge that were likely intended as alternative means of committing the offense. Nevertheless, the alternate means were actually separate offenses because the jury was presented with the two separate shooting incidents from which to choose. Thus, it is possible some jurors chose to convict appellant based on the shooting at the party, while other jurors chose to convict him based on the shooting directed towards Officer Martin and the houses behind the officer. Additionally, the trial court failed to specifically instruct the jury it must be unanimous as to the offense supporting Count III. Therefore, it cannot be said the jury in this case rendered a unanimous verdict with regard to Count III, as required by the Texas Family Code.[8]

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[7] *Francis*, 36 S.W.3d at 125. *See also Ngo v. State*, 175 S.W.3d 738 (Tex. Crim. App. 2005) (holding that for disjunctive jury charges, it is error if the judge fails to instruct a jury that it must be unanimous in deciding which one or more of the disjunctively submitted offenses it found the defendant to have committed).

[8] 357 S.W.3d 124, 131 (Tex. App.–San Antonio 2011).

L.D.C. did not object to the disjunctive jury instruction for Count III, so the question then became whether the error was reversible when it was not preserved. The Family Code provides that in juvenile justice cases, "[t]he requirements governing an appeal are as in civil cases generally."[9] In civil cases, unobjected-to charge error is not reversible unless it is fundamental, which occurs only "in those rare instances in which the record shows the court lacked jurisdiction or that the public interest is directly and adversely affected as that interest is declared in the statutes or the Constitution of Texas."[10] Fundamental error is reversible if it "probably caused the rendition of an improper judgment [or] probably prevented the appellant from properly presenting the case to the court of appeals."[11] But we have stated that "a juvenile proceeding is not purely a civil matter. It is quasi-criminal, and . . . general rules requiring preservation in the trial court . . . cannot be applied across the board in juvenile proceedings."[12] In criminal cases, unobjected-to charge error is reversible if it was "egregious and created such harm that his trial was not fair or impartial", considering essentially every aspect of the case.[13] If, for example, "[i]t is . . . highly likely that the jury's verdicts

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[9] TEX. FAM. CODE § 56.01(b).

[10] *In the Matter of C.O.S.*, 988 S.W.2d 760, 765 (Tex. 1999) (citing *Pirtle v. Gregory*, 629 S.W.2d 919, 920 (Tex. 1982) (per curiam)).

[11] TEX. R. APP. P. 44.1(a).

[12] *C.O.S.*, 988 S.W.2d at 765.

[13] *Cosio v. State*, 353 S.W.3d 766, 776-777 (Tex. Crim. App. 2011) ("An egregious harm determination must be based on a finding of actual rather than theoretical harm. For actual harm to be established, the charge error must have affected the very basis of the case, deprived the defendant of a valuable right, or vitally affected a defensive theory. When assessing harm based on the particular facts of the case, we consider: (1) the charge; (2) the state of the evidence, including contested issues and the weight of the probative evidence; (3) the parties' arguments; and (4) all other relevant information in the record.") (footnote and internal quotation marks and brackets omitted).

. . . were, in fact, unanimous", unobjected-to charge error is not reversible.[14] Without analyzing differences between these standards for civil and criminal cases, the court of appeals followed other courts in applying the criminal standard and concluded that the error was reversible.[15] The court remanded the case for a new trial on Count III.[16]

We granted the State's petition for review[17] to decide the proper standard for reviewing unpreserved charge error in a juvenile delinquency case. We have concluded, however, that under any standard, the error in this case was not harmful.

From the evidence and the jury's finding of aggravated assault, it is highly likely that the jury unanimously agreed that L.D.C. committed deadly conduct both during the party and in the field. L.D.C. admitted that he fired the AK-47 five or six times during the party and that there were vehicles nearby. There can be no question that he acted knowingly — "aware of the nature of his conduct"[18] — or that he shot at a vehicle: a bullet fragment was retrieved from inside a vehicle. L.D.C. also admitted that the rifle was fired in the field — by T.J.; the jury, in finding aggravated assault, unanimously agreed that L.D.C., not T.J., was the shooter, acting "intentionally or knowingly". The evidence established that there were homes behind Martin, in the direction L.D.C.

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[14] *Cosio*, 353 S.W.3d at 778.

[15] 357 S.W.3d 124, 132-133 (Tex. App.–San Antonio 2011).

[16] *Id.* at 133.

[17] 55 Tex. Sup. Ct. J. 1440 (Sept. 21, 2012).

[18] TEX. PENAL CODE § 6.03(b) ("A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.").

was shooting, and well within range of an AK-47. L.D.C.'s unconcern for whether the vehicles and habitations in the directions in which he fired were occupied was reckless — "consciously disregard[ing] a substantial and unjustifiable risk" and "a gross deviation from the standard of care that an ordinary person would exercise"[19] — during the party and later in the field.

For the jury to have agreed that L.D.C. engaged in deadly conduct either during the party or in the field, but not to have agreed that it occurred at one place or both, at least one juror would have had to: disbelieve *both L.D.C.'s denial* that he shot in the field *and his admission* that he shot during the party; or believe that he shot at either vehicles or habitations, but not both; or believe that L.D.C. consciously disregarded the possible presence of occupants in either the surrounding vehicles or the surrounding habitations, but not both; or have been irrational. We think the first three are highly unlikely, and we will not base reversible error on the possibility that a juror might act irrationally, which a correct instruction cannot prevent. Under the civil standard of review, error in the trial court's disjunctive submission of deadly conduct did not probably cause an improper judgment or probably prevent a proper presentation of L.D.C.'s appeal.[20] Under the criminal standard of review, the error was not egregious,[21] and "[i]t is . . . highly likely that the jury's verdicts . . . were, in fact,

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[19] *Id.* § 6.03(c) ("A person acts recklessly, or is reckless, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.").

[20] TEX. R. APP. P. 44.1(a).

[21] *See Cosio v. State*, 353 S.W.3d 766, 776-777 (Tex. Crim. App. 2011).

unanimous."[22] Thus, under either the civil or criminal standard of review, the error does not warrant reversal.

L.D.C. concedes that the State's argument, to the same effect as the argument we have just set out,

> might have been sound if the State's counsel had not argued to the jury [in summation] that it could adjudicate L.D.C. of this single offense [of deadly conduct] on either of the two situations raised by the evidence, but the State invited the jury to adjudicate on either set of fact[s], and the jury of course did not say whether it adjudicated unanimously on one of the two, or split its vote. As the court of appeals said in its opinion, this argument "tipped the scale leaving the jury to decide Count III based on a less than unanimous verdict.["][23]

The State's closing argument to which L.D.C. and the court of appeals refer was this:

> Now, for Count 3, something to remember is that it's not just the houses and vehicles over by the party, because remember when he shot at Officer Martin, what was all behind Officer Martin? Houses. That was a residential fence that Officer Martin was standing in front of. So when he's shooting at Officer Martin — and that rifle can go over 400 yards, the firearms expert testified — when he's shooting at Officer Martin, if he misses, he can hit one of those houses back there. You heard the 911 tapes. People are stuttering, they're crying, they're terrified because they're hearing these gunshots by their houses.

This does not seem to us so much a suggestion that the jury might find that deadly conduct occurred only during the party or only later in the field as it is an encouragement to find that deadly conduct occurred both times. Even if the State's argument did suggest that the jury could find only one or the other, if not both, we think, again based on the jury's finding of aggravated assault and the uncontradicted evidence, the jury did not take the suggestion.

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[22] *Id*. at 778.

[23] Brief for Respondent 19 (citing 357 S.W.3d 124, 133 (Tex. App.–San Antonio 2011)).

Regardless of whether a civil or criminal standard applies, we conclude that the trial court's disjunctive jury instruction, given without objection, was not reversible error. The harm to L.D.C., given the jury's other findings and the evidence, was only theoretical, not actual. Accordingly, we reverse the judgment of the court of appeals and render judgment for the State.

Nathan L. Hecht
Justice

Opinion delivered: May 24, 2013

IN THE SUPREME COURT OF TEXAS

NO. 12-0038

RANCHO LA VALENCIA, INC. AND CHARLES R. "RANDY" TURNER,
PETITIONERS,

v.

AQUAPLEX, INC. AND JAMES EDWARD JONES, JR.,
RESPONDENTS

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

PER CURIAM

This case is before us a second time. It concerns a business dispute between Rancho La Valencia, Inc. and Aquaplex, Inc.[1] In the earlier appeal, we held that the evidence of fraudulent intent by Rancho in connection with the execution of a memorandum of settlement agreement (MSA) was legally sufficient. 297 S.W.3d 768, 775 (*Rancho I*). We next analyzed the court of appeals' treatment of damages for fraudulent inducement of the MSA, and held that "some evidence supported an award of damages for fraud under the MSA, just not at the level awarded by the trial court." *Id.* at 777. We remanded the case to the court of appeals to "determine whether to remand

[1] Parties to the dispute also include Charles Turner, a principal in Rancho La Valencia, Inc., and James Jones, Jr., a principal in Aquaplex, Inc. For convenience herein, Rancho La Valencia, Inc. and Turner are collectively referred to as Rancho; Aquaplex, Inc. and Jones are collectively referred to as Aquaplex.

for a new trial on damages, or whether to suggest a remittitur," *id.* (citations omitted), and to consider other issues.

On remand, the court of appeals addressed certain previously unaddressed issues, and remanded the case to the trial court for a new trial on the issue of damages including punitive damages. The court declined to suggest a remittitur in light of the state of the record. 357 S.W.3d 137, 144.

Rancho now complains to us that the court of appeals should have remanded the case to the trial court for a new trial on both liability and damages, as Rancho requested in a motion for rehearing to the court of appeals. We agree. Texas Rule of Appellate Procedure 44.1 addresses reversible error in civil cases. Rule 44.1(b) provides in part: "The court [of appeals] may not order a separate trial solely on unliquidated damages if liability is contested." In this case, Rancho contested liability and the alleged damages are unliquidated. We stated in *Rancho I* that the court of appeals, on remand, must decide whether "to remand for a new trial on damages" or instead suggest a remittitur. We did not expressly state that, if the court of appeals concluded a remand to the trial court for a new trial was warranted, it must remand for a new trial on both liability and damages, but Rule 44.1(b) requires this result. Failure to comply with this rule is reversible error. *Estrada v. Dillon*, 44 S.W.3d 558, 562 (Tex. 2001); *Redman Homes, Inc. v. Ivy*, 920 S.W.2d 664, 669 (Tex. 1996) (interpreting prior rule). Further, the Supreme Court, like the courts of appeals, "may not order a separate trial solely on unliquidated damages if liability is contested." TEX. R. APP. P. 61.2. Texas Rule of Appellate Procedure 2 provides that for good cause a rule of appellate procedure in a particular case may be suspended. But we did not indicate in *Rancho I* an intent to

suspend the operation of Rule 44.1(b) or Rule 61.2, and we do not see any good cause in this particular case for suspending the Rules.

The court of appeals has already decided not to suggest a remittitur in light of the state of the record; instead it simply remanded the case for a new trial. Accordingly, without hearing oral argument, *see* TEX. R. APP. P. 59.1, we grant the petition for review, reverse the court of appeals' judgment insofar as it ordered a new trial on damages only, and remand the case to the trial court for a new trial on damages and liability on the claim for fraud under the MSA.

OPINION DELIVERED: October 26, 2012

IN THE SUPREME COURT OF TEXAS

NO. 12-0047

CARLA STRICKLAND, PETITIONER,

v.

KATHRYN AND JEREMY MEDLEN, RESPONDENTS

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

Argued January 10, 2013

JUSTICE WILLETT delivered the opinion of the Court.[*]

Beauty without Vanity,
Strength without Insolence,
Courage without Ferocity,
And all the Virtues of Man without his Vices[1]

Texans love their dogs. Throughout the Lone Star State, canine companions are treated—and treasured—not as mere personal property but as beloved friends and confidants, even family members. Given the richness that companion animals add to our everyday lives, losing "man's best

[*] CHIEF JUSTICE JEFFERSON joins all but footnote 58 and Part II-C of this opinion. JUSTICE JOHNSON joins all but Part II-C.

[1] Lord Byron, *Inscription on the Monument of a Newfoundland Dog*, *in* 7 THE WORKS OF LORD BYRON: WITH HIS LETTERS AND JOURNALS, AND HIS LIFE 292–93 n.2 (Thomas Moore ed., 1832).

friend" is undoubtedly sorrowful. Even the gruffest among us tears up (every time) at the end of *Old Yeller*.[2]

This case concerns the types of damages available for the loss of a family pet. If a cherished dog is negligently killed, can a dollar value be placed on a heartsick owner's heartfelt affection? More pointedly, may a bereaved dog owner recover emotion-based damages for the loss? In 1891, we effectively said no, announcing a "true rule" that categorized dogs as personal property,[3] thus disallowing non-economic damages. In 2011, however, a court of appeals said yes,[4] effectively creating a novel—and expansive—tort claim: loss of companionship for the wrongful death of a pet.

In today's case, involving a family dog that was accidentally euthanized, we must decide whether to adhere to our restrictive, 122-year-old precedent classifying pets as property for tort-law purposes, or to instead recognize a new common-law loss-of-companionship claim that allows non-economic damages rooted solely in emotional attachment, a remedy the common law has denied those who suffer the wrongful death of a spouse, parent, or child,[5] and is available in Texas only by statute.[6]

We acknowledge the grief of those whose companions are negligently killed. Relational attachment is unquestionable. But it is also uncompensable. We reaffirm our long-settled rule,

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[2] OLD YELLER (Walt Disney 1957).

[3] *Heiligmann v. Rose*, 16 S.W. 931, 932 (Tex. 1891).

[4] 353 S.W.3d 576, 581.

[5] *See Russell v. Ingersoll-Rand Co.*, 841 S.W.2d 343, 345 (Tex. 1992) ("common law rule" was that "no cause of action [could] be brought for the death of another person").

[6] TEX. CIV. PRAC. & REM. CODE § 71.002.

which tracks the overwhelming weight of authority nationally, plus the bulk of amicus curiae briefs from several pet-welfare organizations (who understand the deep emotional bonds between people and their animals): Pets are property in the eyes of the law, and we decline to permit non-economic damages rooted solely in an owner's subjective feelings. True, a beloved companion dog is not a fungible, inanimate object like, say, a toaster. The term "property" is not a pejorative but a legal descriptor, and its use should not be misconstrued as discounting the emotional attachment that pet owners undeniably feel. Nevertheless, under established legal doctrine, recovery in pet-death cases is, barring legislative reclassification, limited to loss of value, not loss of relationship.

We reverse the court of appeals' judgment and render judgment in favor of the Petitioner.

I. Factual and Procedural Background

In June 2009, Avery, a mixed-breed dog owned by Kathryn and Jeremy Medlen, escaped the family's backyard and was promptly picked up by Fort Worth animal control. Jeremy went to retrieve Avery but lacked enough money to pay the required fees. The shelter hung a "hold for owner" tag on Avery's cage to alert employees that the Medlens were coming for Avery and ensure he was not euthanized. Despite the tag, shelter worker Carla Strickland mistakenly placed Avery on the euthanasia list, and he was put to sleep.

Jeremy and his two children learned of Avery's fate a few days later when they returned to retrieve him. Devastated, the Medlens sued Strickland for causing Avery's death and sought "sentimental or intrinsic value" damages since Avery had little or no market value and "[could not] be replaced." Strickland specially excepted, contending such damages are unrecoverable in pet-death cases. The trial court directed the Medlens to amend their pleadings to "state a claim for damages

recognized at law." The Medlens amended their petition to drop the words "sentimental value" but realleged damages for Avery's "intrinsic value." Strickland specially excepted on the same basis, and the trial court, sure that Texas law barred such damages, dismissed the suit with prejudice.

The court of appeals reversed, becoming the first Texas court to hold that a dog owner may recover intangible loss-of-companionship damages in the form of intrinsic or sentimental-value property damages. Addressing our 1891 decision in *Heiligmann v. Rose*,[7] which pegged dog-loss damages to market value or a value ascertained from the dog's "usefulness and services," the court of appeals stated, "Texas law has changed greatly since 1891" and "sentimental damages may now be recovered for . . . all types of personal property."[8] Specifically, the court said our more recent, non-dog property cases "explicitly held that where personal property has little or no market value, and its main value is in sentiment, damages may be awarded based on this intrinsic or sentimental value."[9] The court of appeals pivoted, too, on our expression in *Heiligmann* that the dogs "were of a special value to the owner,"[10] and took from this phrase that special value "may be derived from the attachment that an owner feels for his pet."[11] Emphasizing these iron truths—that "[d]ogs are unconditionally devoted to their owners"[12] and owners, reciprocally, have a deep attachment "to their

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[7] 16 S.W. 931.

[8] 353 S.W.3d at 576–80.

[9] *Id*. at 578.

[10] *Id*. at 580 (quoting *Heiligmann*, 16 S.W. at 932).

[11] *Id*.

[12] *Id*.

beloved family pets"[13]—the court of appeals declared "the special value of 'man's best friend' should be protected."[14] Thus, given "the special position pets hold in their family, we see no reason why existing law should not be interpreted to allow recovery in the loss of a pet at least to the same extent as any other personal property."[15] Reinstating the Medlens' claim, the court of appeals concluded: "Because an owner may be awarded damages based on the sentimental value of lost personal property, and because dogs are personal property, the trial court erred in dismissing the Medlens' action against Strickland."[16]

This appeal followed, posing a single, yet significant, issue: whether emotional-injury damages are recoverable for the negligent destruction of a dog.[17]

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[13] *Id*.

[14] *Id*. at 580–81.

[15] *Id*. at 580.

[16] *Id*. at 581.

[17] Though no one disputes that Strickland was acting within the scope of her governmental employment, she did not move for dismissal under section 101.106(f) of the Texas Tort Claims Act, TEX. CIV. PRAC. & REM. CODE § 101.106(f), to which she would have been entitled, *Franka v. Velasquez*, 332 S.W.3d 367 (Tex. 2011), as the Medlens concede. Instead, she sought dismissal based on her special exceptions, which the trial court sustained. Dismissal under section 101.106(f) is not automatic; Strickland was required to file a motion. *Univ. of Tex. Sw. Med. Ctr. at Dallas v. Estate of Arancibia*, 324 S.W.3d 544, 551 (Tex. 2010); *see also Univ. of Tex. Health Sci. Ctr. at San Antonio v. Bailey*, 332 S.W.3d 395, 401 (Tex. 2011) ("Substitution of the [governmental body] as the defendant was not automatic; [plaintiff] was required to file a motion."). At the court of appeals, Strickland raised a cross-point urging dismissal on immunity grounds under section 101.106(f). 353 S.W.3d at 581. She requested that if the court of appeals reinstated the Medlens' action, it should remand the case to the trial court where she would file the required motion to dismiss. *Id*. The courts of appeals, however, went straight to the merits and declined to reach Strickland's jurisdictional issue, reasoning that it was remanding anyway by sustaining the Medlens' sole issue on appeal. *Id*. This appeal followed. As Strickland has not satisfied section 101.106(f)'s prerequisites for dismissal, we proceed to the only issue before us, the merits: whether emotion-based damages are recoverable.

II. Discussion

America is home to 308 million humans[18] and 377 million pets.[19] In fact, "American pets now outnumber American children by more than four to one."[20] In a nation where roughly 62% of households own a pet—with about 78 million dogs and 86 million cats (and 160 million fish)[21]—it is unsurprising that many animal owners view their pets not as mere personal property but as full-fledged family members, and treat them as such:

- A study found that 70% of pet owners thought of their pets as family members.[22]
- 45% of dog owners take their pets on vacation.[23]
- Over 50% of pet owners say they would rather be stranded on a deserted island with a dog or cat than with a human.[24]
- 50% of pet owners report being "very likely" to put their own lives in danger to save their pets, and 33% are "somewhat likely" to risk their lives.[25]

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[18] *State and County Quick Facts*, U.S. CENSUS BUREAU (Mar. 14, 2013, 11:17 AM), http://quickfacts.census.gov/qfd/states/00000.html (listing the 2010 U.S. population as almost 309 million).

[19] *Pet Industry Market Size & Ownership Statistics*, AM. PET PRODS. ASS'N, http://www.americanpetproducts.org/press_industrytrends.asp (last visited Apr. 3, 2013).

[20] JONATHAN V. LAST, WHAT TO EXPECT WHEN NO ONE'S EXPECTING: AMERICA'S COMING DEMOGRAPHIC DISASTER 2 (2013) (noting that as birth rates plummet in America—the so-called "baby bust" generation—pet ownership soars).

[21] *Pet Industry Market Size & Ownership Statistics*, *supra* note 19.

[22] William C. Root, *"Man's Best Friend": Property or Family Member? An Examination of the Legal Classification of Companion Animals and its Impact on Damages Recoverable for Their Wrongful Death or Injury*, 47 VILL. L. REV. 423, 436 (2002).

[23] *Id.* at 423.

[24] *Id*.

[25] *Id*.

- In 2012, Americans spent roughly $53 billion on their pets.[26]

The human-animal bond is indeed powerful. As the Medlens' second amended petition states: "The entire Medlen family was devastated by the loss of Avery, who was like a family member to them." Countless Texas families share this pets-as-family view, but Texas law, for a century-plus, has labeled them as "property" for purposes of tort-law recovery.

A. Our Precedent Limits Damages in Dog-Death Tort Cases to "Market Value, If the Dog Has Any," or "Special or Pecuniary Value" Linked to the Dog's "Usefulness and Services"

1. Our 1891 Heiligmann *Decision Ties "Special Value" to a Dog's Economic Attributes, Not Subjective or Emotional Considerations*

Our analysis begins with *Heiligmann v. Rose*,[27] our 1891 case upholding $75 in damages for the poisoning of three "well trained" Newfoundland dogs. *Heiligmann* articulated some key valuation principles for animal cases. First, we classified dogs as personal property for damages purposes, not as something giving rise to personal-injury damages.[28] Second, we declared a "true rule" for damages that flags two elements: (1) "market value, if the dog has any,"[29] or (2) "some special or pecuniary value to the owner, that may be ascertained by reference to the usefulness and services of the dog."[30]

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[26] *Pet Industry Market Size & Ownership Statistics*, *supra* note 19.

[27] 16 S.W. 931.

[28] *Id*. at 932.

[29] *Id*.

[30] *Id*.

In *Heiligmann*, the dogs "were of fine breed, and well trained," with one using different barks to signal whether an approaching person was a man, woman, or child. While the owner could sell each dog for $5, they had no market value beyond that, but the Court upheld damages of $25 each:

> There is no evidence in this case that the dogs had a market value, but the evidence is ample showing the usefulness and services of the dogs, and that they were of special value to the owner. If the jury from the evidence should be satisfied that the dogs were serviceable and useful to the owner, they could infer their value when the owner, by evidence, fixes some amount upon which they could form a basis.[31]

The Medlens insist that *Heiligmann* does not limit recovery to an amount based *solely* on the dog's economic usefulness and services. Rather, when the Court mentioned certain dogs lacking market value but having "a special value to the owner," we meant something far broader and distinct from the dogs' commercial attributes. Similarly, argue the Medlens, when the Court in *Heiligmann* noted a dog's "special or pecuniary value to the owner," the word "or" indicates two distinct categories of non-market value dogs—those with a special value to the owner, and those with a pecuniary value to the owner. We disagree.

Given its ordinary, contextual meaning, *Heiligmann* tied the recovery of "special or pecuniary value" to the dogs' "usefulness and services"[32]—their economic value, not their sentimental value. While we referenced evidence "showing the usefulness and services of the dogs, and that they were of a special value to the owner,"[33] the next conditional sentence pegs the jury's valuation decision to the dogs' economic attributes: "If the jury from the evidence should be satisfied that the dogs were

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[31] *Id*.

[32] *Id*.

[33] *Id*.

serviceable and useful to the owner . . . ."[34] The decision never references, even by implication, any evidence regarding companionship or owner affection.

Thus, a dog's "special or pecuniary value" refers not to the dog-human bond but to the dollars-and-cents value traceable to the dog's usefulness and services. Such value is economic value, not emotional value based on affection, attachment, or companionship. In short, *Heiligmann*'s use of the word "special" does not authorize "special damages" and does not refer generically to a dog's ability to combat loneliness, ease depression, or provide security. The valuation criteria is not emotional and subjective; rather it is commercial and objective.

2. *Our Post*-Heiligmann *Cases Do Not Relax the No Emotional-Injury Damages Rule for Animal-Death Cases*

Alternatively, the Medlens assert that three post-*Heiligmann* decisions—*City of Tyler v. Likes*,[35] *Porras v. Craig*,[36] and *Brown v. Frontier Theatres, Inc.*[37]—viewed collectively, entitle property owners to seek intrinsic or sentimental-value damages for certain destroyed property that lacks market value or "special or pecuniary" value. Because dogs are considered property under Texas law, they should be treated no differently, argue the Medlens. Accordingly, Avery's intrinsic value to them, including companionship, is recoverable. We decline to stretch our post-*Heiligmann* decisions this far.

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[34] *Id*.

[35] 962 S.W.2d 489 (Tex. 1997).

[36] 675 S.W.2d 503 (Tex. 1984).

[37] 369 S.W.2d 299 (Tex. 1963).

Our decision a half-century ago in *Brown* involved irreplaceable family heirlooms such as a wedding veil, pistol, jewelry, hand-made bedspreads and other items going back several generations—in other words, family keepsakes that "have their primary value in sentiment."[38] Such one-of-a-kind memorabilia have a "special value . . . to their owner," and damages may factor in "the feelings of the owner for such property."[39] Notably, on the same day we decided *Brown* fifty years ago, we reaffirmed in another case the default damages rule for destroyed non-heirloom property lacking market or replacement value: "the actual worth or value of the articles to the owner . . . excluding any fanciful or sentimental considerations."[40]

While they rely chiefly on *Brown*, the Medlens also cite our decisions in *Porras* and *Likes*, but neither offers much pertinent guidance here. In *Porras*, a landowner sued someone for clearing several large trees from his land.[41] The landowner testified about what the land meant to him and his wife, not in market terms but in personal terms.[42] We recognized that the landowner had been injured by the destruction of trees, even though the property's overall market value may have actually *increased*.[43] We remanded for a new trial to determine the "intrinsic value" of the felled trees—that

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[38] *Id.* at 304–05.

[39] *Id.* at 305.

[40] *Crisp v. Sec. Nat'l Ins. Co.*, 369 S.W.2d 326, 328 (Tex. 1963).

[41] 675 S.W.2d at 504.

[42] *Id.* at 505.

[43] *Id.* at 506.

is, its ornamental (aesthetic) value and its utility (shade) value.[44] That assessment concerning real property is not rooted in an owner's subjective emotions, as here. While *Porras* permitted recovery of the "intrinsic value" of the trees, the plaintiff did not seek, nor did the Court discuss, the trees' sentimental value. Here, the Medlens have suffered lost companionship and are seeking, as a form of "intrinsic value" property damages, recovery for Avery's role as a cherished family member. The court of appeals read too much into *Porras*, which did not import sentimental considerations into measuring "intrinsic value." And we decline to expand *Porras*'s notion of "intrinsic value" to animal cases, specifically to include the subjective value a dog owner places on his pet's companionship, particularly when *Porras* itself excluded such subjective notions.

Likes is likewise uninstructive. In *Likes*, the plaintiff alleged that a municipality negligently flooded her house and destroyed "many personal irreplaceable items."[45] The principal issue was whether mental-anguish damages are recoverable for the negligent destruction of personal property. We answered no, though we acknowledged *Brown*'s sentimental-value rule for property of which the "greater value is in sentiment and not in the market place."[46] Again, mental anguish is a form of personal-injury damage, unrecoverable in an ordinary property-damage case. The Medlens' emotion-based claim is, like the mental-anguish claim in *Likes*, based wholly on negligent damage to personal property. But *Likes* bars personal-injury-type damages in a case alleging negligent property damage. In short, neither *Porras* nor *Likes* provides the Medlens much support. Distilled

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[44] *See id.*

[45] 962 S.W.2d at 493.

[46] *Id.* at 497 (quoting *Brown*, 369 S.W.2d at 304–05).

down, the pivotal question today is straightforward: whether to extend *Brown*'s special rules for family heirlooms to negligently destroyed pets.

Heiligmann remains our lone case directly on point, and after a century-plus we are loathe to disturb it. An owner's fondness for a one-of-a-kind, family heirloom is sentimental, existing at the time a keepsake is acquired and based not on the item's attributes but rather on the nostalgia it evokes, but an owner's attachment to a beloved pet is more: It is emotional, formed over time and based on the pet's specific attributes, namely the rich companionship it provided. Pets afford here-and-now benefits—company, recreation, protection, etc.—unlike a passed-down heirloom kept around chiefly to commemorate past events or passed family members. We agree with the amicus brief submitted by the American Kennel Club (joined by several other pet-welfare groups): "While no two pets are alike, the emotional attachments a person establishes with each pet cannot be shoe-horned into keepsake-like sentimentality for litigation purposes." Finally, as explained below, permitting sentiment-based damages for destroyed heirloom property portends nothing resembling the vast public-policy impact of allowing such damages in animal-tort cases.

Loss of companionship, the gravamen of the Medlens' claim, is fundamentally a form of *personal-injury* damage, not property damage. It is a component of loss of consortium, including the loss of "love, affection, protection, emotional support, services, companionship, care, and society."[47] Loss-of-consortium damages are available only for a few especially close family

[47] *Reagan v. Vaughn*, 804 S.W.2d 463, 467 (Tex. 1990).

relationships,[48] and to allow them in lost pet cases would be inconsistent with these limitations. Therefore, like courts in the overwhelming majority of other states,[49] the Restatement of the Law of

[48] *See, e.g.*, *Roberts v. Williamson*, 111 S.W.3d 113, 118 (Tex. 2003); *Ford Motor Co. v. Miles*, 967 S.W.2d 377, 383–84 (Tex. 1998); *Reagan*, 804 S.W.2d at 467.

[49] *See Mitchell v. Heinrichs*, 27 P.3d 309, 312–14 (Alaska 2001); *Kaufman v. Langhofer*, 222 P.3d 272, 278–79 (Ariz. Ct. App. 2009); *McMahon v. Craig*, 97 Cal. Rptr. 3d 555, 566–68 (Cal. Ct. App. 2009); *Myers v. City of Hartford*, 853 A.2d 621, 626 (Conn. App. Ct. 2004); *Naples v. Miller*, 2009 WL 1163504, at *2–4 (Del. Super. Ct. Apr. 30, 2009), *aff'd*, 992 A.2d 1237 (Del. 2010); *Kennedy v. Byas*, 867 So. 2d 1195, 1198 (Fla. Dist. Ct. App. 2004); *Gill v. Brown*, 695 P.2d 1276, 1277 (Idaho Ct. App. 1985); *Jankoski v. Preiser Animal Hosp., Ltd.*, 510 N.E.2d 1084, 1087 (Ill. App. Ct. 1987); *Lachenman v. Stice*, 838 N.E.2d 451, 461 (Ind. Ct. App. 2005); *Nichols v. Sukaro Kennels*, 555 N.W.2d 689, 691 (Iowa 1996); *Ammon v. Welty*, 113 S.W.3d 185, 187–88 (Ky. Ct. App. 2002); *Kling v. U.S. Fire Ins. Co.*, 146 So. 2d 635, 642 (La. Ct. App. 1962), *overruled in part by Holland v. Buckley*, 305 So. 2d 113, 114 (La. 1974); *Krasnecky v. Meffen*, 777 N.E.2d 1286, 1289–90 (Mass. App. Ct. 2002); *Koester v. VCA Animal Hosp.*, 624 N.W.2d 209, 211 (Mich. Ct. App. 2000); *Fackler v. Genetzky*, 595 N.W.2d 884, 891–92 (Neb. 1999); *Harabes v. Barkery, Inc.*, 791 A.2d 1142, 1145–46 (N.J. Super. Ct. Law Div. 2001); *Wilcox v. Butt's Drug Stores, Inc.*, 35 P.2d 978, 979 (N.M. 1934); *DeJoy v. Niagara Mohawk Power Corp.*, 786 N.Y.S.2d 873, 873 (N.Y. App. Div. 2004) (mem.); *Shera v. N.C. State Univ. Veterinary Teaching Hosp.*, 723 S.E.2d 352, 357–58 (N.C. Ct. App. 2012); *Pacher v. Invisible Fence of Dayton*, 798 N.E.2d 1121, 1125–26 (Ohio Ct. App. 2003); *Oberschlake v. Veterinary Assocs. Animal Hosp.*, 785 N.E.2d 811, 812–15 (Ohio Ct. App. 2003); *Lockett v. Hill*, 51 P.3d 5, 7–8 (Or. Ct. App. 2002); *Daughen v. Fox*, 539 A.2d 858, 864–65 (Pa. Super. Ct. 1988); *Rowbotham v. Maher*, 658 A.2d 912, 912–13 (R.I. 1995); *Scheele v. Dustin*, 998 A.2d 697, 700–04 (Vt. 2010); *Goodby v. Vetpharm, Inc.*, 974 A.2d 1269, 1273–74 (Vt. 2009); *Kondaurov v. Kerdasha*, 629 S.E.2d 181, 187 (Va. 2006); *Sherman v. Kissinger*, 195 P.3d 539, 548, 549 n.9 (Wash. Ct. App. 2008); *Carbasho v. Musulin*, 618 S.E.2d 368, 370–71 (W.Va. 2005); *Rabideau v. City of Racine*, 627 N.W.2d 795, 798–99, 801–02 (Wis. 2001). *But see Knowles Animal Hosp., Inc. v. Wills*, 360 So. 2d 37, 38 (Fla. Dist. Ct. App. 1978) (per curiam); *Barrios v. Safeway Ins. Co.*, 97 So. 3d 1019, 1022–24 (La. Ct. App. 2012); *Corso v. Crawford Dog & Cat Hosp., Inc.*, 97 Misc.2d 530, 530–31 (N.Y. Civ. Ct. 1979).

Torts,[50] and the other Texas courts of appeals that have considered this question,[51] we reject emotion-based liability and prohibit recovery for loss of the human-animal bond.

We do not dispute that dogs are a special form of personal property. That is precisely why Texas law forbids animal cruelty generally (both civilly[52] and criminally[53]), and bans dog fighting[54] and unlawful restraints of dogs specifically[55]—because animals, though property, are unique. Most dogs have a simple job description: provide devoted companionship. We have no need to overrule *Brown*'s narrow heirloom exception today; neither do we broaden it to pet-death cases and enshrine

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[50] RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 47 cmt. m (2012)(emphasis in original):

> Recovery for emotional harm resulting from negligently caused harm to personal property is not permitted under this Section. Emotional harm due to harm to personal property is insufficiently frequent or significant to justify a tort remedy. While pets are often quite different from other chattels in terms of emotional attachment, an actor who negligently injures another's pet is not liable for emotional harm suffered by the pet's owner. This rule against liability for emotional harm secondary to injury to a pet limits the liability of veterinarians in the event of malpractice and serves to make veterinary services more readily available for pets. Although harm to pets (and chattels with sentimental value) can cause real and serious emotional harm in some cases, lines—arbitrary at times—that limit recovery for emotional harm are necessary. Indeed, injury to a close personal friend may cause serious emotional harm, but that harm is similarly not recoverable under this Chapter. However, recovery for *intentionally* inflicted emotional harm is not barred when the defendant's method of inflicting harm is by means of causing harm to property, including an animal. See § 46, Comment *d*.

[51] In the 122 years since *Heiligmann*, five Texas courts of appeals have decided dog-death cases, and all but one (the court of appeals in this case) have concluded that Texas law prohibits non-economic damages. *See Petco Animal Supplies, Inc. v. Schuster*, 144 S.W.3d 554 (Tex. App.—Austin 2004, no pet.); *Zeid v. Pearce*, 953 S.W.2d 368 (Tex. App.—El Paso 1997, no writ); *Bueckner v. Hamel*, 886 S.W.2d 368 (Tex. App.—Houston [1st Dist.] 1994, writ denied); *Young's Bus Lines, Inc. v. Redmon*, 43 S.W.2d 266 (Tex. App.—Beaumont 1931, no writ).

[52] TEX. HEALTH & SAFETY CODE §§ 821.021–.026.

[53] TEX. PENAL CODE § 42.09–.092.

[54] *Id*. § 42.10.

[55] TEX. HEALTH & SAFETY CODE §§ 821.076–.081.

an expansive new rule that allows recovery for what a canine companion meant to its owner. The Medlens find it odd that Texas law would permit sentimental damages for loss of an heirloom but not an Airedale. Strickland would find it odd if Texas law permitted damages for loss of a Saint Bernard but not for a brother Bernard. The law is no stranger to incongruity, and we need not jettison *Brown* in order to refuse to extend it to categories of property beyond heirlooms.

The "true rule" in Texas remains this: Where a dog's market value is unascertainable, the correct damages measure is the dog's "special or pecuniary value" (that is, its actual value)—the economic value derived from its "usefulness and services,"[56] not value drawn from companionship or other non-commercial considerations.[57]

We recognize that the benefit of most family dogs like Avery is not financial but relational, and springs entirely from the pet's closeness with its human companions. Measuring the *worth* of a beloved pet is unquestionably an emotional determination—what the animal *means* to you and your family—but measuring a pet's *value* is a legal determination. We are focused on the latter, and as

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[56] *Heiligmann*, 16 S.W. at 932.

[57] *Id.* The Texas rule falls squarely within the national mainstream, which cuts overwhelmingly against sentimental-damages recovery. As noted earlier, most other states likewise do not allow pet owners to recover emotional-injury damages. *See supra* note 49. "Fair market value" remains the predominant measure of damages nationally. Some courts, though, have adopted an "actual value" approach when market value for the animal (1) is nonexistent, (2) cannot be ascertained, or (3) is not a true measure of its worth. *See, e.g.*, *Mitchell*, 27 P.3d at 313–14; *Jankoski*, 510 N.E.2d at 1087; *Brousseau v. Rosenthal*, 443 N.Y.S.2d 285, 286 (N.Y. Civ. Ct. 1980); *Shera,* 723 S.E.2d at 357–58; *Sokolovic v. Hamilton*, 960 N.E.2d 510, 513 (Ohio Ct. App. 2011); *McDonald v. Ohio State Univ. Veterinary Hosp.*, 67 Ohio Misc. 2d 40, 42–43 (Ohio Ct. Cl. 1994). Other jurisdictions have permitted punitive damages where the wrongdoer injured or killed an animal with malice. *See* CAL. CIV. CODE § 3340 (West 2012); *Martinez v. Robledo*, 147 Cal. Rptr. 3d 921, 926 (Cal. Ct. App. 2012); *Plotnik v. Meihaus*, 146 Cal. Rptr. 3d 585, 600 (Cal. Ct. App. 2012); *Bruister v. Haney*, 102 So. 2d 806, 807 (Miss. 1958).

a matter of law an owner's affection for a dog (or ferret, or parakeet, or tarantula) is not compensable.[58]

B. Compelling Pet Welfare and Social-Policy Reasons Counsel Against Permitting Emotion-Based Damages in Dog-Death Cases

This is a significant case not only for pet owners but also, as several animal-welfare groups underscore, for pets themselves. Appreciating this case's significant implications, numerous animal-advocacy organizations have submitted amicus curiae briefs. And while there is no unanimous "pro-pet" position—organizations committed to animal well-being are arrayed on both sides[59]—the vast majority of pet-friendly groups oppose the Medlens' request for emotion-based damages,[60] lest

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[58] While actual value cannot include the owner's "feelings," unlike *Brown*'s narrow exception for one-of-a-kind heirlooms, 369 S.W.2d at 305, it *can* include a range of other factors: purchase price, reasonable replacement costs (including investments such as immunizations, neutering, training), breeding potential (if any), special training, any particular economic utility, veterinary expenses related to the negligent injury, and so on. *See Mitchell*, 27 P.3d at 313–14; *see also Heiligmann*, 16 S.W. at 932 (taking into account breed and special training in determining damages); *Nichols*, 555 N.W.2d at 692 ("In determining the measure of damages for injuries to a dog, factors include its market value, which may be based on purchase price, relatively long life of breed, its training, usefulness and desirable traits." (quoting 4 AM. JUR. 2d *Animals* § 162 (1964))). Emotional attachment, however, is not a component of actual value.

[59] Supporting the Medlens (and thus favoring emotional-injury damages) are the Texas Dog Commission (TDC) and a group of law professors. The TDC says the court of appeals' decision follows *Heiligmann* and tracks prevailing law. The law professors say *Heiligmann* divided personal property into three categories, "based on where the greatest value of the property lies"—(1) personal property with market value, (2) personal property with use value, and (3) personal property that has sentiment as its primary value—"and created a different damages test for each." This case, they contend, falls neatly within category three in light of our post-*Heiligmann* cases that allow intrinsic value when market or pecuniary valuations are out of place.

[60] Supporting Strickland (and thus opposing emotional-injury damages) are the Texas Municipal League, the Texas City Attorneys Association, and the City of Arlington, Texas (collectively "Municipal Amici"); the American Kennel Club, Cat Fanciers' Association, Animal Health Institute, American Veterinary Medical Association, National Animal Interest Alliance, American Pet Products Association, and Pet Industry Joint Advisory Council (collectively "AKC"); the Texas Veterinary Medical Association (TVMA); the Texas Civil Justice League (TCJL); and the Property Casualty Insurers Association of America, American Insurance Association, and National Association of Mutual Insurance Companies (collectively "Insurer Amici").

The Municipal Amici argue the court of appeals' ruling essentially allows "wrongful death" damages for dogs that are barred for human beings. Also, such damages would irrationally expose to unrestricted damages municipalities, veterinarians, and other service providers who must make difficult, on-the-fly decisions in the field. The AKC warns that allowing such liability will necessarily increase the costs of pet "health care, pet products, and other pet services."

greater liability raise the cost of pet ownership and ultimately cause companion animals more harm than good.

Several animal-welfare groups—organizations that understand the intense grief and despair occasioned by a pet's death—insist that relational-injury damages would adversely impact pet welfare. For example, the American Kennel Club, joined by the Cat Fanciers' Association and other pro-animal nonprofits, worry that "pet litigation will become a cottage industry," exposing veterinarians, shelter and kennel workers, animal-rescue workers, even dog sitters, to increased liability: "Litigation would arise when pets are injured in car accidents, police actions, veterinary visits, shelter incidents, protection of livestock and pet-on-pet aggression, to name a few." As risks and costs rise, there would be fewer free clinics for spaying and neutering, fewer shelters taking in animals, fewer services like walking and boarding, and fewer people adopting pets, leaving more animals abandoned and ultimately put down. The Texas Veterinary Medical Association sounds alarms of "vast unintended consequences," asserting its members would have no choice but to practice defensive medicine "to safeguard against potential claims of malpractice." The unfortunate outcome, they contend, would be higher prices for veterinary care, thus fewer owners bringing in their pets for needed treatment. Families, particularly lower-income families, will avoid preventive care for their pets, not seek needed care for ill or injured pets, and be more apt to euthanize a pet.

The TVMA says allowing emotion-based damages may actually harm pets "by driving up the basic costs of pet ownership," and that litigation and insurance costs will cause veterinarians to boost prices to offset the threat of noneconomic damages. The TCJL contends such damages offend well-settled law, put Texas jurisprudence far outside the mainstream, and force a radical policy change better left to the Legislature. The Insurer Amici assert that allowing subjective, emotional-injury damages for harmed personal property will skew "the underwriting of risk, the setting of rates, and the payment of claims." This abrupt imbalance, they argue, will impact not only veterinary insurance, but insurance more generally, particularly homeowner's and automobile coverage.

The Texas Municipal League and other government associations worry about police officers and animal-service employees being second-guessed for split-second decisions they must make in the field when they encounter loose and potentially dangerous animals. Not all dogs are good-natured, they warn, and government workers must be free to take swift action to protect citizens rather than worrying about lawsuits that, even if successfully defended, drain finite taxpayer resources. Various insurance groups caution that expanded damages would spike the cost of insurance across the board, not just for veterinarians but also for homeowners and automobile drivers, "inflat[ing] the value of property loss far above that which insurance contracts have been written to cover with serious consequences for the affordability and availability of insurance in Texas."

The opposing amici, including the Texas Dog Commission and eleven Texas law professors, emphasize that the court of appeals' judgment is consistent with our post-*Heiligmann* property-valuation precedent, which they contend allows for sentimental-value damages for the loss of a dog. On this heirloom point, the Medlens pose a unique hypothetical, asserting they could seek sentimental damages if a *taxidermied* Avery had been negligently destroyed. If property is property, and if they could seek sentimental value for a stuffed Avery destroyed long after death, why can't they recover for a euthanized Avery destroyed while alive? For the reasons stated above and below, we are unpersuaded.

A decade ago we explained: "When recognizing a new cause of action and the accompanying expansion of duty, we must perform something akin to a cost-benefit analysis to assure that this

expansion of liability is justified."[61] On this score, the pet-welfare amici make a forceful case. While recognizing that dogs are treasured companions whose deaths generate tremendous sorrow, we are persuaded that allowing loss-of-companionship suits raises wide-reaching public-policy implications that legislators are better suited to calibrate. Our carefulness is augmented by two legal-policy concerns: (1) the anomaly of elevating "man's best friend" over multiple valuable human relationships; and (2) the open-ended nature of such liability.

The court of appeals' decision works a peculiar result, effectively allowing "wrongful death" damages for pets. Loss of companionship is a component of loss of consortium[62]—a form of personal-injury damage, not property damage—and something we have "narrowly cabined" to two building-block human relationships: husband-wife[63] and parent-child.[64] The Medlens request something remarkable: that pet owners have the same legal footing as those who lose a spouse, parent, or child.

Moreover, they seek damages they plainly could not seek if other close relatives (or friends) were negligently killed: siblings, step-children, grandparents, dear friends, and others.[65] Our cases reject loss-of-consortium recovery for such losses. Losing one's pet, even one considered family,

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[61] *Roberts*, 111 S.W.3d at 118.

[62] *See Reagan*, 804 S.W.2d at 467.

[63] *Whittlesey v. Miller*, 572 S.W.2d 665, 667 (Tex. 1978).

[64] *Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 549, 551 (Tex. 1985) (allowing a child to recover loss-of-companionship damages when a parent dies), *overruled in part on other grounds by Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 533 (Tex. 1998); *Sanchez v. Schindler*, 651 S.W.2d 249, 252–53 (Tex. 1983) (allowing a parent to recover such damages when a child dies).

[65] *See Miles*, 967 S.W.2d at 382–84 (refusing to allow loss-of-consortium recovery by siblings and step-parents).

should not invite damages unavailable if an actual human family member were lost. Put differently, the Medlens seek emotion-based damages for the death of "man's best friend" when the law denies such damages for the death of a human best friend. For all their noble and praiseworthy qualities, dogs are not human beings, and the Texas common-law tort system should not prioritize human-animal relationships over intimate human-human relationships, particularly familial ones. Analogous would be anomalous.

It would also invite seemingly arbitrary judicial line-drawing. Certainly, if we anointed a common-law claim for loss of pet companionship, we could prescribe limits, but the issue is not whether the Court *can* draw lines, but whether it *should*. After all, people form genuine bonds with a menagerie of animals, so which "beloved family pets" (the court of appeals' description[66]) would merit such preferred treatment? Domesticated dogs and cats only (as in a Tennessee statute[67])? Furry, but not finned or feathered? What about goldfish? Pythons? Cockatiels? There seems to be no cogent stopping point, at least none that doesn't resemble judicial legislation.

Similarly, while statutory damage caps exist in various types of cases involving people, the court of appeals' decision leaves matters wholly unconfined. Such broad, unstructured liability would invite peculiar results. Under *Heiligmann*, for example, if a Westminster best-of-breed champion with a $20,000 market value is negligently destroyed, that would be its owner's top-end recovery. But if a 15-year-old frail dog with no market value dies, the owner could sue for unlimited

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[66] 353 S.W.3d at 580.

[67] TENN. CODE ANN. § 44-17-403 (2012).

emotional-injury damages. We could impose damages limits, but such fine-tuning is more a legislative function than a judicial one. The Medlens and amici urge a damages model based on a pet's primary value, but that, too, invites gamesmanship. The owner of a well-trained dog with legitimate market or pecuniary value, like a service animal, would be better off saying his beloved pet was a "worthless mutt" (to avoid a less-rewarding recovery under *Heiligmann*), yet a lovable, part-of-the-family mutt that the owner adored with all his heart (to maximize sentimental damages under *Brown*). Our tort system cannot countenance liability so imprecise, unbounded, and manipulable.

C. The Legislature Is Best Equipped to Weigh and Initiate Broad Changes to Social and Civil-Justice Policy, Including Whether to Liberalize Damages Recovery in Pet-Death Cases

The Medlens seek a sweeping alteration of Texas tort-law principles, upending a century-plus of settled rights, duties, and responsibilities. The judiciary, however, while well suited to adjudicate individual disputes, is an imperfect forum to examine the myriad policy trade-offs at stake here. Questions abound: who can sue, who can be sued, for what missteps, for what types of damages, for how much money? And what of the societal ripple effects on veterinarians, animal-medicine manufacturers, homeowners and drivers seeking insurance, pet owners, pet caretakers, and ultimately pets themselves? Animal-death suits portend fundamental changes to our civil-justice system, not incremental adjustments on a case-by-case basis. They require detailed findings and eligibility criteria, which in turn require the careful balancing of a range of views from a range of perspectives, something best left to our 181-member Legislature. If lawmakers wish, they can hold hearings and

then, after hearing testimony and weighing arguments, craft meticulous, product-of-compromise legislation that allows non-economic damages to a controllable and predictable degree.

We also draw counsel from the history of Texas common law, which, though it has allowed sentimental damages for the loss of an heirloom, has not done so for the loss of a person, instead deferring to the Legislature. One explanation is that with heirlooms, the value is sentimental; with people, the value is emotional. The reason the common law historically declined to create a wrongful-death action is not because the common law is incapable of setting reasonable parameters, or because such parameters are impossible or necessarily capricious. Rather it is because such parameters are most optimally informed by policy- and value-laden judgments the Legislature is best equipped to make. The difficulties of measuring damages for the loss of human life and identifying the beneficiaries entitled to recover were deemed by the common law too great. Because the judiciary was an imperfect decider, courts decided legislatures should decide. And our Legislature did so, authorizing a statutory wrongful-death action for reasons it was better suited to gauge.[68] Having historically declined to recognize a common-law action for the loss of a human, the common law should not, for mostly the same reasons, recognize one for the loss of a pet.

Our precedent on the legal valuation of companion animals has endured for 122 years, and while we decline today to expand the damages available to bereaved pet owners, we understand the strength of the human-animal bond. Few Texans consider their pets throw-away commodities. Perhaps the Legislature will enact a more generous valuation formula for family pets. Valuation

[68] *See* TEX. CIV. PRAC. & REM. CODE §§ 71.001–.011 (current version of the Texas wrongful-death statute).

derives fundamentally from values, and elected legislators may favor scrapping the "property" label and reclassifying companion pets as something more elevated. The Legislature has passed a wrongful-death statute for humans; it has not (yet) for animals. Given the competing public-policy considerations, we believe if there is to be expanded recovery in pet-death cases, it, too, should be confronted legislatively, not judicially.

In 2000, Tennessee enacted legislation authorizing non-economic damages, up to $5,000, when someone negligently or intentionally kills a companion animal.[69] The T-Bo Law[70] (named for the senate sponsor's beloved Shih Tzu)[71] narrowly defines "pet" as a domesticated dog or cat, limits recovery to "the deceased pet's owner or caretaker," and immunizes veterinarians and animal shelters from negligence liability.[72] The Maryland Legislature has likewise limited damages in pet cases, restricting damages to fair market value plus the necessary costs of veterinary care, not to exceed $7,500 total.[73] An Illinois statute allows non-economic damages, but it, too, tries to narrow them, allowing emotional-distress recovery only in cases of aggravated cruelty or torture or when an animal is injured or killed in bad faith when seized or impounded.[74] That is, it forbids non-economic damages for acts of ordinary negligence.

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[69] TENN. CODE ANN. § 44-17-403 (2012).

[70] 2000 Tenn. Pub. Acts Ch. 762.

[71] *See* Susan Cover, *Maine Bill Would Raise Status of Pets That Are Killed*, PORTLAND PRESS HERALD (Feb. 15, 2013), http://www.pressherald.com/politics/bill-would-raise-status-of-pets-that-are-killed_2013-02-16.html.

[72] TENN. CODE ANN. § 44-17-403.

[73] MD. CODE ANN., CTS. & JUD. PROC. § 11-110 (2012).

[74] 510 ILL. COMP. STAT. ANN. 70/16.3 (West 2013).

As a matter of Texas common law, emotion-based damages are unrecoverable, but whether to permit such liability statutorily is a quintessential legislative judgment. Societal attitudes inexorably change, and shifting public views may persuade the Legislature to extend wrongful-death actions to pets. Amid competing policy interests, including the inherent subjectivity (and inflatability) of emotion-based damages, lawmakers are best positioned to decide if such a potentially costly expansion of tort law is in the State's best interest, and if so, to structure an appropriate remedy.

III. Conclusion

To his dog, every man is Napoleon;
hence the constant popularity of dogs.[75]

It is an inconvenient, yet inescapable, truth: "Tort law . . . cannot remedy every wrong."[76] Lines, seemingly arbitrary, are required. No one disputes that a family dog—"in life the firmest friend"[77]—is a treasured companion. But it is also personal property, and the law draws sensible, policy-based distinctions between types of property. The majority rule throughout most of America—including Texas since 1891—leavens warm-heartedness with sober-mindedness, applying a rational rule rather than an emotional one. For the reasons discussed above, we decline to (1) jettison our 122-year-old precedent classifying dogs as ordinary property, and (2) permit non-economic damages rooted in relational attachment.

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[75] Aldous Huxley, *as quoted in* ROBERT ANDREWS, THE CONCISE COLUMBIA DICTIONARY OF QUOTATIONS 83 (1990).

[76] *Roberts*, 111 S.W.3d at 118.

[77] Lord Byron, *supra* note 1, at 293.

Under Texas common law, the human-animal bond, while undeniable, is uncompensable, no matter how it is conceived in litigation—as a measure of property damages (including "intrinsic value" or "special value . . . derived from the attachment that an owner feels for his pet"[78]), as a personal-injury claim for loss of companionship or emotional distress, or any other theory. The packaging or labeling matters not: Recovery rooted in a pet owner's feelings is prohibited. We understand that limiting recovery to market (or actual) value seems incommensurate with the emotional harm suffered, but pet-death actions compensating for such harm, while they can certainly be legislated, are not something Texas common law should enshrine.

We reverse the court of appeals' judgment and render judgment in favor of Strickland.

_____

Don R. Willett
Justice

OPINION DELIVERED: April 5, 2013

[78] 353 S.W.3d at 580.

IN THE SUPREME COURT OF TEXAS

NO. 12-0142

RICHMONT HOLDINGS, INC., NUKOTE HOLDINGS, INC., NUKOTE INTERNATIONAL, INC., INKBRARY, L.L.C., SUPERIOR ACQUISITIONS, L.L.C., CO., JOHN P. ROCHON, SR., JOHN P. ROCHON, JR., KELLY KITTRELL, RUSSELL MACK, C & R SERVICES, INC. AND KENNETH R. SCHLAG, PETITIONERS,

v.

SUPERIOR RECHARGE SYSTEMS, L.L.C., A TEXAS LIMITED LIABILITY COMPANY, AND JON BLAKE, RESPONDENTS

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

PER CURIAM

This is an interlocutory appeal from an order denying a motion to compel arbitration under the Texas General Arbitration Act. *See* TEX. CIV. PRAC. & REM. CODE § 171.098(a)(1). The trial court denied the motion, concluding that the movant had waived its right to arbitration. The court of appeals affirmed the order denying arbitration, but for a different reason. The appellate court concluded that the movant failed to establish the existence of an arbitration agreement covering the dispute and therefore did not reach the waiver issue. ___ S.W.3d ___, ___ (Tex. App.—Fort Worth 2012) (mem. op.). Because we conclude that the movant established the existence of an applicable arbitration agreement, we reverse and remand to the court of appeals.

Richmont Holdings, Inc. owns a number of businesses that manufacture and distribute ink jet and laser print cartridges. In 2007, Richmont, through one of its affiliates, Superior Acquisition, L.L.C., agreed to purchase the assets of Superior Recharge Systems, L.L.C. The terms of the sale were set out in an asset purchase agreement, which included a provision for binding arbitration of any dispute relating to the agreement.[1]

In connection with the asset sale, Superior Acquisition agreed to hire Jon Blake, who was an owner and manager of Superior Recharge. The employment agreement provided that Blake was to serve as Superior Acquisition's general manager for two years. The employment agreement also contained a non-compete clause, but, unlike the asset purchase agreement, it did not include an arbitration provision. The employment agreement and the asset purchase agreement were both signed on August 14, 2007. Six months later, Blake's employment was terminated.

Blake sued Richmont, Superior Acquisition, and others[2] (hereafter Richmont) for damages and other relief, including the cancellation of his covenant not to compete. Among other things, he alleged that Richmont fraudulently induced him to enter into the asset purchase and employment agreements. Richmont answered, but delayed eighteen months before moving to compel arbitration.

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[1] The purchase agreement stated that: "Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by binding arbitration."

[2] Blake also sued Nukote Holding, Inc., Nukote International, Inc., Inkbrary, L.L.C., John P. Rochon, Sr., John P. Rochon, Jr., Kelly Kittrell, Russell Mack, C & R Services, Inc., and Kenneth R. Schlag. Richmont owns Nukote Holding and Nukote International, both of which are in the business of manufacturing and distributing imaging supplies for printers. According to the pleadings, Rochon, Sr. made the management decisions for Richmont and, at that time, Rochon, Jr., Kittrel, and Mack were officers of Richmont. These officers formed Inkbrary for the purpose of acquiring other print imaging companies, and Inkbrary in turn formed Superior Acquisitions for the purpose of acquiring Superior Recharge's assets. Schlag is a former member of Superior Recharge and the president of C&R Services. Each of these parties is named as a petitioner in this Court.

In support of its motion to compel, Richmont submitted a copy of the asset purchase agreement and a supporting affidavit. Blake responded to the motion by arguing that Richmont waived its right to arbitrate. The trial court denied the motion to arbitrate, agreeing with Blake that Richmont waived its arbitration rights by substantially invoking the judicial process. Richmont appealed.

The court of appeals affirmed, but on different grounds. ___ S.W.3d at ___. The court of appeals concluded that the trial court correctly denied the motion to arbitrate because Richmont failed to establish the existence of an applicable arbitration agreement. *Id.* The court reasoned that the dispute did not involve the asset purchase agreement or its mandatory arbitration clause, but instead arose exclusively out of the employment agreement. *Id.* The court therefore did not reach the waiver issue argued by the parties.

In this Court, Richmont complains that the court of appeals erred by holding that the parties do not have a valid agreement to arbitrate. Blake concedes the point, agreeing that the underlying dispute involves both the asset purchase and employment agreements. Blake argues that the court of appeals' judgment is nevertheless correct because Richmont waived its arbitration rights by its conduct in the trial court and its delay in asserting its rights.

We have held that a "'court has no discretion but to compel arbitration and stay its own proceedings'" when a claim falls within the scope of a valid arbitration agreement and there are no defenses to its enforcement. *Forrest Oil Corp. v. McAllen*, 268 S.W.3d 51, 56 (Tex. 2008) (quoting *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 753–54 (Tex. 2001)); *see also In re J.D. Edwards*

World Solutions Co., 87 S.W.3d 546, 549 (Tex. 2002) (per curiam); *Cantella & Co., Inc. v. Goodwin*, 924 S.W.2d 943, 944 (Tex. 1996).

Richmont submitted the asset purchase agreement with its motion to compel. The asset purchase agreement contained the parties' agreement to arbitrate all disputes relating to the agreement. Blake did not contest the validity of the arbitration agreement, nor did he complain that the parties' dispute was outside the scope of that agreement. The only defense he raised to the agreement was waiver.

The court of appeals' conclusion that the arbitration provision in the asset purchase agreement has no application to Blake's lawsuit is contrary to the parties' contentions and has no support in the record. Moreover, the court's failure to recognize the arbitration agreement here is contrary to our precedent, which mandates enforcement of such an agreement absent proof of a defense. Because the court of appeals' decision conflicts with our precedent,[3] we grant the petition for review and, without hearing oral argument, reverse the court of appeals' judgment and remand the case to that court to consider the waiver defense raised below. *See* TEX. R. APP. P. 59.1.

OPINION DELIVERED: January 25, 2013

[3] We have jurisdiction to hear an appeal from an interlocutory order denying arbitration when the court of appeals' decision conflicts with prior precedent. *See Forrest Oil Corp. v. McAllen*, 268 S.W.3d 51, 55 n.8 (Tex. 2008) (citing TEX. GOV'T CODE §§ 22.001(a)(2), 22.225(c); TEX. CIV. PRAC. & REM. CODE § 171.098; *Certain Underwriters at Lloyd's of London v. Celebrity, Inc.*, 988 S.W.2d 731, 733 (Tex. 1998)).

IN THE SUPREME COURT OF TEXAS

NO. 12-0198

PHILLIPS PETROLEUM COMPANY, GPM GAS CORPORATION, PHILLIPS GAS MARKETING COMPANY, PHILLIPS GAS COMPANY, AND GPM GAS TRADING COMPANY, PETITIONERS,

v.

ROYCE YARBROUGH, RESPONDENT

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

~ consolidated for oral argument with ~

NO. 12-0199

IN RE CONOCOPHILLIPS COMPANY F/K/A PHILLIPS PETROLEUM COMPANY, DCP MIDSTREAM, LP F/K/A GPM GAS CORPORATION, CONOCOPHILLIPS GAS COMPANY F/K/A PHILLIPS GAS COMPANY, AND DCP MIDSTREAM MARKETING, LLC F/K/A GPM GAS TRADING COMPANY

ON PETITION FOR WRIT OF MANDAMUS

Argued January 10, 2013

JUSTICE LEHRMANN delivered the opinion of the Court.

For the second time, we address issues of class certification in this action involving alleged underpayment of oil and gas royalties. In 2008, we reviewed the trial court's certification of three subclasses of royalty owners, each asserting a single breach-of-lease claim. *Bowden v. Phillips Petrol. Co.*, 247 S.W.3d 690 (Tex. 2008). After the court of appeals reversed the certification order as to all three subclasses, we affirmed in part and reversed and remanded in part on interlocutory appeal. *Id.* at 694. We affirmed as to the two subclasses that asserted claims for breach of the implied covenant to market. *Id.* at 702, 709. We reversed the decertification order as to the third subclass, which alleged breach of a uniform express royalty provision contained in gas royalty agreements (GRAs) that amended the class members' leases. *Id.* at 708. We also directed the trial court to conduct a res judicata analysis in determining whether certification was appropriate under former Rule 42(b)(4) of the Texas Rules of Civil Procedure.[1] *Id.* at 698.

On remand, Respondent Royce Yarbrough, class representative of the remaining subclass of royalty owners, amended her petition to allege that Phillips Petroleum Company and its affiliates (collectively, Phillips)[2] breached the implied covenant to market, which in turn contributed to their underpayment of royalties under the GRAs. Phillips filed various motions seeking a ruling from the trial court that there was no class claim for breach of the implied covenant to market, arguing that

[1] As noted in *Bowden*, former Rule 42(b)(4) is now codified as Rule 42(b)(3), and we will continue to refer to Rule 42(b)(3) as including the former (b)(4) paragraph. *Bowden*, 246 S.W.3d at 694 n.1.

[2] The named defendants in the operative petition are ConocoPhillips Company, successor by merger to Phillips Petroleum Company and Phillips Gas Marketing Company; DCP Midstream, LP, successor to GPM Gas Corporation; ConocoPhillips Gas Company, successor to Phillips Gas Company; and DCP Midstream Marketing, LLC, successor to GPM Gas Trading Company. For ease of reference, we will continue to refer to the defendants collectively as "Phillips," as we did in *Bowden*.

a new certification motion and hearing were required to determine whether the claim was an appropriate class claim under Rule 42(b)(3). These motions were all denied.

Phillips filed both a notice of interlocutory appeal and a petition for writ of mandamus in the court of appeals. That court dismissed the interlocutory appeal for lack of jurisdiction and denied the petition for writ of mandamus. Phillips then filed both a petition for review and a petition for writ of mandamus in this Court. We hold that the court of appeals erred in dismissing the interlocutory appeal for lack of jurisdiction, that the trial court abused its discretion in allowing the addition of a class claim for breach of the implied covenant to market without requiring Yarbrough to file an amended motion for class certification or holding a certification hearing, and that the trial court abused its discretion in failing to conduct a rigorous analysis of res judicata in contravention of our mandate in *Bowden*. Accordingly, we reverse the court of appeals' judgment and remand to the trial court for further proceedings consistent with this opinion.

I. Factual and Procedural Background

A. Pre-*Bowden* Proceedings[3]

This suit was filed as a putative class action on behalf of Texas royalty owners alleging Phillips underpaid oil and gas royalties. In September 2000, the trial court signed its first certification order, certifying three subclasses of royalty owners. *Bowden*, 247 S.W.3d at 694. On interlocutory appeal, the court of appeals reversed and remanded. *Id.* at 695. The royalty owners filed an amended certification motion, and in June 2002, following a hearing, the trial court entered

[3] Our opinion in *Bowden* contains a lengthy description of the factual background leading up to that opinion. We borrow from *Bowden* those portions that continue to be relevant in these proceedings.

the certification order at issue in *Bowden*. *Id.* The trial court again certified three subclasses of royalty owners, each of whom asserted a single claim for relief. *Id.* Subclasses 1 and 3 asserted a claim for breach of the implied covenant to market,[4] while Subclass 2 (the GRA class) alleged Phillips breached uniform provisions in the GRAs governing the calculation of royalty payments. *Id.* at 695–96.

On interlocutory appeal, the court of appeals reversed the certification order as to all three subclasses, holding that individual issues of liability would predominate over common issues. *Id.* at 694. The court of appeals further held, with respect to all three subclasses, that "the certification order impermissibly split the class members' causes of action," resulting in the application of res judicata to bar all unasserted breach of contract claims. *Id.* at 696. The court concluded that the class representatives' "willingness to abandon" all such unasserted claims rendered them per se inadequate to represent the class. *Id.* at 696–97.

B. *Bowden* Holdings

We issued our opinion in *Bowden* in February 2008, affirming the court of appeals' decertification order in part and reversing in part. Addressing the res judicata issue first, we cited our intervening opinion in *Citizens Insurance Co. v. Daccach*, 217 S.W.3d 430 (Tex. 2007), in which we held that class suits are "subject to the same preclusion rules as other procedural forms of litigation" and that class members are therefore barred from asserting in subsequent litigation claims that arose from the same transaction or subject matter as the class claims and either could have been

[4] The subclass 3 claim was characterized as a breach of the implied covenant to manage and administer the lease. *Bowden*, 247 S.W.3d at 708. In *Bowden*, however, we held that the substance of the claim concerned Phillips's "alleged failure to diligently market the gas and obtain a higher price." *Id.* at 709.

or were litigated in the prior suit. *Bowden*, 247 S.W.3d at 697 (citing *Daccach*, 217 S.W.3d at 450, 451, 455). While we disagreed with the court of appeals' conclusion that class representatives who split claims are per se inadequate, *id.*, we noted that "[t]rial courts should assess the Rule 42 requirements in light of res judicata's preclusive effect on abandoned claims when considering whether to certify a class," *id.* at 698. We concluded:

> In the second certification order, the trial court acknowledged that the class limited its suit to a single claim for each subclass. On remand, it should consider the applicability of res judicata in future proceedings to abandoned claims in evaluating certifiability, as we explain in *Daccach*, as part of its determination [under Rule 42] of the prerequisites of commonality, typicality, superiority, adequacy of representation, and predominance.

Id. (citation omitted).

With regard to the court of appeals' order decertifying the three subclasses on predominance grounds, we affirmed as to Subclasses 1 and 3, but reversed as to the GRA class. *Id.* at 709. As to Subclass 1, we held that "individual issues would predominate" because the claim for breach of the implied covenant to market would require an evaluation of "the price a reasonably prudent operator would have received at the wellhead," and the royalty owners failed to provide evidence that such a price could be evaluated classwide. *Id.* at 701–02. Subclass 3, which alleged Phillips paid an unreasonably high post-production fee to the gas purchaser (affiliate GPM), similarly "fail[ed] to explain how a reasonable processing fee [could] be proven classwide." *Id.* at 709.

With respect to the GRA class, however, we disagreed with the court of appeals' conclusion that individualized issues would predominate.[5] The GRA class was and is defined to include the following members:

> Royalty owners who own or owned royalty interests under leases located in the [S]tate of Texas; where Phillips Petroleum Company is the lessee; the royalty is paid pursuant to a Gas Royalty Agreement containing language substantially identical to the language bracketed in the Gas Royalty Agreement attached as Exhibit 1 and incorporated herein by reference; the Gas Royalty Agreement has no additional language relating to processing gas or the payment of royalty on natural gas liquids; and during the period February 1995 through the present.

Id. at 695. The GRAs provide a specific formula for calculating the royalty, summarized in *Bowden* as "the 'weighted average price' multiplied by the total volume of natural gas production in M.c.f. times the one-eighth royalty interest, for gas delivered within the defined [multi]-county area."[6] *Id.* at 703. The royalty owners claimed that Phillips breached the GRAs in two ways: (1) by including in the weighted average price only sales of "dry residue natural gas production and exclud[ing] the liquid components, which are separated from the gas by Phillips's downstream processing"; and (2) by failing to include in the weighted average price an adjustment for "the varying heat content of the components of gas produced." *Id.* at 703–04.

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[5] The court of appeals also held that GRA class representatives Royce Yarbrough and Ted Powell were inadequate, Yarbrough because of conflicts with the class stemming from the owners' proposed royalty calculation and Powell because there was no evidence of his adequacy. *Bowden*, 247 S.W.3d at 707. We affirmed as to Powell and reversed as to Yarbrough, who remains the GRA class representative. *Id.*

[6] There are three GRA forms, which provide for the weighted average price to be calculated using sales of gas in different groups of counties. Form BP includes sales within Hutchinson, Carson, Gray, and Wheeler Counties, Texas. Form H includes sales within Sherman and Hansford Counties, Texas, and Texas County, Oklahoma. Form MH includes sales within Moore, Hartley, Sherman, and Hansford Counties, Texas, and Texas County, Oklahoma.

The court of appeals' decertification of the GRA class was based on the trial court's implicit finding that the GRAs are ambiguous and its plan to submit the interpretation issue to the jury, thereby raising thousands of individual issues regarding the intent of the parties in entering into each GRA. *Id.* at 705. We disagreed, however, that the GRAs' pricing provisions are ambiguous. *Id.* at 706–07. Specifically, we held:

> The GRAs in Subclass 2 require royalties to be paid based on the volume of natural gas metered at the wells multiplied by a price averaged from sales to third parties, before liquid products are extracted or processed.

Id. at 707. We further held that the GRAs do not provide for an adjustment to the price for heating content. *Id.* at 706. Because the GRAs "are unambiguous and may be construed classwide for royalty owners who executed substantially identical GRAs," we held that the court of appeals erred in decertifying the GRA class on predominance grounds. *Id.* at 706–07. We remanded the case to the trial court "for further proceedings consistent with this opinion." *Id.* at 709.

C. Proceedings on Remand

On remand, Yarbrough, as the sole representative of the only remaining subclass, filed an Eighth Amended Petition alleging that "the manner and method used by [Phillips] to market the GRA gas and pay royalties under the uniform GRAs" constituted breaches of Phillips's "express *and implied* obligations under the GRAs." (Emphasis added). Yarbrough further alleged, *inter alia*:

> [Phillips] has not calculated and paid royalties according to the express language of the GRAs and the Texas Supreme Court's construction of the GRAs, nor in a manner that complies with their implied obligation to diligently market the GRA gas production so as to obtain the best weighted average price reasonably obtainable.

Taking the position that the Eighth Amended Petition added new class claims requiring a new motion for certification and hearing, Phillips filed several motions requesting various forms of relief. First, Phillips filed a motion to decertify the class, requesting that the trial court order Yarbrough to file a motion for certification with respect to the new claims. The trial court denied the motion, noting at the hearing that a decertification motion was an "improper way" of addressing Phillips's contentions, which the trial court construed as "attacking the method of [the class's] asserting the proper way to calculate damages."

The parties then filed competing motions for entry of a trial plan order and filed briefs on the issue of res judicata and its effect on the propriety of class certification. While Phillips argued that the preclusive effect a class action judgment would have on individual claims abandoned by the representative rendered Yarbrough an inadequate representative of the GRA class, Yarbrough maintained that certification of the GRA class had already been affirmed in *Bowden* and that *Bowden*'s directive to the trial court regarding res judicata "contemplated the potential of future efforts to certify additional subclasses."

The trial court entered a Trial Plan Order describing Yarbrough's allegations in pertinent part as follows:

> During [the relevant] periods, . . . [Phillips] did not market the gas in a manner that allowed proper calculation of the weighted average price under the GRA, and used weighted average prices to calculate and pay royalties that did not include all components of the gas (pre-processing liquids) and were burdened with transportation and purification costs.

The trial court also entered a formal Order Denying Further Proceedings Regarding Res Judicata (the Res Judicata Order), stating:

> [T]he Court reviewed the parties' briefing on res judicata and the proposed trial plans submitted by each party. The Court concluded, after review of the briefs, the supporting law and definition of the class that res judicata is adequately addressed by the class definition and the representatives of the class and that [Sub]class 2 as certified and approved by the Supreme Court of Texas fully sets out those individuals and their claims sufficiently to meet the preclusion requirements.

Following entry of the Trial Plan Order, Phillips filed a "Motion for Partial Summary Judgment on Implied Covenant Claims or, in the Alternative, Motion to Sever the Implied Covenant Claims or, in the Alternative, Motion for Order Clarifying that Plaintiff Yarbrough's Implied Covenant Claims Are Not Included in [the GRA class]" (the Alternative Motions). Phillips requested that the implied-covenant claims be severed from the express breach-of-lease claims, or that the trial court clarify that the implied-covenant claims were not included in the GRA class given Yarbrough's failure to take any action to seek certification of such claims. The trial court denied the Alternative Motions.

Phillips filed an interlocutory appeal of the order denying the Alternative Motions and the Res Judicata Order, as well as a petition for writ of mandamus. The court of appeals dismissed the interlocutory appeal for want of jurisdiction, holding that the trial court's orders did not "fundamentally alter[] the nature of the class" so as to make those orders immediately appealable under our decision in *De Los Santos v. Occidental Chemical Corp.*, 933 S.W.2d 493 (Tex. 1996) (per curiam). ___ S.W.3d ___, ___. The court of appeals also denied mandamus relief, holding that "[a]llowing mandamus to lie from the denial of a partial summary judgment in these circumstances would contravene the policies underlying limited mandamus review." ___ S.W.3d ___, ___. Phillips filed both a petition for review and a petition for writ of mandamus in this Court.

II. Cause No. 12-0198: Interlocutory Appeal

A. Jurisdiction

The Texas Civil Practice and Remedies Code permits an appeal from a trial court's interlocutory order that "certifies or refuses to certify a class in a suit brought under Rule 42 of the Texas Rules of Civil Procedure." TEX. CIV. PRAC. & REM. CODE § 51.014(a)(3). In turn, we have jurisdiction to consider a petition for review appealing such an order. TEX. GOV'T CODE § 22.225(d). On its face, the trial court's order denying Phillips's Alternative Motions is not an order that certifies or refuses to certify a class. Phillips asserts, however, that it is such an order in substance and is therefore subject to interlocutory appeal.

A trial court has discretion to alter or amend an order certifying a class. TEX. R. CIV. P. 42(c)(1)(C). Generally, modifications of certification orders, such as those modifying the size of a class or a class definition, are not appealable. *Bally Total Fitness Corp. v. Jackson*, 53 S.W.3d 352, 355 (Tex. 2001); *see also Citgo Ref. & Mktg., Inc. v. Garza*, 94 S.W.3d 322, 328 (Tex. App.—Corpus Christi 2002, pet. dism'd by agr.) (holding that "an order that merely alters attributes of a class and does not affect the underlying certification of the action as a class action is not an order subject to interlocutory appeal"). However, in *De Los Santos* we held that an order changing a class action from opt-out to mandatory "alters the fundamental nature of the class" and that an interlocutory appeal of such an order is authorized. 933 S.W.2d at 495. The court of appeals in this case summarily held that the trial court's orders "are denials of requested relief and do not alter the fundamental nature of the class." ___ S.W.3d at ___.

The ruling in *De Los Santos* is narrow, reached in accordance with legislative intent "that section 51.014 be strictly construed as a narrow exception to the general rule that only final judgments and orders are appealable." *Bally Total Fitness Corp.*, 53 S.W.3d at 355 (citations and internal quotation marks omitted). The crux of the order being appealed in *De Los Santos* was that it changed the class in such a way as to call into question whether certification remained proper. Specifically, the alteration to the class resulted in potential conflicts between class members and class counsel, 933 S.W.2d at 495, which in turn raised concerns as to whether the class members were adequately represented by class counsel under Rule 42(a), *see Gen. Motors Corp. v. Bloyed*, 916 S.W.2d 949, 954 (Tex. 1996) (explaining that the threshold requirement of adequacy of representation under Rule 42(a) mandates that both class representatives and their counsel be adequate). Thus, under *De Los Santos*, an order that changes the class in such a way as to raise significant concerns about whether certification remains proper alters the fundamental nature of the class and is therefore appealable. *De Los Santos*, 933 S.W.2d at 495.[7]

Yarbrough argues that the orders being appealed here, which effectively allow the GRA class to pursue a class claim for breach of the implied covenant to market, do not alter the fundamental nature of the GRA class, but merely modify the scope of the class's underpayment damages under the GRAs. Phillips, by contrast, argues that the inclusion of an implied-covenant claim on remand changes the fundamental nature of the class we upheld in *Bowden*, which Phillips describes as "a

[7] In holding that interlocutory appeal jurisdiction existed in *De Los Santos*, we did not go so far as to require a finding that the trial court's order changed the class in such a way as to actually result in an improperly certified class. *See De Los Santos*, 933 S.W.2d at 495 (remanding to the court of appeals to determine the merits of the appeal). Such a holding would have conflated the jurisdictional analysis with the merits of the appeal.

class asserting only one claim for breach of express provisions of the uniform GRAs." We agree with Phillips.

Certification is conducted "on a claim-by-claim, rather than holistic, basis" in order "to preserve the efficiencies of the class action device without sacrificing the procedural protections it affords to unnamed class members." *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 976 (5th Cir. 2000) (addressing certification under Rule 23 of the Federal Rules of Civil Procedure); *see also Ford Motor Co. v. Sheldon*, 22 S.W.3d 444, 452–53 (Tex. 2000) (noting that "there is no right to litigate a *claim* as a class action" (emphasis added)). In *Bowden*, we analyzed the propriety of certification with respect to the "breach of contract claim [brought] on behalf of each respective subclass." *Bowden*, 247 S.W.3d at 696.

With respect to the GRA class, the claim we analyzed was that Phillips failed to properly calculate royalties under the formula contained in the express provisions of the GRAs. *Id.* at 703–04. As discussed above, that formula requires multiplying the "weighted average price" by the volume of gas produced and adjusting for the interest owned. *Id.* at 702–03. We interpreted the GRAs to unambiguously require "royalties to be paid based on the volume of natural gas metered at the wells multiplied by a price averaged from sales to third parties, before liquid products are extracted or processed." *Id.* at 707. Because the GRAs' pricing provisions could be so "construed classwide for royalty owners who executed substantially identical GRAs," we held that the GRA class satisfied Rule 42(b)(3)'s predominance requirement. *Id.* at 706–07. Yarbrough now alleges not only that Phillips breached the express royalty provisions of the GRAs, but also that Phillips failed to comply

with its "implied obligation to diligently market the GRA gas production so as to obtain the best weighted average price reasonably obtainable."

Yarbrough significantly overstates the scope of the original GRA claim we analyzed in *Bowden* in claiming that it "includes the breach of implied covenants claim and all other underpayment of royalty claims, which have undergone rigorous Rule 42 analysis, and even this Court's scrutiny." A duty to market is implied in leases that base royalty calculations on the price received by the lessee for the gas. *Yzaguirre v. KCS Res., Inc.*, 53 S.W.3d 368, 373–74 (Tex. 2001). A lessee may breach its implied covenant to market regardless of whether the lessee complies with the lease's express provisions; indeed, the purpose of an implied covenant claim is to protect a lessor from the lessee's negligence or self-dealing that would result in unfairly low royalties under the express provisions. *See id.* Thus, while the claim we addressed in *Bowden* involved whether Phillips took the proper gas sales into account in calculating the weighted average price, the implied covenant claim Yarbrough added on remand requires consideration of whether the weighted average price, as properly calculated under our interpretation of the GRAs, was nevertheless not the "highest weighted average price reasonably obtainable" because of Phillips's failure to reasonably market the gas.

That said, we do not share Phillips's view that the implied-covenant claim now being asserted by the GRA class raises the exact same predominance issues that defeated certification of Subclasses 1 and 3. *See Bowden*, 247 S.W.3d at 701 (holding that a trial on Subclass 1's implied covenant claim would require the jury to "conduct a well-by-well analysis" in order "to determine the price a reasonably prudent operator would have received at the wellhead"). Because the GRA

royalties are calculated using a weighted average price that is common for all royalty owners whose leases are amended by the same GRA form, there is a significant difference between the implied-covenant claim alleged by the GRA class and the implied-covenant claims that were pursued by Subclasses 1 and 3. Specifically, while the facts and circumstances of many individual sales would need to be examined to evaluate the reasonableness of the monthly weighted average price for the GRA class, that same analysis would be required to evaluate the reasonableness of the monthly weighted average price for a single class member. In other words, the number of individualized sales that must be evaluated does not increase with the number of claims. Accordingly, the specific concerns that led us to decertify Subclasses 1 and 3 do not appear to be present with respect to the implied-covenant claim asserted by the GRA class.

Nevertheless, the new claim raises other concerns regarding the propriety of certification that were not present and thus were not evaluated in *Bowden*. First, Phillips asserts that the leases of an unidentified number of GRA class members contain express covenants to market that supersede—and require different duties than—the implied covenant to market. *See Yzaguirre*, 53 S.W.3d at 373 (noting that there is no implied covenant when the lease expressly covers the subject matter of the implied covenant). In response, Yarbrough contends that the GRA amends any express covenant to market that may exist in the class members' original leases, that the GRA does not contain an express covenant to market, and that the GRA therefore contains an implied covenant to market applicable to the leases of all GRA class members. We conclude Yarbrough reads the GRAs too broadly.

The GRAs amend their corresponding leases by "substituting" the GRA provisions "in lieu of" the lease provisions "for payment of royalty." While a lessee's duty to market certainly can affect the royalty it owes under a proceeds-based lease, this duty is not properly pigeonholed solely as a provision "for payment of royalty." In *Bowden*, we cited the following example of an express duty-to-market clause contained in the lease of a member of now-decertified Subclass 1:

> Lessee covenants and agrees to use reasonable diligence to produce, utilize, or market the minerals capable of being produced from said wells, but in the exercise of such diligence, lessee shall not be obligated to install or furnish facilities other than well facilities and ordinary lease facilities of flow lines, separator, and lease tank, and shall not be required to . . . market gas upon terms unacceptable to lessee.

247 S.W.3d at 699 n.3. Whether a lessee complies with such a covenant may be determined independently of whether the express royalty provisions were properly applied. Thus, the absence of an express covenant to market in the GRAs does not automatically impose an implied covenant to market in those leases with provisions that "expressly cover[] the subject matter of [that] implied covenant." *Yzaguirre*, 53 S.W.3d at 373. In turn, the existence of express covenants to market in some class members' leases, while not necessarily defeating predominance,[8] raises a significant issue that was not present and that we thus did not consider with respect to the GRA class in *Bowden*.

The implied covenant claim also raises concerns as to the typicality of Yarbrough's claims under Rule 42(a). A class representative's claim must be "typical of the claims or defenses of the class." TEX. R. CIV. P. 42(a)(3). "A claim is typical if it arises from the same event or practice or

[8] This fact did underlie the court of appeals' decertification of Subclass 1 on predominance grounds; however, we affirmed for different reasons, noting that it was "not clear from the record that any of the express duty to market clauses would in practice require different conduct from the duty in the implied covenant to market." *Bowden*, 247 S.W.3d at 701.

course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory." *Sw. Bell Tel. Co. v. Mktg. on Hold Inc.*, 308 S.W.3d 909, 920 (Tex. 2010) (citation and internal quotation marks omitted). Yarbrough's claim for Phillips's breach of the implied covenant to market is based on the same legal theory as the claim of the GRA class as a whole—whether Phillips failed to reasonably market the gas and to "obtain the best weighted average price reasonably obtainable." However, whether Phillips breached its implied covenant to market depends on where the gas was sold, which in turn depends on which of the three GRA forms is at issue.

As discussed above, in formulating the weighted average price under the GRAs, Form BP utilizes gas sales occurring within Hutchinson, Carson, Gray, and Wheeler Counties, Texas; Form H includes sales within Sherman and Hansford Counties, Texas, and Texas County, Oklahoma; and Form MH includes sales within Moore, Hartley, Sherman, and Hansford Counties, Texas, and Texas County, Oklahoma. Yarbrough's leases are amended by GRA Form H.[9] Thus, while Yarbrough's implied-covenant claim against Phillips appears to be "typical" of the claims of other class members whose leases are also amended by GRA Form H, it remains to be seen whether Yarbrough's claim is typical of the claims of other class members whose leases are amended by GRA Forms BP and MH. *See Adams v. Reagan*, 791 S.W.2d 284, 290 (Tex. App.—Fort Worth 1990, no pet.) (noting that "[t]he presence of even an arguable defense peculiar to a named plaintiff or a small subset of

[9] Although Yarbrough has two leases with Phillips, only one is in the record with its accompanying GRA. There is no indication in the record whether Yarbrough's other lease was amended by a different GRA form.

the plaintiff class destroys the typicality of the class" (citing *J. H. Cohn & Co. v. Am. Appraisal Assocs., Inc.*, 628 F.2d 994, 999 (7th Cir. 1980))).

As Yarbrough recognizes, the focus of an action for breach of an implied covenant to market will be the conduct of the lessee. *Union Pac. Res. Grp., Inc. v. Hankins*, 111 S.W.3d 69, 71 (Tex. 2003). The propriety of Phillips's behavior with respect to conducting sales in one county is not necessarily indicative of the propriety of its behavior in conducting sales within another county. This distinction was not material to the breach of contract claim we analyzed in *Bowden*, but it could very well be material to the implied covenant claim that is now being asserted.

In sum, while we do not fully endorse Phillips's characterization of the effect of the implied-covenant claim on certification of the GRA class, we agree that the trial court changed the fundamental nature of the class in allowing the addition of the claim. The new implied-covenant claim requires different proof of different conduct than did the claim we evaluated in *Bowden*. Further, the new claim raises concerns about the propriety of certification that, regardless of whether certification is ultimately ordered or upheld, were not present or considered with respect to the class claim affirmed in *Bowden*. Accordingly, the court of appeals had jurisdiction to review the merits of the appeal, as do we. In the interest of judicial economy, rather than remanding to the court of appeals, we will address the merits of Phillips's challenge to the trial court's order allowing Yarbrough to assert an implied-covenant claim on behalf of the GRA class. *See Segrest v. Segrest*, 649 S.W.2d 610, 611 (Tex. 1983).

B. Class Certification

We review for an abuse of discretion the trial court's order that denied the Alternative Motions and thereby changed the fundamental nature of the class. *Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675, 691 (Tex. 2002). We decline to hold at this point that certification of the GRA class on the implied-covenant claim is necessarily improper. However, the effect of the trial court's order was to certify a new class without the benefit of a motion for certification or a certification hearing. Further, as discussed above, the new claim raises issues of typicality and predominance that have not been adequately considered by the trial court. The trial court thus abused its discretion by failing to conduct the "rigorous analysis" we have emphasized is required in certifying a class. *Id.* at 688; *Sw. Ref. Co. v. Bernal*, 22 S.W.3d 425, 435 (Tex. 2000). It may very well be the case that class certification is appropriate with respect to the implied-covenant claim, but "[c]ompliance with Rule 42 must be demonstrated; it cannot merely be presumed." *Henry Schein*, 102 S.W.3d at 691. Should the royalty owners demonstrate compliance with Rule 42 on remand with respect to the implied-covenant claim,[10] they will be entitled to certification.[11]

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[10] In conducting the analysis, the trial court should also take into account Yarbrough's new assertions in the Eighth Amended Petition that Phillips breached the GRAs by failing to include pre-plant condensates in calculating the weighted average price and by reducing the weighted average price by the costs of transportation and purification. *See Bowden*, 247 S.W.3d at 704 n.7 (noting that the royalty owners were not at that time complaining about condensate production).

[11] We do not address Phillips's argument that the GRAs provide an objective basis for calculating royalties such that Phillips owes the GRA class no implied duty to reasonably market the gas as a matter of law. *See Yzaguirre*, 53 S.W.3d at 374 (explaining that no covenant to market is implied where "the lease provides an objective basis for calculating royalties that is independent of the price the lessee actually obtains"). This argument relates solely to the merits of Yarbrough's implied covenant claim, which are not at issue here.

C. Res Judicata

Phillips contends that, in certifying the class, the trial court failed to conduct a rigorous analysis regarding the effect of res judicata on the Rule 42 requirements in accordance with both our decision in *Daccach* and our mandate in *Bowden*. We agree. As discussed above, in remanding the proceedings in *Bowden*, we instructed the trial court to "consider the applicability of res judicata in future proceedings to abandoned claims in evaluating certifiability, as we explain in *Daccach*, as part of its determination [under Rule 42] of the prerequisites of commonality, typicality, superiority, adequacy of representation, and predominance." 247 S.W.3d at 698. Yarbrough argued on remand, and continues to argue in this Court, that the res judicata directive in *Bowden* contemplated only "future efforts to certify additional subclasses," as opposed to the GRA class that had already been certified. Yarbrough misreads our directive.

As noted previously, our opinion in *Daccach* was issued after the trial court's certification order was entered and reversed by the court of appeals in this case. We held in *Bowden* that the court of appeals erred in finding the class representatives per se inadequate for splitting claims and clarified that, under *Daccach*, the decision to pursue some claims and abandon others "is one relevant factor in evaluating the requirements for class certification such as typicality, superiority, and adequacy of representation." *Id.* at 697–98 (citing *Daccach*, 217 S.W.3d at 448). This makes sense because certification may unfairly force members to choose between class membership and giving up viable claims that could otherwise be asserted individually.

Although we reversed the court of appeals' decertification of the GRA class, that holding was based on our conclusion that the GRAs were not ambiguous and thus need not be construed by the

jury on a lease-by-lease basis. *Id.* at 706–07. Notably, we did not analyze the effect of res judicata on the propriety of certification; instead, we instructed the trial court to do so on remand. *Id.* at 698; *see also id.* at 696 ("Although all three subclasses involve lease agreements, the class representatives, on behalf of the royalty owners, did not assert all claims involving the lease agreements at issue, choosing to assert only those claims they believed likely to meet the predominance requirement of Rule 42(b)(3).").

The importance of the res judicata analysis should not be overlooked, as "[a] class representative's decision to abandon certain claims may be detrimental to absent class members for whom those claims could be more lucrative or valuable." *Daccach*, 217 S.W.3d at 457. It is thus the trial court's responsibility, as part of its Rule 42 "rigorous analysis," to assess the rule's requirements "with awareness of res judicata's preclusive effect on abandoned claims." *Id.* at 460. In this case, the trial court's Res Judicata Order summarily states that "res judicata is adequately addressed by the class definition and the representatives of the class." Without an explanation of how the trial court determined that the risk of preclusion was "not high enough to refuse certification," *id.* at 457, we cannot conclude that the trial court conducted the rigorous analysis required by Rule 42.

III. Cause No. 12-0199: Petition for Writ of Mandamus

In light of our disposition of Phillips's interlocutory appeal, we need not reach or evaluate Phillips's petition for writ of mandamus. Accordingly, the petition is dismissed as moot.

IV. Conclusion

A trial court's order changes the fundamental nature of a class, and is therefore subject to interlocutory appeal under section 51.014(a)(3) of the Texas Civil Practice and Remedies Code, if it modifies the class in such a way as to raise significant concerns about whether certification remains proper. In this case, the trial court's order denying Phillips's Alternative Motions allowed the addition of a new class claim that raised such concerns, without the required rigorous analysis to determine whether certification was appropriate. The trial court further failed to consider the effect of res judicata on abandoned claims in accordance with our directive in *Bowden*. We express no opinion on the proper outcome of a rigorous Rule 42 analysis, but we do require the trial court to conduct it. Accordingly, we reverse the court of appeals' order dismissing the interlocutory appeal, dismiss the petition for writ of mandamus as moot, and remand the case to the trial court for further proceedings consistent with this opinion.

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Debra H. Lehrmann
Justice

OPINION DELIVERED: June 21, 2013

IN THE SUPREME COURT OF TEXAS

NO. 12-0203

DALLAS COUNTY, TEXAS, PETITIONER,

v.

ROY LOGAN, RESPONDENT

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

PER CURIAM

Section 51.014(a)(8) of the Texas Civil Practice and Remedies Code permits an interlocutory appeal of an order denying a plea to the jurisdiction by a governmental unit. Pursuant to that statute, Dallas County appealed the denial of a plea in which it asserted governmental immunity from claims brought under the Texas Whistleblower Act. *See* TEX. GOV'T. CODE § 554.0035. The court of appeals affirmed the trial court's denial of the plea, declining to consider additional grounds argued by the County in support of the jurisdictional plea because the County had not raised them in the trial court. 359 S.W.3d 367, 371-72 (Tex. App.—Dallas 2012). Following its prior precedent, the court held that the interlocutory-appeal statute limited its appellate jurisdiction to grounds raised in the trial court: "In appeals pursuant to section 51.014(a)(8), an appellate court's jurisdiction is limited to reviewing the grant or denial of the plea to the jurisdiction that was filed or considered by the trial

court." *Id*. citing *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).

Other courts have held that new or additional challenges raised in a section 51.014(a)(8) interlocutory appeal must be considered by the appellate court, "regardless of whether such challenges were presented to or determined by the trial court." *Fort Bend Cnty. Toll Road Auth. v. Olivares*, 316 S.W.3d 114, 118 (Tex. App. — Houston [14th Dist.] 2010, no pet.). We recognized this split in the courts of appeals recently in another interlocutory appeal in which we took jurisdiction to resolve the conflict. *See Rusk State Hosp. v. Black*, 392 S.W.3d 88 (Tex. 2012). The court of appeals, however, did not have the benefit of our decision in *Black* as it issued several months after the court's decision in this case.

A court of appeals' judgment is ordinarily conclusive in interlocutory appeals taken pursuant to section 51.014(a), but this Court has jurisdiction to resolve conflicts. The conflict, however, must be with a prior decision. *See* TEX. GOV'T CODE § 22.001(a)(2) (granting the supreme court appellate jurisdiction in "a case in which one of the courts of appeals holds differently from a prior decision of another court of appeals or of the supreme court on a question of law material to a decision of the case"). And, although *Black* is not a "prior" decision, the conflict found to exist among the courts of appeals in *Black* likewise gives us jurisdiction over this appeal. *See Black*, 392 S.W.3d at 93.

In *Black*, we concluded that section 51.014(a) does not preclude an appellate court from having to consider immunity grounds first asserted on interlocutory appeal. *Id*. at 95. We further disapproved contrary authority, including *Arancibia*, the case followed by the court of appeals here. *Id*. at 95 & n.3. Because *Black* rejects the basis for the court of appeals' decision below, we grant

the petition for review and, without hearing oral argument, reverse and remand the cause to the court of appeals for its further deliberation. TEX. R. APP. P. 59. 1.

Opinion Delivered: August 23, 2013

IN THE SUPREME COURT OF TEXAS

NO. 12-0257

BENNY P. PHILLIPS, M.D., PETITIONER,

v.

DALE BRAMLETT, INDIVIDUALLY AND AS INDEPENDENT ADMINISTRATOR OF THE ESTATE OF VICKI BRAMLETT, DECEASED, SHANE FULLER AND MICHAEL FULLER, RESPONDENTS

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

Argued February 6, 2013

JUSTICE BOYD delivered the opinion of the Court.

When the life cycle of a judgment extends beyond an initial appeal, courts often face unique or unsettled jurisdictional and procedural issues. This case presents three of those issues; namely, (1) whether the court of appeals had jurisdiction to review the judgment that the trial court entered after this Court remanded the case to the trial court for entry of judgment; (2) whether postjudgment interest should be calculated from the date of the trial court's first judgment (the "original judgment") or the date of the judgment that the trial court entered following our remand (the "remand judgment"); and (3) whether the trial court erred by "vacating" the original judgment when it issued the remand judgment. We hold that (1) the court of appeals had jurisdiction to review the trial court's remand judgment; (2) postjudgment interest must be calculated from the date of the

original judgment; and (3) the trial court's order vacating the original judgment was unnecessary because that judgment had already been reversed in its entirety, but it was not reversible error. We affirm the court of appeals' judgment on these grounds and again remand the case to the trial court for entry of a final judgment consistent with this opinion.

I. Background

This is our second time to hear this health care liability case. Because several prior opinions address the underlying facts,[1] we will describe only the procedural history that is relevant to the issues currently before us. In 2005, a Lubbock County trial court entered a judgment on a jury's verdict in favor of Respondents, the family of Vicki Bramlett (the Bramletts),[2] on their claims against Petitioner Benny P. Phillips, M.D. (Phillips). This original judgment awarded the Bramletts approximately $9 million in actual damages and $3 million in punitive damages. Former article 4590i,[3] which governs this case, capped the recoverable amount of actual damages, but the trial court concluded that a statutory exception to the cap—the *Stowers* exception—applied.[4] Apparently to support its application of the *Stowers* exception, the trial court made certain recitals in the original

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[1] *See Phillips v. Bramlett*, 288 S.W.3d 876 (Tex. 2009); *Bramlett v. Phillips*, 359 S.W.3d 304 (Tex. App.—Amarillo 2012) (under review herein); *Bramlett v. Phillips*, 322 S.W.3d 443 (Tex. App.—Amarillo 2010); *Phillips v. Bramlett*, 258 S.W.3d 158 (Tex. App.—Amarillo 2007, no pet.) (per curiam), *rev'd* 288 S.W.3d 876 (2009).

[2] Respondents are Dale Bramlett, individually and as administrator of the estate of Vicki Bramlett, deceased, Shane Fuller, and Michael Fuller. Dale Bramlett is Vicki's surviving husband; Shane and Michael Fuller are her surviving sons.

[3] See Act of May 30, 1977, 65th Leg., R.S. ch. 817, § 11.02, 1977 Gen. Laws 2039, 2052 (former TEX. REV. CIV. STAT. art. 4590i, § 11.02), *repealed by* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.09, 2003 Tex. Gen. Laws 847, 884 (eff. Sept. 1, 2003) [herein, "article 4590i"].

[4] Section 11.02(c) of article 4590i provided that the damages cap in section 11.02(a) does "not limit the liability of any insurer where facts exist that would enable a party to invoke the common law theory of recovery commonly known in Texas as the 'Stowers Doctrine.'" Article 4590i, § 11.02(c).

judgment, including statements that Phillips was insured under a liability policy with limits of $200,000; that the Bramletts made, and Phillips did not timely accept, two "proper" *Stowers* demands to settle for the policy's limits; and that "facts exist to enable a party to invoke the common law theory of recovery known as the 'Stowers Doctrine.'"[5]

Phillips appealed. The Amarillo Court of Appeals reversed in part and modified and affirmed in part. First, the court found the evidence legally insufficient to support the jury's gross negligence finding, and thus reversed the part of the original judgment that awarded punitive damages and ordered that the Bramletts take nothing on that claim. The court next found the evidence sufficient to support the jury's remaining liability and damages findings, except as to certain future damages. The court suggested a remittitur on those future damages, which the Bramletts accepted. The court agreed with the trial court that the *Stowers* exception to article 4590i's damages cap applied, and therefore affirmed the actual damages portion of the trial court's original judgment, as modified to conform to the remittitur.

The Bramletts did not challenge the court of appeals' reversal of the punitive damages award. Phillips, however, petitioned for review of the court of appeals' judgment on actual damages, and we granted review on the issue of whether former article 4590i capped Phillips's liability. We held that it did, reversed the court of appeals' judgment, and remanded the case to the trial court for entry

[5] A party who seeks to hold a liability insurer liable for rejecting a settlement offer under the *Stowers* doctrine must prove, among other things, that an ordinarily prudent insurer would have accepted the offer, considering the likelihood and degree of the insured's potential exposure to an excess judgment. *See Am. Physicians Ins. Exch. v. Garcia*, 876 S.W.2d 842, 849 (Tex. 1994) (identifying elements of a *Stowers* claim). Here, the trial court did not make such a finding but instead stated that "[f]acts exist to enable a party to invoke the common law theory of recovery known as the 'Stowers Doctrine,'" which is the determination necessary to trigger the *Stowers* exception to article 4590i's damages cap. Although we discuss these recitals further below, we do not address whether they could support a subsequent *Stowers* claim against Phillips's insurer, as that issue is not before us in this case.

of a new judgment consistent with our opinion. 288 S.W.3d 876 (Tex. 2009). Because the Bramletts did not seek review of the court of appeals' take-nothing judgment on punitive damages, we did not address that claim. *Id.*

Back in the trial court on remand, both sides moved for entry of a new judgment. After a hearing at which the trial court admitted no new evidence, the trial court entered a new judgment (the remand judgment) that awarded the Bramletts actual damages capped under former article 4590i plus postjudgment interest calculated from the date of the remand judgment. In addition, the remand judgment expressly "vacated" the original judgment, did not include the *Stowers* recitals that were included in the original judgment, and stated that any suit against Phillips's insurer under former article 4590i was "reserved for another case."

In response to the remand judgment, the Bramletts filed a petition for writ of mandamus in this Court and separately appealed again to the Amarillo Court of Appeals. In both instances, the Bramletts argued that the trial court (1) should have calculated postjudgment interest from the date of the original judgment rather than the date of the remand judgment and (2) should not have vacated the original judgment. The Bramletts asserted that these actions conflicted with the mandate that we issued when we reversed the original judgment and remanded the case to the trial court.

We denied the Bramletts' mandamus petition without issuing an opinion. Meanwhile, Phillips moved to dismiss the Bramletts' appeal, contending that the court of appeals lacked jurisdiction because this Court had exclusive jurisdiction to enforce its mandate. The court of appeals held that it had jurisdiction and denied the motion to dismiss. 322 S.W.3d 443, 444. The court then held that the trial court had erred by vacating its original judgment and by calculating

postjudgment interest from the date of the remand judgment rather than the date of the original judgment. 359 S.W.3d 304, 312. The court of appeals thus reversed the remand judgment and again remanded the case to the trial court. *Id.* at 313.

We granted Phillips's petition for review. Phillips contends that the court of appeals (1) lacked jurisdiction to review the trial court's remand judgment, (2) erred in holding that the trial court erred by calculating postjudgment interest from the date of the remand judgment, and (3) erred in holding that the trial court erred by vacating its original judgment.

II. Jurisdiction Following Remand

Phillips argues that this Court has "exclusive jurisdiction to enforce [its] mandate and opinion," and the court of appeals therefore lacked jurisdiction over the Bramletts' appeal from the remand judgment. The court of appeals disagreed, and held that the trial court exceeded its jurisdiction by taking actions outside the scope of our mandate and judgment—specifically, by vacating its original judgment. We therefore begin by discussing the trial court's and the court of appeals' jurisdiction over a case that we have remanded to the trial court.

A. The Trial Court's Jurisdiction on Remand

The court of appeals held that the trial court exceeded its jurisdiction on remand by acting beyond the scope of its authority under our mandate and judgment. While we agree that our mandate and judgment limited the trial court's authority on remand, such limits are not "jurisdictional" in the true sense of that word.

When an appellate court reverses a lower court's judgment and remands the case to the trial court, as we did here, the trial court is authorized to take all actions that are necessary to give full

effect to the appellate court's judgment and mandate. *See In re Columbia Med. Ctr. of Las Colinas*, 306 S.W.3d 246, 248 (Tex. 2010) (per curiam) (holding trial court erred on remand by failing to reduce punitive damages award to conform to this Court's reduction of actual damages, as dictated by statutory cap on punitive damages). But the trial court has no authority to take any action that is inconsistent with or beyond the scope of that which is necessary to give full effect to the appellate court's judgment and mandate. *See, e.g.*, *Hudson v. Wakefield*, 711 S.W.2d 628, 630 (Tex. 1986) ("When this court remands a case and limits a subsequent trial to a particular issue, the trial court is restricted to a determination of that particular issue.").

Parties and courts sometimes use the term "jurisdiction" to refer to the trial court's authority on remand, as the court of appeals did here. *See Bramlett*, 359 S.W.3d at 311–12. In doing so, however, they are not referring to the trial court's constitutional or statutory power to conduct the necessary proceedings or to enter a judgment, but are instead referring to the scope of the trial court's authority in exercising that power. *See generally State v. Holloway*, 360 S.W.3d 480, 484–85 (Tex. Crim. App. 2012) (distinguishing court's jurisdiction to hear a case from its authority to act under that jurisdiction). The appellate court's mandate and judgment do not limit the trial court's jurisdiction to preside over the case and enter a remand judgment, but instead limit the trial court's authority in exercising that jurisdiction.

This is why we have reversed, rather than vacated, remand judgments that failed to comport with an appellate court's mandate. *See Wall v. Wall*, 186 S.W.2d 57 (Tex. 1945) (reversing trial court's remand judgment and remanding case to trial court for entry of new judgment complying with appellate court's prior instruction); *see also Tex. Workers' Comp. Ins. Fund v. Mandlbauer*, 34

S.W.3d 909, 912 (Tex. 2000) (per curiam) (reversing and remanding to court of appeals that awarded costs in appeal after remand with language that could be interpreted to contradict this Court's judgment in first appeal). We reversed, rather than vacated, these remand judgments because, although the trial courts exceeded their authority on remand, they had jurisdiction to enter the remand judgment, even if it exceeded their authority and was thus erroneous.

Here, the trial court had jurisdiction to enter a judgment upon remand. Although our judgment and mandate limited the trial court's authority in exercising its jurisdiction, we do not agree with the court of appeals that, to the extent the trial court exceeded its authority, it acted "beyond its jurisdiction." Rather, to the extent the trial court's judgment exceeds the requirements of our judgment and mandate, we will reverse the judgment for error rather than vacate it for lack of jurisdiction. *See Wall*, 186 S.W.2d at 59.

B. The Court of Appeals' Jurisdiction on Remand

Phillips's challenge to the court of appeals' ability to review the remand judgment does raise a jurisdictional question. Phillips contends that we have exclusive jurisdiction over a case that we have remanded, and therefore the court of appeals had no power even to consider an appeal from the remand judgment. We disagree.

As a general matter, our statutes and rules confirm that courts of appeals have jurisdiction to review the final judgments of trial courts within their districts. *See* TEX. GOV'T CODE § 22.220(a) ("Each court of appeals has appellate jurisdiction of all civil cases within its district of which the district courts or county courts have jurisdiction when the amount in controversy or the judgment rendered exceeds $250, exclusive of interest and costs."); TEX. R. APP. P. 25.1(b) ("The filing of a

notice of appeal by any party invokes the appellate court's jurisdiction over all parties to the trial court's judgment or order appealed from."). Phillips contends that this general jurisdiction does not exist after this Court remands a case to the trial court because this Court has exclusive jurisdiction to enforce its mandates and judgments. The cases on which Phillips relies do not support his contention. *See Wells v. Littlefield*, 62 Tex. 28 (1884); *Conley v. Anderson*, 164 S.W. 985 (Tex. 1913); *Dallas/Fort Worth Int'l Airport Bd. v. City of Irving II*, 868 S.W.2d 750 (Tex. 1993) (per curiam); *Bilbo Freight Lines, Inc. v. State*, 645 S.W.2d 925 (Tex. App.—Austin 1983, writ dism'd w.o.j., writ ref'd n.r.e.).

In *Wells*, we observed the now well-established principle that this Court has jurisdiction to enforce its judgments and mandates, regardless of whether we render judgment or remand to the trial court for entry of judgment in accordance with our instructions. 62 Tex. at 30. But we did not say that our jurisdiction is exclusive, and in fact we made no mention of exclusivity. *See id.*

In *City of Irving*, we held that when we remanded the case to the trial court, the *trial court's* jurisdiction over the case was exclusive with respect to *other trial courts*, and another trial court with a related case could not enjoin prosecution of the remanded case. 868 S.W.2d at 750. We explained that, "[o]nce this court has remanded a cause to a lower court, it has exclusive jurisdiction over the remanded proceedings, and will permit no interference from any other court." *Id.* at 751. Although Phillips contends that the "it" in this statement refers to this Court, the context confirms that it refers instead to the trial court. We did not hold that this Court's jurisdiction was exclusive or that courts of appeals lack jurisdiction to review a judgment that a trial court enters after remand. *See id.*

In *Conley*, we held that this Court has exclusive jurisdiction to interpret and enforce judgments that we render on appeal, not judgments that a trial court enters after we remand the case. 164 S.W. at 986. We stated that "[t]his court, having upon writ of error reversed the judgment of the district court in the former suit, and having entered final judgment in that case, no district court had jurisdiction to review that judgment, nor to interpret and enforce it, but must observe it as it was framed by this court." *Id.*

Finally, *Bilbo Freight Lines* provides no support for Phillips's position, for several reasons. In that case, the Austin Court of Appeals dismissed an appeal because the entity that filed the appeal, Bilbo Freight, was not a party to the suit below and had failed to establish standing to appeal. 645 S.W.2d at 927. After concluding that Bilbo Freight lacked standing to appeal, the court of appeals stated in dicta that it could not consider Bilbo Freight's contention that the trial court erred in construing this Court's mandate because "[t]he interpretation of the Supreme Court's judgment and mandate lies *exclusively* with that Court."[6] *Id.* (citing *Wells* and *Conley*).

As an initial matter, *Bilbo Freight Lines*, like *Conley*, involved the interpretation and enforcement of a final judgment that this Court rendered—not a judgment that the trial court rendered on remand. Seventeen years after this Court modified and affirmed the judgment of the trial court and court of appeals, the State moved in the trial court for injunctive relief that it had

[6] This analysis is dicta, and not an alternative basis for the court of appeals' holding, because the court of appeals had determined that, due to Bilbo Freight's lack of standing, no appeal was properly before the court. *Bilbo Freight Lines*, 645 S.W.2d at 927. If a proper party to the case had appealed, that party could have challenged the trial court's jurisdiction to enter the new judgment, and the court of appeals would have had jurisdiction to consider whether the trial court's judgment was void for lack of jurisdiction. *See State ex rel. Latty v. Owens*, 907 S.W.2d 484, 486 (Tex. 1995) (per curiam).

sought but not obtained in the original judgment. *Id.* at 926. Despite our final judgment in the case, the trial court purported to grant an additional judgment, and none of the parties to the judgment appealed or otherwise attacked the new judgment. *Id.* Only Bilbo Freight, which was not a party and did not establish privity of estate or interest with any party, challenged the trial court's action. *See id.*

We have held under similar circumstances that a trial court lacked jurisdiction to hear a non-party's motion for relief from a final judgment after the expiration of the trial court's plenary power, and consequently the court of appeals lacked jurisdiction to review the merits of the trial court's decision on such a motion. *Times Herald Printing Co. v. Jones*, 730 S.W.2d 648, 649 (Tex. 1987) (per curiam) (vacating court of appeals' judgment and dismissing cause). *Bilbo Freight Lines* provides no guidance in this case, because this case does not involve an appeal by a nonparty who lacked standing to initiate the appeal; nor does it involve a trial court's action long after the expiration of plenary power.

Moreover, the Austin Court of Appeals has since limited its dicta in *Bilbo Freight Lines*. *See Tex. Health & Human Servs. Comm'n v. El Paso Cnty. Hosp. Dist.*, 351 S.W.3d 460, 475–77 (Tex. App.—Austin 2011), *aff'd by* No. 11-0830, 2013 WL 2150666 (Tex. May 17, 2013). In *El Paso County Hospital*, the hospitals moved to dismiss the Health and Human Services Commission's appeal from a remand judgment, relying on *Bilbo Freight Lines* for the proposition that this Court had exclusive jurisdiction to review the trial court's remand judgment. *Id.* at 475–76. The Austin Court of Appeals disagreed, recognizing that our more recent decisions foreclosed any such argument:

> To the extent that the Hospitals are suggesting that lower courts literally have no jurisdiction to interpret an appellate court's judgment or mandate, even if only to determine their meaning in order to comply, that notion is belied by more recent Texas Supreme Court decisions. The core notion underlying decisions like *Conley*, as we have more recently observed, is simply that a higher court's mandate imposes a mandatory, ministerial duty on the lower court to comply with the higher court's judgment. It is in this respect that the lower court has no "jurisdiction" or "discretion" in regard to "reviewing" or "interpreting" the mandate.

Id. at 476 (citations omitted). The court also pointed out that both *Bilbo Freight Lines* and *Conley* involved appeals following this Court's entry of a final judgment, rather than a trial court's remand judgment. *Id.* at 477. The hospitals did not challenge these holdings on petition for review, and we affirmed the Austin Court of Appeals' judgment. 2013 WL 2150666, at *9.

The cases that Phillips cites do not support his contention that the court of appeals lacked jurisdiction over the Bramletts' appeal from the trial court's remand judgment, and we have found no case in which this Court has preempted the courts of appeals' jurisdiction following a remand to the trial court for entry of judgment. We thus hold that a court of appeals has jurisdiction, consistent with section 22.220(a) of the Texas Government Code, to review a trial court's final judgment after remand from this Court. And we in turn have jurisdiction, consistent with section 22.001(a) of the Government Code, to review the court of appeals' judgment. To be sure, we also retain jurisdiction to enforce our judgments and mandates and are authorized to exercise our writ power to do so, *see In re Columbia Med. Ctr. of Las Colinas*, 306 S.W.3d at 247–48, but our enforcement jurisdiction does not deprive the courts of appeals of jurisdiction to review a trial court's remand judgment. We conclude that the court of appeals had jurisdiction over this appeal from the trial court's remand judgment.

II. The Trial Court's Remand Judgment

We now turn to the issue of whether the trial court or the court of appeals erred in the exercise of their jurisdiction. Phillips contends that the trial court got it right by calculating postjudgment interest based on the date of the remand judgment rather than the date of the original judgment, by vacating its original judgment, and by declining to include the *Stowers* recitals in its remand judgment. The Bramletts contend that the court of appeals got it right by holding that postjudgment interest must be calculated based on the date of the original judgment and that the trial court lacked authority to vacate its original judgment containing the *Stowers* recitals.

The parties agree, as do we, that the first appeal resulted in a complete reversal of the trial court's original judgment. The court of appeals reversed the original judgment with respect to punitive damages, rendered a take-nothing judgment on punitive damages, and affirmed the remainder of the trial court's judgment as modified to conform to the remittitur. 258 S.W.3d at 182–83. On review, this Court held that the trial court and the court of appeals erred in failing to cap the actual damages award, reversed the court of appeals' judgment, and remanded the case to the trial court for entry of a new judgment consistent with our opinion. 288 S.W.3d at 882–83. Our opinion did not expressly state that we were not reversing the unchallenged portion of the court of appeals' judgment that reversed the award of punitive damages, but the parties do not contend otherwise. Our opinion addressed only the award of actual damages, and the trial court and the parties correctly understood the opinion as approving the court of appeals' unchallenged holding on punitive damages. By remanding the case to the trial court for entry of a judgment consistent with our

opinion, we permitted the trial court to enter a final judgment that reflected this Court's holdings and the court of appeals' holding on punitive damages.

The parties disagree, however, on whether, on remand, the trial court should have entered a judgment modifying its original judgment or entered a completely new one. As a practical matter, this is a distinction without meaning, at least in this case. A judgment that has been wholly reversed (as the trial court's original judgment was) is without effect, and whether the trial court's remand judgment is labeled as a "new" or a "modified" version of the earlier judgment does not alter the correctness of its content.[7] *See Coats v. Blanding*, 59 Tex. Civ. App. 334, 336, 125 S.W. 627, 628 (1910, writ ref'd) ("It is a well-settled rule that a vacated, set aside, or reversed judgment, order, or declaration is deprived of its conclusive character as such, and cannot be made the basis of any rights thereafter."); *cf. Dynegy Midstream Servs., Ltd. P'ship v. Apache Corp.*, 294 S.W.3d 164, 174 & n.39 (Tex. 2009) (remanding cause to trial court for entry of "new judgment" consistent with appellate opinion and instructing trial court to consider whether to award attorney's fees in its "modified judgment"). Thus, we turn to the substantive issues: whether the trial court should have calculated postjudgment interest based on the date of the original judgment or the remand judgment and whether the trial court should have vacated the original judgment or included the *Stowers* findings in the remand judgment.

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[7] The Bramletts argue that our opinion directed the trial court to "conform" its existing judgment to our opinion, not enter a new judgment. But this language in our opinion relates to how trial courts should apply section 11.02 of former article 4590i in the first instance: "both the statutory cap and its exception can be applied as written by conforming the judgment against the physician to section 11.02(a)'s cap and reserving for another case any suit against the insurer under section 11.02(c)'s Stowers exception." *Id.* at 882. By contrast, our instruction to the trial court for remand was that it should "apply the cap and *render* judgment consistent with our opinion." *Id.* at 883.

A. Postjudgment Interest

Prejudgment interest and postjudgment interest compensate judgment creditors for their lost use of the money due to them as damages. *See Miga v. Jensen*, 96 S.W.3d 207, 212 (Tex. 2002) ("[L]ike pre-judgment interest, post-judgment interest is simply compensation for a judgment creditor's lost opportunity to invest the money awarded as damages at trial."); *Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 528 (Tex. 1998) ("Prejudgment interest is 'compensation allowed by law as additional damages for lost use of the money due as damages during the lapse of time between the accrual of the claim and the date of the judgment.") (citation omitted). Prejudgment interest performs this function for the time period from the date the damages are incurred through the date of judgment; postjudgment interest, from the date of judgment through the date the judgment is satisfied. *See Miga*, 96 S.W.3d at 212; *Kenneco Energy*, 962 S.W.2d at 528. Generally, the interest rate is the same for prejudgment and postjudgment interest. *See* TEX. FIN. CODE § 304.103 ("The prejudgment interest rate is equal to the postjudgment interest rate applicable at the time of judgment."); *Kenneco Energy*, 962 S.W.2d at 532 (conforming rate and accrual of prejudgment interest under common law to that awarded under Finance Code, including accrual of "prejudgment interest . . . at the rate for postjudgment interest"). Thus, the date on which prejudgment interest ceases and postjudgment interest commences is often inconsequential.

Here, however, we have held that the Bramletts' damages are capped under former article 4590i. 288 S.W.3d at 882. Previously, we have held that prejudgment interest is included among the damages that are capped by former article 4590i. *See Columbia Hosp. Corp. of Houston v. Moore*, 92 S.W.3d 470, 474 (Tex. 2002); *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887,

897–901 (Tex. 2000). We have never held that postjudgment interest is subject to the damages cap. Thus, the parties' dispute over which judgment date ends prejudgment interest and begins postjudgment interest is not merely academic in this case; it dictates whether the Bramletts may be able to recover interest for the four-year period between the trial court's original judgment in 2005 and its remand judgment in 2009. With these pragmatic concerns in mind, we turn to the procedural issue before us.

The Legislature has instructed that any "money judgment of a court in this state must specify the postjudgment interest rate applicable to that judgment," TEX. FIN. CODE § 304.001, and that, with one exception, the postjudgment interest accrues beginning on the date the judgment is rendered:

> (a) Except as provided by Subsection (b), postjudgment interest on a money judgment of a court in this state accrues during the period beginning on the date the judgment is rendered and ending on the date the judgment is satisfied.
>
> (b) If a case is appealed and a motion for extension of time to file a brief is granted for a party who was a claimant at trial, interest does not accrue for the period of extension.

Id. § 304.005.

The Finance Code does not define the term "judgment" or otherwise distinguish between a trial court's original judgment and judgments on remand or appeal. The issue here is whether, when a trial court enters a second judgment following remand, the "date the judgment is rendered" is the date of the remand judgment (as Phillips contends) or of the original judgment (as the Bramletts contend). We hold that, when an appellate court remands a case to the trial court for entry of judgment consistent with the appellate court's opinion, and the trial court is not required to admit new or additional evidence to enter that judgment, as is the case here, the date the trial court entered

the original judgment is the "date the judgment is rendered," and postjudgment interest begins to accrue and is calculated as of that date.

Construing the predecessor to section 304.005, we have repeatedly held that, when an appellate court reverses a trial court's judgment and renders judgment on appeal, postjudgment interest begins to run from the date of the trial court's judgment, not the later date of the appellate court's judgment. In *American Paper Stock Co. v. Howard*, the trial court entered a judgment for the defendant notwithstanding the jury's verdict for the plaintiff, and the court of appeals reversed and rendered judgment for the plaintiff on the jury's verdict, but calculated postjudgment interest from the date of the jury verdict instead of the date of the trial court's or appellate court's judgment. 528 S.W.2d 576, 576–77 (Tex. 1975) (per curiam). We reformed the court of appeals' judgment, holding that the "judgment" that the statute refers to "is the judgment of the trial court," and when that judgment is "erroneous," the appellate court's judgment "must take its place and [the] plaintiff is entitled to interest from the date of the erroneous judgment." *Id.* at 577.

We reaffirmed this holding in *Thornal v. Cargill, Inc.*, when we reformed a court of appeals' judgment to provide for postjudgment interest from the date of the trial court's original judgment, after the court of appeals had reversed and rendered judgment but failed to include an award of postjudgment interest. 587 S.W.2d 384, 384–85 (Tex. 1979) (per curiam). Citing *American Paper Stock*, we explained again that, "when the trial court's judgment is erroneous, the judgment of the court of civil appeals must take its place and [the] plaintiff is entitled to interest from the date of the erroneous judgment." *Id.* at 385. Finally, in *Danziger v. San Jacinto Savings Association*, we applied this same holding when we reversed a court of appeals' judgment and remanded in part and

rendered in part. As to the part that we rendered, we awarded "post-judgment interest to accrue . . . from . . . the date of the trial court's [original] judgment." 732 S.W.2d 300, 305 (Tex. 1987).

Phillips acknowledges these decisions, but argues that a different rule should apply when an appellate court remands the case to the trial court rather than renders judgment on appeal. When an appellate court remands a case, Phillips contends, the trial court's original judgment becomes a "nullity," as if it never existed, and the remand judgment becomes the court's "operative" judgment under the postjudgment interest statute. The logic of Phillips's distinction between render and remand fails. When we have reversed a trial court's original judgment, that judgment is ineffective and unenforceable; this is no more or less true whether we then render judgment ourselves or remand the case to the trial court to render judgment in accordance with our opinion. It is the reversing of the judgment, rather than the rendering of a new judgment or the remanding of the case, that makes the original judgment ineffective. Thus, Phillips's reliance on the ineffectiveness of the trial court's original, reversed judgment is not a basis for distinguishing between render and remand.

Instead, we are guided by *D.C. Hall Transport, Inc. v. Hard*, 358 S.W.2d 117 (Tex. 1962) (per curiam). In that case, the jury rendered a verdict for the plaintiff but the trial court granted the defendants' motion for judgment notwithstanding the verdict; the court of appeals reversed, and rendered judgment for the plaintiff. *Hard v. Hall*, 318 S.W.2d 108 (Tex. Civ. App.—Fort Worth 1958), *rev'd Hall v. Hard*, 335 S.W.2d 584 (Tex. 1960). We in turn reversed the court of appeals' judgment and remanded the case to the trial court "for further proceedings in accordance with this opinion," instructing the trial court to "proceed with the disposition of the cause . . . as though no judgment non obstante veredicto had been entered." *Hall*, 335 S.W.2d at 591. On remand, the trial

court heard arguments but "[n]o evidence was offered by either party." *D.C. Hall Transp., Inc. v. Hard*, 355 S.W.2d 257, 258 (Tex. Civ. App.—Fort Worth 1962), writ ref'd n.r.e., 358 S.W.2d 117, 117 (Tex. 1962) (per curiam). The trial court then entered a remand judgment for the plaintiff, with postjudgment interest from the date of the original judgment notwithstanding the verdict. *Id.*

In the second appeal, the defendant argued that the trial court erred by calculating postjudgment interest from the date of the original judgment. *Id.* at 260. The court of appeals affirmed, noting that "the Supreme Court did not remand for a new trial. The case was remanded with directions to the trial court to make certain findings, on the evidence adduced at the original trial, and enter judgment in accordance with such findings." *Id.* "In effect," the court of appeals reasoned, "the [remand] judgment was the judgment which should have been rendered . . . when the [original] non obstante judgment was rendered. Since the judgment non obstante was erroneous, and the [remand] judgment took its place, plaintiff was entitled to interest from the date of the erroneous judgment." *Id.* In refusing review, we confirmed that "[w]e are . . . in agreement with and accordingly approve the decisions of law announced by the Court of Civil Appeals in its opinion." 358 S.W.2d 117, 117 (Tex. 1962).

Similarly, in *Vassallo v. Nederl-Amerik Stoomv Maats Holland*, we reversed a trial court's take-nothing judgment against a plaintiff and remanded the case to the trial court with instructions to enter a judgment for the plaintiff in accordance with our opinion. 344 S.W.2d 421, 426 (Tex. 1961). The trial court entered a remand judgment for the plaintiff with postjudgment interest from the date of the original judgment, and the court of appeals affirmed, holding that the trial court correctly calculated postjudgment interest because this Court's judgment remanding the cause with

instructions to enter judgment for plaintiffs in accordance with its opinion "was an instruction to enter the judgment which the trial court should have entered" when it entered its original judgment. *Nederlandsch-Amerikaansche-Stoomvaart-Maatschappij; Holland-Am. Line v. Vassallo*, 365 S.W.2d 650, 656 (Tex. Civ. App.—Houston 1963, writ ref'd n.r.e.).

Phillips asserts that *D.C. Hall* "is not persuasive authority" because, unlike this case, *D.C. Hall* involved a judgment notwithstanding the verdict. But Phillips does not explain why the presence or absence of a J.N.O.V. should be a determinative factor. In both this case and *D.C. Hall*, the trial court could have entered a correct judgment based on the jury's verdict, but did not, and in both cases we remanded the case to the trial court for entry of the correct judgment based on the existing jury verdict and governing law. We agree with the holdings in *D.C. Hall* and *Vassallo*.

As a matter of statutory construction, additional reasons support our conclusion. First, this Court "presume[s] the Legislature is aware of relevant case law when it enacts or modifies statutes." *In re Allen*, 366 S.W.3d 696, 706 (Tex. 2012); *see also 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.") (citation omitted). We therefore presume that when the Legislature enacted section 304.005 in 1999, it was aware of our interpretations of the word "judgment" in the predecessor statute to mean the trial court's original judgment when a court of appeals either entered the judgment that the trial court should have entered or remanded to the trial court for entry of the judgment the trial court should have entered. *See id.* Nothing in section 304.005 or the Finance Code indicates that the Legislature intended a different meaning for the term "judgment" as used in the statute. *See* TEX. FIN. CODE § 304.001–.302. We therefore must conclude

that the Legislature selected the term "judgment" for the purpose of conveying a meaning consistent with that which we historically afforded to it. *See In re Allen*, 366 S.W.3d at 706 ("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.") (quoting *State v. K.E.W.*, 315 S.W.3d 16, 21 (Tex. 2010)).

Second, subsection (b) of section 304.005 evidences an expectation that postjudgment interest will accrue during the pendency of an appeal, subject to subsection (b)'s exclusion. *See* TEX. FIN. CODE § 304.005(b) (excluding period of claimant's extensions of time to file brief from postjudgment interest calculation). In providing for postjudgment interest "on a money judgment of a court in this state," the Legislature did not distinguish between a judgment rendered by an appellate court and a judgment rendered by a trial court on remand as directed by the appellate court. *See id.* § 304.005(a), (b). We see no basis for applying that subsection differently depending solely on whether an appellate court renders judgment directly or remands for entry of judgment consistent with the opinion on appeal.

Finally, our rules of procedure expressly authorize this Court to remand a case to the trial court in the interest of justice "even if a rendition of judgment is otherwise appropriate." TEX. R. APP. P. 60.3. Our decision to remand rather than render is a procedural decision, often based on practical considerations, the purpose of which generally is not to alter a party's substantive right of recovery. It should not be the basis for altering whether a party is entitled to postjudgment interest during the pendency of the appeal.

However, we are not holding today that postjudgment interest *always* accrues from the date of the original judgment when an appellate court remands a case to the trial court, although some of our courts of appeals have suggested that this is the case even when the trial court is required to admit additional evidence on remand. In *State Department of Highways & Public Transportation v. City of Timpson*, for example, the plaintiff sued both the City and the State, but when the plaintiff settled with the City, the trial court dismissed the City and entered judgment against the State based on the jury's verdict. 795 S.W.2d 24 (Tex. App.—Tyler 1990, writ denied). The court of appeals reversed the judgment in part and remanded the case "for trial only of the issues of the comparative negligence of the State and the City." *Id.* at 25. After this new trial, the trial court entered a new judgment reducing the amount of the award by the City's percentage of responsibility, and the plaintiff appealed, "complaining that the trial court erred in failing to award post-judgment interest from the date of the original judgment." *Id.* at 27. The court of appeals agreed, reasoning that, because it had remanded the case "with instructions to the trial court to determine the single issue" of comparative negligence, "[i]nterest on the revised judgment should run from the date of the original or erroneous judgment." *Id*. Similarly, in *Gamma Group v. Transatlantic Reinsurance Co.*, the court of appeals held that postjudgment interest should run from the date of the original judgment even when the trial court conducted an evidentiary hearing on remand, at which the plaintiffs offered additional evidence of damages, leading to a remand judgment that awarded plaintiffs nearly twice the amount of damages awarded in the original judgment. 365 S.W.3d 469, 471, 476 (Tex. App.—Dallas 2012, no pet.).

Relying on *City of Timpson*, the Tyler Court of Appeals recently held that "the general rule is that after examining the entire procedural history of a dispute, a party that *ultimately* prevails is entitled to postjudgment interest from the date the original judgment was rendered, irrespective of whether the original judgment was erroneous, because that is the date upon which the trial court should have rendered a correct judgment." *Long v. Castle Tex. Prod. Ltd. P'ship*, 330 S.W.3d 749, 753 (Tex. App.—Tyler 2010, pet. granted and abated). In the Tyler Court's view, postjudgment interest runs from the date of the original judgment any time a court of appeals remands the case to the trial court, and "[w]hether the remand . . . created a fact issue or required a limited retrial was immaterial to the accrual of postjudgment interest." *Id*. We granted a petition for review in *Long*, but have since abated the case pending bankruptcy proceedings. *See Long v. Castle Tex. Prod. Ltd. P'ship*, 55 Tex. Sup. Ct. J. 1170 (Aug. 17, 2012).

For purposes of the present case, we need not (and do not) decide whether postjudgment interest runs from the date of the original judgment in every remanded case, or particularly in cases in which the trial court is required to conduct a new trial or other evidentiary proceeding before entering the remand judgment. Here, we remanded the case for the trial court to enter judgment in accordance with our opinion, and the trial court was not required to admit or consider any additional evidence before entering its remand judgment.

Because we remanded the case for entry of judgment consistent with our opinion, and the trial court was not required to admit new or additional evidence to enter that judgment, the date the trial court entered the original judgment is the "date the judgment is rendered," and postjudgment interest began to accrue and must be calculated as of that date.

B. Recitals in the Judgment

Finally, we address the Bramletts' arguments that the trial court should not have vacated its original judgment and that it should have included the *Stowers* recitals in its remand judgment. Regardless of the correctness of the trial court's *Stowers*-related determinations, the Bramletts have not explained and we do not see what continuing effect the trial court's recitals could have now. They are recitals and not part of the judgment's decretal language. They are not material to the ultimate disposition of the case, and they do not represent jury findings.

We do not agree with the court of appeals that the trial court "exceeded its jurisdiction" by vacating the original judgment, because, as we have explained, the trial court had "jurisdiction" on remand even to enter an erroneous judgment. The issue is whether the trial court exceeded its authority in light of our mandate, not whether it acted without jurisdiction. But by the time we remanded the case to the trial court, we had reversed the original judgment in its entirety. Although we can agree that the trial court erred in "vacating" a judgment that no longer had any effect, any such error was harmless. *See* TEX. R. APP. P. 44.1(a), 61.1; *G & H Towing Co. v. Magee*, 347 S.W.3d 293, 297–98 (Tex. 2011) (per curiam).

This leaves us with the question of whether, as the Bramletts contend, the trial court should have included the *Stowers* recitals in the remand judgment. To the extent that the Bramletts believe that such findings were necessary to support application of the *Stowers* exception to article 4590i's cap on actual damages, we had already resolved that issue in our prior opinion, thus making any such findings moot on remand. And to the extent that the Bramletts believe that the recitals are somehow relevant or necessary to their subsequent *Stowers* claim against Phillips's liability insurer, they have

failed to explain to us how that could be or why they would be entitled to obtain such recitals in a case to which Phillips's liability insurer was not a party. We therefore hold that the trial court did not err in declining to include the *Stowers* recitals in the remand judgment.

III. Conclusion

We agree with the court of appeals that it had jurisdiction over this appeal and that the trial court erred in calculating postjudgment interest based on the date of the remand judgment rather than the date of the original judgment. We disagree with the court of appeals that the trial court exceeded its jurisdiction by vacating the original judgment. Though it was unnecessary for the trial court to vacate its original judgment, which had been reversed in its entirety, the trial court did not lack jurisdiction to enter judgment—even an erroneous judgment—in the case. The court of appeals' holding on this issue, however, is not reflected in its judgment, which reverses the trial court's order and remands the cause to the trial court for recalculation of damages without reference to vacatur. We therefore affirm the court of appeals' judgment reversing and remanding this case, and instruct the trial court on remand to modify its judgment to award postjudgment interest from the date of its original judgment in accordance with the applicable provisions of the Finance Code, consistent with this opinion.

_____

Jeffrey S. Boyd
Justice

OPINION DELIVERED: June 7, 2013

IN THE SUPREME COURT OF TEXAS

NO. 12-0357

CHCA WOMAN'S HOSPITAL, L.P. D/B/A THE WOMAN'S HOSPITAL OF TEXAS AND WOMAN'S HOSPITAL OF TEXAS, INC., PETITIONERS,

v.

SCOTT LIDJI AND ANGELA LIDJI, AS NEXT FRIENDS OF R. L., A MINOR, RESPONDENTS

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

Argued February 5, 2013

JUSTICE LEHRMANN delivered the opinion of the Court.

In this interlocutory appeal, we are once again called upon to interpret and apply the Texas Medical Liability Act's (TMLA) expert-report requirement, contained in section 74.351 of the Texas Civil Practice and Remedies Code. With respect to health care liability claims governed by the TMLA, a claimant is generally required to serve an expert report on each physician or health care provider against whom such a claim is asserted no later than 120 days after the original petition is filed. TEX. CIV. PRAC. & REM. CODE § 74.351(a).[1] Failure to do so results in dismissal of the claim

[1] Section 74.351(a) was recently amended, and the amended statute will take effect on September 1, 2013. *See* Act of May 26, 2013, 83rd Leg., R.S., ch. __, § __, __ Tex. Gen. Laws __, __. The amendment does not affect this case and is not referenced further in this opinion.

with prejudice and an award of attorney's fees on the motion of the affected defendant. *Id.* § 74.351(b). The issue presented here is whether a claimant's nonsuit of a health care liability claim before the expiration of the 120-day period tolls the expert-report period until suit is refiled. For the reasons discussed below, we hold that it does and therefore affirm the court of appeals' judgment.

I. Background

Scott and Angela Lidji, as next friends of their daughter, R.L., sued CHCA Woman's Hospital, L.P. d/b/a The Woman's Hospital of Texas and Woman's Hospital of Texas, Inc. (CHCA) for injuries sustained by R.L. following her premature birth. The Lidjis allege that, as a result of improper treatment while in CHCA's Neonatal Intensive Care Unit, R.L. suffered severe and permanent neurological damage. The Lidjis filed a health care liability claim against CHCA on April 2, 2009 (the First Suit). On July 27, 2009, 116 days after filing their original petition, the Lidjis nonsuited their claim. Just over two years later, on August 15, 2011, the Lidjis filed a new lawsuit against CHCA and several other health care providers (the Second Suit).[2] The same day they filed the Second Suit,[3] the Lidjis served an expert report on CHCA.

CHCA objected to the report as untimely and moved to dismiss the claim against it with prejudice. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(b). CHCA asserted that the deadline to serve the report expired on July 31, 2009, which was the 120th day after the Lidjis filed their original

[2] The other defendants in this suit are William Scott Jarriel, M.D., Karen T. Deville, M.D., Brenda H. McIntyre, M.D., Deborah Selma Enad de Guzman, M.D., and Medical Center Neonatology Associates, P.A. They were not named in the First Suit and are not parties to the interlocutory appeal.

[3] The Lidjis filed and served their original petition in the Second Suit well within the TMLA's statute of limitations. *See* TEX. CIV. PRAC. & REM. CODE § 74.251 (subject to a ten-year statute of repose, minors under the age of 12 shall have until their 14th birthday to file, or have filed on their behalf, a health care liability claim).

petition in the First Suit.[4] The Lidjis responded that their nonsuit tolled the expert-report deadline, such that they had four days after filing the original petition in the Second Suit to serve the report on CHCA. The trial court overruled CHCA's objection and denied the motion to dismiss.

CHCA appealed the trial court's order. *See id.* § 51.014(a)(9) (allowing an interlocutory appeal from an order denying relief sought under section 74.351(b)). The court of appeals affirmed, holding that "a claimant's nonsuit, filed prior to the expiration of section 74.351's 120-day time period for serving expert reports, tolls the running of the 120-day period until the claimant re-files his claims, at which point the claimant has the time remaining from the 120-day period to serve the defendant with his expert report." 369 S.W.3d 488, 496. Accordingly, the court of appeals concluded that the Lidjis timely served their expert report on day 117 of the statutory period. *See id.*

CHCA now seeks interlocutory review by this Court. The Lidjis moved to dismiss CHCA's petition for review, arguing that we lack subject matter jurisdiction over the merits of the appeal. We first determine whether we have such jurisdiction before resolving the substantive issue presented.

II. Interlocutory Appeal Jurisdiction

As indicated above, a party who has been denied relief sought under section 74.351 of the TMLA may seek an interlocutory appeal of the trial court's order. TEX. CIV. PRAC. & REM. CODE § 51.014(a)(9). However, the court of appeals' judgment in an interlocutory appeal is generally final,

[4] CHCA did not object to the report on any other grounds.

and we lack jurisdiction over such cases unless a specific exception applies. TEX. GOV'T CODE § 22.225(b)(3). One such exception allows us to consider a petition for review on interlocutory appeal in a case in which the court of appeals "holds differently from a prior decision of another court of appeals . . . on a question of law material to a decision of the case." *Id.* § 22.001(a)(2); *accord id.* § 22.225(c). For jurisdictional purposes, "one court holds differently from another when there is inconsistency in their respective decisions that should be clarified to remove unnecessary uncertainty in the law and unfairness to litigants." *Id.* § 22.001(e). CHCA asserts that the court of appeals' decision in this case conflicts with that of the Third Court of Appeals in *Estate of Allen v. Scott & White Clinic*, No. 03-08-00576-CV, 2011 WL 2993259 (Tex. App.—Austin July 22, 2011, no pet.) (mem. op.), thereby conferring jurisdiction. We agree.

In *Estate of Allen*, the claimant Estate sued several health care providers under the TMLA and nonsuited its claims 118 days after filing its original petition. *Id.* at *2. Nearly four months later, the Estate filed a second TMLA suit against the providers and attached an expert report to its petition. *Id.* On the date the petition in the second suit was filed, the Estate made arrangements for the sheriff's office to serve the providers with process and furnished the office with the relevant documents; however, the providers were not actually served with the petition and expert report until four days later. *Id.* The trial court granted the providers' motion to dismiss. *Id.* The court of appeals affirmed, holding that the "Estate's decision to nonsuit [the providers] did not toll the passage of the 120-day deadline." *Id.* at *5. This is the exact opposite conclusion, on the same issue, that the court of appeals reached in the case at hand.

The Lidjis contend that the court of appeals' discussion of the tolling issue in *Estate of Allen* was dicta, as the focus of the parties' dispute in that case was not whether the nonsuit tolled the report deadline, but whether the Estate's service of the report two days *after* the tolled deadline should relate back to the date it made arrangements for service because it acted with due diligence in attempting to serve the providers. The Lidjis, however, mischaracterize the holding in *Estate of Allen*. The court of appeals expressly decided that case on the tolling issue, holding that the deadline expired before "the Estate made arrangements to serve and actually served [the providers] with its expert report." *Id.* By resolving the tolling issue against the Estate, the court of appeals did not even reach the due diligence question. In fact, one justice on the panel concurred in the judgment on the grounds that the Estate had failed to prove that a due-diligence exception applied, but nevertheless disagreed with the majority opinion, opining that "the filing of a nonsuit tolls the 120 days for the period between the filing of the nonsuit and the refiling of the same claim." *Id.* at *6 (Henson, J., concurring in part and dissenting in part).

In sum, we hold that the First Court of Appeals in the underlying case and the Third Court of Appeals in *Estate of Allen* held differently on a question of law material to a decision of the case: whether a plaintiff's nonsuit of a health care liability claim tolls the expert-report deadline.[5] Accordingly, we have jurisdiction over CHCA's petition for review under sections 22.001(a)(2) and 22.225(c) of the Texas Government Code.

[5] *See also White v. Baylor All Saints Med. Ctr.*, No. 07-08-0023-CV, 2009 WL 1361612, at *1–2 (Tex. App.—Amarillo May 13, 2009, pet. denied) (mem. op.) (holding principally that the claimant's nonsuit did not restart the expert-report clock and alternatively that the claimant's nonsuit did not toll the report deadline).

III. Analysis of Tolling Issue

The outcome of this case rests on our interpretation of various provisions of the TMLA. Matters of statutory construction are legal questions that we review de novo. *Tex. W. Oaks Hosp., LP v. Williams*, 371 S.W.3d 171, 177 (Tex. 2012). The aim of statutory construction is to determine and give effect to the Legislature's intent, *id.*, which is generally reflected in the statute's plain language, *Prairie View A&M Univ. v. Chatha*, 381 S.W.3d 500, 507 (Tex. 2012). We analyze statutory language in context, considering the specific section at issue as well as the statute as a whole. *In re OAG*, ___ S.W.3d ___, ___ (Tex. 2013) (citing *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 866 (Tex. 1999)).

The TMLA provides a statutory framework governing health care liability claims. The Legislature's stated purposes in enacting the TMLA included "reduc[ing] excessive frequency and severity of health care liability claims" and "decreas[ing] the cost of those claims," but doing so "in a manner that will not unduly restrict a claimant's rights." Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.11(b)(1)–(3), 2003 Tex. Gen. Laws 847, 884. We have noted that, with these purposes in mind, "the Legislature struck a careful balance between eradicating frivolous claims and preserving meritorious ones." *Leland v. Brandal*, 257 S.W.3d 204, 208 (Tex. 2008).

As part of this statutory framework, the TMLA sets forth the following expert-report requirement:

> In a health care liability claim, a claimant shall, not later than the 120th day after the date the original petition was filed, serve on each party or the party's attorney one or more expert reports, with a curriculum vitae of each expert listed in the report for each physician or health care provider against whom a liability claim is asserted. The date for serving the report may be extended by written agreement of the affected

> parties. Each defendant physician or health care provider whose conduct is implicated in a report must file and serve any objection to the sufficiency of the report not later than the 21st day after the date it was served, failing which all objections are waived.

TEX. CIV. PRAC. & REM. CODE § 74.351(a). We have described this "threshold report requirement as a substantive hurdle for frivolous medical liability suits before litigation gets underway." *Spectrum Healthcare Res., Inc. v. McDaniel*, 306 S.W.3d 249, 253 (Tex. 2010). In this case, we consider the effect of a claimant's nonsuit on the statutory expert-report deadline.

Several courts of appeals have addressed and rejected the argument, which the Lidjis do not assert here, that a claimant's nonsuit and subsequent refiling of a petition asserting a health care liability claim restarts the 120-day period to serve an expert report. *See, e.g.*, *Runcie v. Foley*, 274 S.W.3d 232, 236 (Tex. App.—Houston [1st Dist.] 2008, no pet.); *Mokkala v. Mead*, 178 S.W.3d 66, 71, 73 (Tex. App.—Houston [14th Dist.] 2005, pet. denied).[6] As discussed above, the Lidjis argue not that the expert-report period restarted upon their filing of the Second Suit, but that the period was tolled during the time between the pre-deadline nonsuit of the First Suit and the filing of the original petition in the Second Suit. Thus, the Lidjis contend, they are entitled to a total of 120 days while their health care liability claim is pending to serve the report. CHCA responds that the Lidjis' filing of the original petition in the First Suit triggered an "expert report countdown" and that the TMLA contains no language tolling or abating the deadline in the event of a nonsuit.

[6] In *Mokkala*, which was one of the first opinions to address the issue, the 120-day period had expired before the claimant's nonsuit. 178 S.W.3d at 68 n.3. The *Mokkala* court thus noted that it "need not decide whether filing of a nonsuit before the expiration of the 120-day period would toll" the period between the nonsuit and the refiling of the claim. *Id.*

Under Texas law, parties have "an absolute right to nonsuit their own claims for relief at any time during the litigation until they have introduced all evidence other than rebuttal evidence at trial." *Villafani v. Trejo*, 251 S.W.3d 466, 468–69 (Tex. 2008); TEX. R. CIV. P. 162. However, a voluntary nonsuit does not interrupt the running of the statute of limitations. *See Bailey v. Gardner*, 154 S.W.3d 917, 920 (Tex. App.—Dallas 2005, no pet.). The Lidjis contend that construing the expert-report requirement to prohibit tolling in the event of a nonsuit would interfere with their absolute right to nonsuit the claims in the First Suit and that such legislative intent is not reflected in the statute's plain language. We agree.

The TMLA neither expressly allows nor expressly prohibits tolling of the expert-report period in the event of a claimant's nonsuit. In *Gardner v. U.S. Imaging, Inc.*, however, we held, in the default-judgment context, that a defendant's failure to timely answer after proper service of citation tolled the statutory period to serve the expert report until the defendant made an appearance. 274 S.W.3d 669, 671 (Tex. 2008) (per curiam). The situation at hand is not identical to that in *Gardner*, but *Gardner* did not purport to create a lone tolling scenario. Rather, as noted by the court of appeals, we recognized in *Gardner* that tolling of the expert-report period can be proper under certain circumstances notwithstanding the statute's silence on the matter. *See* 369 S.W.3d at 494 (citing *Gardner*, 274 S.W.3d at 671). As we hold today, one such circumstance is when a claimant nonsuits a health care liability claim prior to the expiration of the deadline to serve the report.

Tolling the expert-report period both protects a claimant's absolute right to nonsuit and is consistent with the statute's overall structure. To that end, we agree with the Lidjis that the various provisions of the TMLA's expert-report requirement, construed together, demonstrate legislative

intent that the expert report be provided within the context of pending litigation. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE § 74.351(a) (requiring service of the report on the "party or the party's attorney" and requiring the "defendant" that is the subject of the report to "file and serve" objections to the sufficiency of the report within 21 days of service); *id.* § 74.351(b) (providing for dismissal of a claim and an award of attorney's fees and costs "on the motion of the affected [defendant]" if the report is not timely served); *id.* § 74.351(c) (permitting a court to grant one thirty-day extension to the claimant to cure deficiencies found in the report). Construing the TMLA to require service of an expert report in the absence of a pending lawsuit would thus give rise to a host of procedural complications that the statute does not envision and cannot adequately address. We decline to attribute such intent to the Legislature without a clear expression of it in the statute's language.

Our interpretation of the TMLA is also consistent with the statute's purposes of reducing expense and eliminating frivolous claims early in the lawsuit.[7] First, it encourages plaintiffs to voluntarily nonsuit claims that appear to lack merit early in the litigation process, without being penalized for doing so in the event additional investigation strengthens those claims. Further, when a claim is nonsuited, the defendant against whom the claim was asserted does not incur additional litigation expenses unless and until the claim is refiled. Any extra expense incurred by the defendant as a result of the nonsuit and refiling will likely be minimal, as a claimant's lawsuit on a health care liability claim may only be maintained for a finite period of time without service of the expert

[7] Although the TMLA controls "[i]n the event of a conflict between [the TMLA] and another law," TEX. CIV. PRAC. & REM. CODE § 74.002, we conclude the TMLA is properly construed as consistent with the procedural right to nonsuit.

report.[8] The expert report thus remains a "threshold" requirement that must be met "before litigation gets underway." *Spectrum Healthcare Res., Inc.*, 306 S.W.3d at 253. And of course, health care liability claimants are subject to the TMLA's overarching statute of limitations. TEX. CIV. PRAC. & REM. CODE § 74.251.

CHCA's interpretation of the TMLA to prohibit tolling promotes early elimination of health care liability claims without regard to their merit. But "[t]he Legislature's directive that the civil justice system repel weak claims stands alongside its insistence that malpractice be penalized." *Hernandez v. Ebrom*, 289 S.W.3d 316, 329 (Tex. 2009) (Jefferson, C.J., dissenting). Tolling the expert-report period when a claimant nonsuits before the deadline promotes both sides of the legislative equation and, when the report provisions are properly considered together, effectuates the statute's plain language.

IV. Conclusion

Because we have conflicts jurisdiction over CHCA's petition for review in this interlocutory appeal, we deny the Lidjis' motion to dismiss. We hold that, when a claimant nonsuits a claim governed by the TMLA before the expiration of the statutory deadline to serve an expert report and subsequently refiles the claim against the same defendant, the expert-report period is tolled between the date nonsuit was taken and the date the new lawsuit is filed. Here, the Lidjis nonsuited their claims against CHCA in the First Suit four days before the deadline expired and served their expert report on CHCA the same day they filed the original petition in the Second Suit. The Lidjis thus

[8] The parties may extend the deadline by written agreement. TEX. CIV. PRAC. & REM. CODE § 74.351(a).

complied with section 74.351, and the trial court correctly denied CHCA's motion to dismiss. Accordingly, we affirm the court of appeals' judgment.

_____

Debra H. Lehrmann
Justice

OPINION DELIVERED: June 21, 2013

IN THE SUPREME COURT OF TEXAS

NO. 12-0358

UNIVERSITY OF HOUSTON, PETITIONER,

v.

STEPHEN BARTH, RESPONDENT

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

PER CURIAM

In this case, Stephen Barth, a professor at the University of Houston, sued the University under the Texas Whistleblower Act for retaliation allegedly stemming from Barth's reports that his supervisor violated internal administrative policies located in the University's System Administrative Memorandum (SAM) and other state civil and criminal law. The court of appeals held that the trial court had subject-matter jurisdiction over Barth's claim because the SAM's administrative policies constitute "law" under the Whistleblower Act. 365 S.W.3d 438, 446. We disagree. Because there is no evidence that the University's Board of Regents enacted the SAM's administrative rules pursuant to authority granted to it in the Texas Education Code, we hold that the rules do not fall within the definition of "law" under the Whistleblower Act. *See* TEX. GOV'T CODE § 554.001(1). Moreover, there is no evidence that Barth had an objectively reasonable belief that his reports of the alleged violations of state civil and criminal law were made to an "appropriate law enforcement

authority." *See id.* § 554.002. Accordingly, the University's sovereign immunity is not waived, and thus we reverse the court of appeals' judgment and dismiss the case for lack of subject-matter jurisdiction. *See id.* § 554.0035.

Barth is an attorney and tenured professor in the hotel management college at the University. In March and April of 1999, Barth reported to the University's chief financial officer, Randy Harris, and general counsel, Dennis Duffy, that his college's dean, Alan Stutts, allegedly engaged in questionable accounting practices, mishandled funds, and entered into improper contracts relating to the University. In May 1999, Barth also reported the alleged violations to the University's internal auditor, Don Guyton, and spoke with an associate provost, Elaine Charlson, about the alleged violations. In June 1999, Stutts gave Barth a "marginal" rating in one area during Barth's annual evaluation, which affected his merit raise for that year. Barth was also denied travel funds in 1999, and Barth's annual legal symposium on hotel law was cancelled allegedly after Stutts and a sponsor withdrew their support. Barth filed two administrative grievances against Stutts, claiming he was subject to adverse personnel actions for reporting the alleged violations. However, the parties were unable to successfully resolve Barth's grievances.

In 2001, Harris requested that Guyton investigate Barth's allegations regarding Stutts, which included claims that Stutts violated state civil and criminal laws as well as University policy. In the audit report, Guyton concluded that Stutts failed to comply with internal University procedures and state regulations, including section 03.A.05 of the University's SAM, which requires a contract between the hotel management college and a public relations firm to be approved by the office of general counsel and to be reported to the Board of Regents. Guyton also found that Stutts did not

violate section 37.10 of the Texas Penal Code, which proscribes tampering with governmental records. *See* TEX. PENAL CODE § 37.10. Shortly after the University published Guyton's report, Barth sued the University for retaliation under the Whistleblower Act.

At trial, Barth claimed liability under the Whistleblower Act based on his reporting of three alleged violations of law, which included: (1) the Penal Code, (2) the University's SAM, and (3) state civil statutes on government contracting. The jury found the University liable, but the charge did not specify on which of the three grounds. The trial court rendered judgment in favor of Barth, awarding him $40,000 in actual damages and $245,000 in attorney's fees. The University appealed.

The court of appeals reversed the trial court's judgment, holding that the trial court lacked jurisdiction over some of Barth's claims due to the untimely filing of his first grievance and remanded for a new trial. 265 S.W.3d 607, 614. The court of appeals also held that the University had waived its legal sufficiency challenge as to the elements of Barth's whistleblower claim. *Id.* at 616. Both parties appealed. We reversed and remanded the case back to the court of appeals to consider whether the trial court had jurisdiction in light of our decision in *State v. Lueck*, 290 S.W.3d 876, 881 (Tex. 2009), where we held the elements of a claim under the Whistleblower Act are jurisdictional and may not be waived. 313 S.W.3d 817, 818 (Tex. 2010) (per curiam).

On remand, the court of appeals held that the trial court had subject-matter jurisdiction and affirmed the trial court's judgment. 365 S.W.3d 438, 441. The court of appeals concluded that Barth's allegation that the University retaliated against him for reporting that Stutts violated the SAM's internal policies was sufficient for purposes of establishing jurisdiction under the

Whistleblower Act.[1] *Id.* at 448. The University again petitions this Court for review, arguing that (1) the SAM's administrative policies are not "law" under the Whistleblower Act, and (2) Barth failed to show that his alternative reports of violations of law were made to an appropriate law enforcement authority as required by the Whistleblower Act. *See* TEX. GOV'T CODE §§ 554.001–.002.

The issue is one of subject-matter jurisdiction, which we review de novo. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004); *see also Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443–44 (Tex. 1993) (providing that subject-matter jurisdiction is never presumed and cannot be waived). Section 554.0035 of the Texas Government Code waives sovereign immunity when a public employee alleges a violation of the Whistleblower Act. TEX. GOV'T CODE § 554.0035. A violation "occurs when a governmental entity retaliates against a public employee for making a good-faith report of a violation of law to an appropriate law enforcement authority." *Lueck*, 290 S.W.3d at 878. The Whistleblower Act defines "law" as a state or federal statute, an ordinance of a local governmental entity, or "a rule adopted under a statute or ordinance." TEX. GOV'T CODE § 554.001(1). The first issue presented here requires us to determine whether the administrative policies in the University's SAM are "rule[s] adopted under a statute or ordinance."

We have never construed the phrase "a rule adopted under a statute or ordinance," but we have noted that a constable department's internal policies are not "law" as the term is defined under the Whistleblower Act. *See, e.g.*, *Harris Cnty. Precinct Four Constable Dep't v. Grabowski*, 922

[1] Because the court of appeals held that Barth's report related to Stutts's alleged violation of the SAM's administrative policies imbued the trial court with jurisdiction, the court of appeals did not address the University's challenges to the other two alleged violations of law. 365 S.W.3d at 448 n.9.

S.W.2d 954, 956 (Tex. 1996) ("Grabowski presented no evidence of a law he believed Constable Moore violated other than his department's internal policies."); *accord Mullins v. Dallas Indep. Sch. Dist.*, 357 S.W.3d 182, 188 (Tex. App.—Dallas 2012, pet. denied) ("Other complaints and grievances, including alleged violations of an agency's internal procedures and policies, will not support a [whistleblower] claim."); *City of Houston v. Kallina*, 97 S.W.3d 170, 174–75 (Tex. App.—Houston [14th Dist.] 2002, pet. denied) ("[T]he Whistleblower Act does not protect reports of violations of a department's internal policies."); *Ruiz v. City of San Antonio*, 966 S.W.2d 128, 130 (Tex. App.—Austin 1998, no pet.) (same). In *Grabowski*, we held that a peace officer's report that a constable allegedly failed to comply with departmental policies when conducting an investigation did not satisfy the good-faith element of a whistleblower claim because there was no evidence in the record showing that his belief that a law had been violated was reasonable in light of his experience as a peace officer. *Grabowski*, 922 S.W.2d at 956. In contrast to the department's policies in *Grabowski*, we have held that rules enacted by the University of Texas's Board of Regents under the University of Texas's predecessor enabling statute "are of the same force as would be a like enactment of the Legislature." *See Foley v. Benedict*, 55 S.W.2d 805, 808 (Tex. 1932). Our inquiry here focuses on whether the SAM's policies were adopted under the University's enabling statute.

We disagree with the court of appeals that the SAM's administrative policies are "law" under the Whistleblower Act because there is no evidence that the policies were enacted by the Board of Regents as required by the University's enabling statute. *See* TEX. EDUC. CODE § 111.35. The court of appeals relied on Guyton's testimony that the SAM's policies "are established for the University of Houston System as a whole" as sufficient evidence "that the administrative policies in the SAM

are rules or regulations adopted by the Board of Regents." *Id.* A rule is only a "law" under the Whistleblower Act, however, if the rule is "adopted under a statute." TEX. GOV'T CODE § 554.001(1)(C). We agree that the applicable statute in this case is section 111.35 of the Education Code, which grants the University's Board of Regents authority to "*enact* bylaws, rules, and regulations necessary for the successful management and government of the university." TEX. EDUC. CODE § 111.35 (emphasis added). Thus, for the SAM's administrative policies to be "rule[s] adopted under a statute," the Board of Regents must have *enacted* the policies as required by that section. *See* BLACK'S LAW DICTIONARY (9th ed. 2009) (defining "enact" as "[t]o make into law by authoritative act" or "to pass"). Neither Guyton's testimony nor any other evidence presented at trial provides evidence that the Board of Regents enacted or passed the SAM's administrative policies.

In fact, the record is unclear as to which party enacts the SAM's administrative policies. The record demonstrates that three levels of internal policies govern the University: (1) the Board of Regents' policies; (2) the system-level policies, known as the SAM; and (3) the campus-level policies, known as the Manual of Administrative Policies and Procedures (MAPP). The record is clear that the Board of Regents passes their own policies. However, Guyton's testimony regarding the party responsible for enacting the SAM and MAPP is less clear:

> Q: [Barth's Counsel:] Does the Board of Regents of the University of Houston System have the authority to establish policies and rules regarding the administration of the University System and the University of Houston?
> A: [Guyton:] Yes.
> Q: And those policies and procedures—some of those policies and procedures are in various memoranda that are issued, correct?
> A: Not the Board's policies, no. The Board establishes their own policies.
> Q: The Board has their own policies?
> A: Right.

Q. But pursuant to those policies, they are policies that are established for the University of Houston System as a whole, correct?
A. That's correct.
Q. And there are also policies that, pursuant to the Board's authority, that are policies and rules that are issued for each component of the University of Houston System?
A: That's correct.
. . .
Q: [The MAPP policies]—those are enacted pursuant to the authority of the Board of Regents?
A: No, that's the campus policies.

While Guyton's testimony suggests that the SAM's policies are issued "pursuant to [the Board of Regents' policies]," his testimony provides no evidence that the Board of Regents actually enacted the SAM.

Further, the portions of the SAM in the record make no mention of enactment by the Board of Regents. Instead, section 01.C.04 of the SAM designates the vice chancellor for administration as the "responsible party" and provides that the chancellor "approved" this particular memorandum—not the Board of Regents. Moreover, the Board of Regents' policies support the conclusion that the chancellor provides the authoritative act that makes the internal policies in the SAM effective and not the Board of Regents. Taking judicial notice of section 01.01.4 of the Board of Regents' policies, we note that "[t]he Chancellor is responsible for the development and adoption of the System Administrative Memoranda," which is consistent with section 01.C.04 of the SAM in the record. *See* TEX. R. EVID. 201; *see also Freedom Comm'cs, Inc. v. Coronado*, 372 S.W.3d 621, 623–24 (Tex. 2012) (taking judicial notice of facts outside the record to aid a determination of jurisdiction).

Barth contends that even if the SAM's policies are not enacted by the Board of Regents, they are still "law" under the Whistleblower Act because they were adopted pursuant to the Board of Regents' authority. In other words, Barth argues that it is irrelevant who adopts the rule or regulation so long as it is "adopted under a statute." We refuse to adopt such a broad construction. Barth's proposed construction ignores the interplay between the definition of "law" in the Whistleblower Act and the required reference to section 111.35 of the Education Code, which expressly authorizes only the Board of Regents to enact rules. *See* TEX. EDUC. CODE § 111.35. While the Board of Regents can certainly delegate its authority to establish rules, the interaction between the definition of "law" in the Whistleblower Act and section 111.35 demonstrates that the Legislature did not intend for whistleblower protection to extend to reports of violations of the SAM's rules. Accordingly, we conclude that the SAM cannot form the basis for a report of a violation of "law" because the SAM's administrative policies are not "rule[s] adopted under a statute" as required by the Whistleblower Act. *See* TEX. GOV'T CODE § 554.001(1).

Barth argues that, even if the SAM's administrative policies are not "law," the University's sovereign immunity is waived as to his claim because he believed in "good faith" that he was reporting a violation of law. The good-faith inquiry under the Whistleblower Act has both subjective and objective components, which require that Barth "must have believed he was reporting conduct that constituted a violation of law and his belief must have been reasonable based on his training and experience." *See City of Elsa v. Gonzales*, 325 S.W.3d 622, 626 (Tex. 2010). Barth provided undisputed testimony that he believed that violations of "contracting guidelines at the University" were violations of law. While Barth's belief satisfies the subjective prong, we hold that Barth failed

to satisfy the objective prong given his legal training, experience as a former practicing attorney, and familiarity with the University's rules from serving on the faculty senate. *See Grabowski*, 922 S.W.2d at 956. Therefore, we hold that the trial court lacked jurisdiction over this portion of Barth's claim.

Turning next to Barth's alternative reports of purported violations of state civil and criminal law, the University contends that none of Barth's reports were made to an appropriate law enforcement authority under the Act. We agree. The Whistleblower Act requires a claimant to show that he in "good faith" reported a violation of law to an "appropriate law enforcement authority." TEX. GOV'T CODE § 554.002; *see also Tex. Dep't of Transp. v. Needham*, 82 S.W.3d 314, 321 (Tex. 2002) (providing that the good-faith inquiry requires both a subjective and objective good-faith belief by the employee). An appropriate law enforcement authority is a part of a state entity that the employee in good faith believes is authorized (1) to regulate under or to enforce the allegedly violated law, or (2) to investigate or prosecute a violation of criminal law. TEX. GOV'T CODE § 554.002(b). We recently held that "purely internal reports untethered to the Act's undeniable focus on law enforcement—those who either make the law or pursue those who break the law—fall short." *Univ. of Tex. Sw. Med. Ctr. at Dallas v. Gentilello* ___ S.W.3d ___, ___ (Tex. 2013). We noted that:

> [F]or an entity to constitute an appropriate law-enforcement authority under the [Whistleblower] Act, it must have authority to enforce, investigate, or prosecute violations of law against third parties outside of the entity itself, or it must have authority to promulgate regulations governing the conduct of such third parties. Authority of the entity to enforce legal requirements or regulate conduct within the entity itself is insufficient to confer law-enforcement authority status.

Id. at ___. Accordingly, Barth was required to have an objective good-faith belief that he was reporting violations of law involving (1) section 37.10 of the Penal Code or (2) state law pertaining to the administration of government contracts to an entity that could have enforced, investigated, or prosecuted similar violations against third parties—not just an entity that can internally discipline its own employees for an alleged violation. *See id.* at ___.

First, none of the four people that Barth reported to regarding alleged violations of the Penal Code—the University's general counsel, CFO, internal auditor, and associate provost—could have investigated or prosecuted criminal law violations against third parties outside of the University. *See id.* at ___ ("[T]he [Whistleblower] Act protects those who report to authorities that issue legal directives, not authorities that follow them."). While Barth made a report to the University's police regarding the alleged criminal violation, the report was not made until June 2000, after the alleged retaliatory acts occurred. Barth argues that his compliance with section 01.C.04 of the SAM, which provides that suspected criminal activity should be reported to either the campus police, the University's system director, the director of internal auditing, the University's counsel, or the University's CFO, supports the proposition that he reported the violations to an "appropriate law enforcement authority." In addition, Barth contends that section 01.C.04 obligated any one of those people to report the alleged violations to the University's police. However, complying with an internal obligation is insufficient in this case. *See id.* (holding that "lodging an internal complaint to an authority whom one understands to be only charged with internal compliance, even including investigating and punishing noncompliance, is jurisdictionally insufficient under the Whistleblower Act"); *Tex. A&M Univ.–Kingsville v. Moreno*, ___ S.W.3d ___, ___ (Tex. 2013) (per curiam)

(holding that evidence by an employee at a state university showing that she reported an alleged violation of law to an authority that only oversaw internal university compliance was jurisdictionally insufficient under the Whistleblower Act); *Needham*, 82 S.W.3d at 321 (providing that evidence that an employee believed his report would be forwarded on to another entity that could prosecute the alleged violation was no evidence to support the objective prong of the good-faith test under the Whistleblower Act). The Whistleblower Act requires that the public employee report the alleged violation to an appropriate law enforcement authority. TEX. GOV'T CODE § 554.002(a). None of the people that Barth reported to could have investigated or prosecuted the alleged violations of criminal law.

Second, Barth never specifically cites to which state laws pertaining to government contracts that he believed Stutts violated, but nevertheless argues that the Government Code authorizes Guyton, as the University's internal auditor, to conduct audits and investigations. *See* TEX. GOV'T CODE §§ 2102.003, .007. Section 321.0136 defines "investigation" as "an inquiry into specified acts or allegations of impropriety, malfeasance, or nonfeasance in the obligation, expenditure, receipt, or use of state funds, or into specified financial transactions or practices that may involve such impropriety, malfeasance, or nonfeasance." *Id.* § 321.0136. However, the fact that Guyton can "inquire" into allegations of malfeasance does not mean that he can "regulate or enforce" the law, as required by subsection 554.002(b)(1) of the Whistleblower Act. Further, Barth provided no evidence that Guyton could have enforced state law or regulations regarding government contracts against any third party outside of the University.

In sum, given Barth's legal training and experience as a practicing attorney, Barth failed to meet the objective component of the good-faith test for reporting a violation of law to an appropriate law enforcement authority. *See Gentilello*, ___ S.W.3d at ___. Barth could not have believed in good faith that a violation of the SAM's administrative policies were violations of "law" under the Whistleblower Act, or that the University's general counsel, CFO, internal auditor, or associate provost possessed the power to either (1) regulate or enforce state civil law relating to the University's contracting with third parties or (2) prosecute or investigate the alleged criminal law violations. *See* TEX. GOV'T CODE § 554.002(b). Accordingly, the trial court lacked a basis for subject-matter jurisdiction over the entirety of Barth's claim.

Because the University's immunity from suit was not waived under the Whistleblower Act, the trial court lacked subject-matter jurisdiction over Barth's cause of action. Accordingly, we grant the petition for review and, without hearing oral argument, we reverse the judgment of the court of appeals and dismiss Barth's suit against the University. TEX. R. APP. P. 59.1.

OPINION DELIVERED: June 14, 2013

IN THE SUPREME COURT OF TEXAS

NO. 12-0388

PSYCHIATRIC SOLUTIONS, INC. AND MISSION VISTA BEHAVIORAL HEALTH SERVICES, INC. D/B/A MISSION VISTA BEHAVIORAL HEALTH CENTER, PETITIONERS,

v.

KENNETH PALIT, RESPONDENT

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

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

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

In *Texas West Oaks Hospital, LP v. Williams*, we held that a mental health professional employee's claims against his employer, a mental health hospital, alleging inadequate security and training were health care liability claims (HCLC) based on the 2003 amendments to the Texas Medical Liability Act (TMLA).[1] Here, we consider the claims of an employee health care provider against his employer, also a health care provider. The employee's claims arise from an incident similar to that in *West Oaks*, and we thus determine whether the employee's claim that the employer provided improper security of a psychiatric patient and inadequate safety for the employee is an HCLC under the TMLA. As in *West Oaks*, we conclude here that the employee's claim is an HCLC,

[1] 371 S.W.3d 171, 179 (Tex. 2012).

the employee is a claimant, and his failure to serve the defendant with an expert report within the TMLA's 120-day deadline mandates dismissal of his suit. Because the court of appeals concluded otherwise, we reverse its judgment.

I. Background

Kenneth Palit was employed as a psychiatric nurse at Mission Vista Behavioral Health Center, operated by Psychiatric Solutions, Inc., and Mission Vista Behavioral Health Services, Inc. (collectively "Mission Vista"). On April 2, 2008, he was injured at work while physically restraining a psychiatric patient during a behavioral emergency. Palit subsequently filed suit asserting a cause of action for negligence against Mission Vista, seeking damages for personal injuries.

Over 120 days later, Mission Vista moved to dismiss Palit's suit, claiming the suit alleged an HCLC and must be dismissed because Palit failed to serve an expert report as required by section 74.351 of the TMLA. The trial court denied the motion to dismiss, and the court of appeals affirmed. __ S.W.3d __, __.

II. Discussion

Under the TMLA, a claimant is "a person . . . seeking or who has sought recovery of damages in a health care liability claim." TEX. CIV. PRAC. & REM. CODE § 74.001(a)(2). When a claimant asserts an HCLC, the claimant must comply with the TMLA's requirements, one of which is to serve an expert report within 120 days of filing suit. *Id.* § 74.351. Palit, is a claimant under the TMLA if his suit is seeking damages in an HCLC. *Tex. W. Oaks Hosp., LP v. Williams*, 371 S.W.3d 171, 179 (Tex. 2012) (holding the change from "patient" to "claimant" in the 2003 amendment to the HCLC definition in the TMLA now includes an employee of a health care provider who brings an

HCLC). We must therefore determine whether Palit's claim is an HCLC to resolve whether Palit's suit must be dismissed for failing to comply with the TMLA's expert-report requirement.

In *West Oaks*, we held that a mental health professional employee's claims against his employer mental health hospital regarding inadequate security and training were HCLCs based on the 2003 amendments to the TMLA. *Id*. at 181. The 2003 Legislation amended the definition of an HCLC to mean:

> a *cause of action against a health care provider* or physician for . . . 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.

Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.01, 2003 Tex. Gen. Laws 847, 865 (current version at TEX. CIV. PRAC. & REM. CODE § 74.001(a)(13)) (emphases added).

We explained in *West Oaks* that an HCLC has three basic elements:

> (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.

371 S.W.3d at 179–80. The parties only dispute the second element here.

We addressed the second element in *West Oaks*, which involved a negligence claim by a mental health professional against his mental health hospital employer for injuries sustained in a physical altercation with a patient. *Id*. at 174–75. We reasoned that a "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.'" *Id.* at 181 (quoting *Diversicare*

Gen. Partner, Inc. v. Rubio, 185 S.W.3d 942, 850 (Tex. 2005)) (alterations in original). Importantly, "by specific statutory directive[,] health care claims must involve a patient-physician relationship," and claims involving employee supervision of a patient at a mental health care facility can still qualify as a health care claim because the patient's presence at the facility is due to their patient-physician relationship. *Id.* Thus, because appropriate supervision and security of patients and "providing a safe workplace . . . [for] caregiver[s] at a psychiatric facility are integral to the patient's care and confinement," those acts or omissions constitute "health care" under section 74.001(a)(10) of the TMLA. *Id.* at 182.

Following the 2003 amendments, HCLCs now include "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). Of these types of claims, safety is the only term not defined in the TMLA. *See*, *e.g.*, *id.* § 74.001(a)(10), (a)(19), (a)(24) (defining "health care," "medical care," and "professional or administrative services"). Because "safety" is not defined, it is construed "according to its common meaning as being secure from danger, harm or loss." *Tex. W. Oaks*, 371 S.W.3d at 184.

Here, Palit's claim alleges he was injured "as a result of improper security of a dangerous psychiatric patient" because Mission Vista "failed to provide a safe working environment and failed to make sufficient precautions for [his] safety." As in *West Oaks*, these allegations fall under both the safety and health care components of an HCLC, indicating both an alleged departure from the accepted standards of safety, *see id.* at 186, and that Palit's health care provider employer violated the standard of health care owed to its psychiatric patients, *id.* at 182. In *West Oaks* we noted that

Texas mental health statutes and regulations require that inpatient mental health facilities "'provide adequate medical and psychiatric care and treatment to every patient in accordance with the *highest standards accepted in medical practice*,'" *id.* at 181 (quoting TEX. HEALTH & SAFETY CODE § 576.022(a)) (emphasis added), and that "[i]t would blink reality to conclude that no professional mental health judgment is required to decide what those [standards] should be, and whether they were in place at the time of [the] injury," *id.* at 182. As such, we have held "that if expert medical or health care testimony is necessary to prove or refute the merits of a claim against a physician or health care provider, the claim is a health care liability claim." *Id.* Thus, because Palit's allegations implicate a standard of care that requires expert testimony to prove or refute it, his claim is an HCLC. *See id.*[2]

III. Conclusion

In sum, Palit's suit claims that Mission Vista departed from the accepted standards of safety and health care, which requires the use of expert health care testimony to support or refute the allegations. *Id*. at 182, 193. Thus, the claim is an HCLC. *Id*. at 182. As a person seeking recovery of damages in an HCLC, Palit is a claimant and was required to serve an expert report within 120 days of filing suit. TEX. CIV. PRAC. & REM. CODE § 74.351(a). Because he failed to serve an expert report, Mission Vista is entitled to a dismissal of the claim and reasonable attorney's fees and costs.

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[2] The concurrence believes that the Legislature's 2003 amendments to the TMLA indicate that claims alleging a departure from the accepted standards of safety must be directly related to health care to qualify as HCLCs. __ S.W.3d __, __ (Boyd, J., concurring). Because the concurrence itself concedes that the claim here directly relates to health care, the opinion is advisory at best. *See Heckman v. Williamson Cnty.*, 369 S.W.3d 137, 147 (Tex. 2012).

Id. § 74.351(b). Mission Vista requested its attorney's fees and costs in the trial court pursuant to section 74.351(b)(1) of the TMLA. Accordingly, without hearing oral argument, TEX. R. APP. P. 59.1, we grant the petition for review, reverse the court of appeals' judgment, and remand to the trial court with instructions to dismiss Palit's claim against Mission Vista and consider Mission Vista's request for attorney's fees and costs. *Tex. W. Oaks*, 371 S.W.3d at 193.

_____

Eva M. Guzman
Justice

OPINION DELIVERED: August 23, 2013

IN THE SUPREME COURT OF TEXAS

NO. 12-0388

PSYCHIATRIC SOLUTIONS, INC. AND MISSION VISTA BEHAVIORAL HEALTH SERVICES, INC. D/B/A MISSION VISTA BEHAVIORAL HEALTH CENTER, PETITIONERS,

v.

KENNETH PALIT, RESPONDENT.

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

JUSTICE BOYD, joined by JUSTICE LEHRMANN, concurring.

I agree with the Court's conclusion that Palit's claims are health care liability claims subject to the Texas Medical Liability Act (TMLA), and I agree with the Court's disposition of those claims, which is consistent with the Court's prior decision in *Texas West Oaks Hospital, L.P. v. Williams*, 371 S.W.3d 171 (Tex. 2012). I do not agree, however, with the *West Oaks* majority's broad construction of the "safety standards" component of the TMLA's definition of a "health care liability claim." Although this disagreement does not alter the proper disposition of this case, it relates to an important issue that I anticipate the Court will face again in future cases. I therefore concur in the Court's judgment, but write separately to express and explain the nature of my disagreement.

The Texas Legislature has defined a "health care liability claim" to mean "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). Prior to 2003, this definition included only "claimed departure[s] from accepted standards of medical care, or health care, or safety"—that is, it did not include the language "or professional or administrative services directly related to health care." Act of May 30, 1977, 65th Leg., R.S., ch. 817, § 1.03(a)(4), 1977 TEX. GEN. LAWS 2039, 2041 (former TEX. REV. CIV. STAT. art. 4590i, § 1.03(a)(4)), *repealed by* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.09, 2003 TEX. GEN. LAWS 847, 884.

This Court has struggled to reach a consensus on the meaning of the word "safety," as used in both the prior and current versions of the statute. Under the prior version, a five-member majority of the Court first held that the Legislature's inclusion of the reference to "safety" standards "expands the scope of the statute beyond what it would be if it only covered medical and health care," and thus includes "[p]rofessional supervision, monitoring, and protection of the patient population." *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 855 (Tex. 2005) (Wainwright, J., joined by Hecht, Medina, Johnson, and Willett, JJ., joined by Jefferson, C.J. as to Part III.B.3 ("Safety")). Chief Justice Jefferson joined the Court's discussion of "safety" and concluded in his concurring and dissenting opinion that the "statute's plain text" and "plain meaning" did not limit safety claims only to those that "involve health care" or "safety as it relates to the provision of health care." *Id.* at 860–61 (Jefferson, C.J., concurring in part and dissenting in part). Dissenting from the judgment, three Justices disagreed with Chief Justice Jefferson and agreed instead "with the Court" that the Act

encompassed "safety" claims only "when those claims are directly related to the provision of health care." *Id*. at 866 (O'Neill, J., dissenting, joined by Brister and Green, JJ.).

The Court addressed the prior version of the statute again in *Marks v. St. Luke's Episcopal Hospital*, 319 S.W.3d 658 (Tex. 2010). There, two members of the Court concluded that a cause of action alleging departures from accepted safety standards is a health care liability claim only if the safety standards are "an inseparable or integral part of the patient's care or treatment," and held that the plaintiff's claims did, in fact, involve "an integral and inseparable part of the health care services provided" to him. *Id*. at 664 (Medina, J., joined by Hecht, J.).[1] Four Justices disagreed that the plaintiff's claims involved an integral component of his treatment, but noted that the claims would have satisfied the broader construction of the "safety" that Chief Justice Jefferson advocated in *Diversicare*, which the Court had rejected. *Id*. at 675–76 (Jefferson, C.J., joined by Green, Guzman, and Lehrmann, JJ., concurring in part and dissenting in part). Two other Justices separately concurred and expressly agreed with Chief Justice Jefferson's broader construction of the "safety" component in *Diversicare*. *Id*. at 672–74 (Johnson, J., joined by Willett, J., concurring).[2] One Justice declined to join any of the others' constructions of "safety" because "it is not necessary in this case, as it was not in *Diversicare*, to define the precise scope of 'safety' under the [Act]." *Id*. at 667 (Wainwright, J., concurring).

[1] Justices Wainwright, Johnson, and Willett joined other parts of Justice Medina's opinion, including the disposition.

[2] Justices Hecht and Wainwright joined other parts of Justice Johnson's concurring opinion.

More recently, in *West Oaks*, the Court addressed the statute's current definition of a "health care liability claim," and a six-member majority held that "the safety component of [health care liability claims] need not be directly related to the provision of health care." *West Oaks*, 371 S.W.3d at 186. The Court concluded, *inter alia*, that the Legislature intended that the new phrase "directly related to health care" modify only the newly-added terms "professional or administrative services," and not the previously-existing term "safety." *Id.* at 185. The Court thus construed the statute to mean that any cause of action against a health care provider or physician claiming departure from accepted standards of "safety" is a health care liability claim, even if the safety standards are not "directly related to health care." *Id.* at 186. Three Justices dissented in *West Oaks*, concluding that, in adopting the 2003 amendments, the Legislature intended that the new phrase "directly related to health care" modify the term "safety" as well as the terms "professional or administrative services." *See id.* at 198–99 (Lehrmann, J., joined by Medina and Willett, JJ., dissenting). They read the statute to mean that a cause of action claiming departure from accepted standards of "safety" is a health care liability claim only if it "arise[s] from a breach of a health care provider's duty to adequately ensure a patient's safety in providing health care services." *Id*. at 198.

As in *West Oaks*, the current statutory definition of a "health care liability claim" governs this case. I agree with the Justices who dissented in that case. For three primary reasons, I conclude that the Legislature intended the phrase "directly related to health care" to modify the term "safety" as well as the terms "professional or administrative services," and thus claims asserting a departure from accepted safety standards are health care liability claims only if the safety standards are "directly related to health care."

First, I believe this construction is required in light of the statutory context and under the principle of ejusdem generis. *See Marks*, 319 S.W.3d at 663 (observing that "the principle of ejusdem generis warns against expansive interpretations of broad language that immediately follows narrow and specific terms, and counsels us to construe the broad in light of the narrow"). Even before the Legislature added the phrase "directly related to health care," some Justices on this Court concluded that, for this reason and others, the statute's reference to safety standards included only those standards related to patient care or treatment. *See Marks*, 319 S.W.3d at 663–64 (plurality op.); *Diversicare*, 185 S.W.3d 866 (O'Neill, J., joined by Brister and Green, JJ., dissenting). Several of these Justices concluded that the Legislature's later addition of the phrase "or professional or administrative services directly related to health care" after the term "safety" indicates the Legislature's agreement with the narrower construction of the term "safety." *See Diversicare*, 185 S.W.3d 867 (O'Neill, J., joined by Brister and Green, JJ., dissenting). Reading the statutory language in context, I agree that the most appropriate conclusion is that the Legislature added the phrase "directly related to health care" to modify the term "safety" as well as the terms "professional or administrative services."

Second, I believe we must attribute meaning to the Legislature's choice not to insert a comma after the word "safety" when it inserted the phrase "or professional or administrative services directly related to health care." Although I acknowledge the debate over usage of the Oxford or "serial" comma,[3] I necessarily attribute meaning to the lack of such usage in this instance. By inserting a

[3] *See Omaha Healthcare Ctr., L.L.C. v. Johnson*, 246 S.W.3d 278, 282 (Tex. App.—Texarkana 2008) (discussing use of serial comma and debate), *rev'd on other grounds* 344 S.W.3d 392 (Tex. 2011) and *abrogated by Tex. W. Oaks Hosp., LP v. Williams*, 371 S.W.3d 171 (Tex. 2012); *see also* Lynne Truss, EATS, SHOOTS & LEAVES: THE ZERO TOLERANCE APPROACH TO PUNCTUATION (Gotham 2004) ("There are people who embrace the Oxford comma, and

comma after "safety," the Legislature would have clearly indicated its intent to separate that term from the newly-added language, so that health care liability claims would include claims alleging a departure from accepted standards of:

1. medical care, or
2. health care, or
3. safety, or
4. professional or administrative services directly related to health care . . .

By choosing not to insert the comma, the Legislature instead tied the term "safety" to the new language, so that health care liability claims include claims alleging a departure from accepted standards of:

1. medical care, or
2. health care, or
3. safety or professional or administrative services directly related to health care . . .

In my view, we must read the Legislature's choice not to insert a comma after "safety" as an indication of its intent that "safety" be included with "professional or administrative services," and thus modified by the requirement that the claim be "directly related to health care."

Finally, as other Justices have noted, this construction is most consistent with the purposes of the TMLA. *See id.*; *Marks*, 319 S.W.3d at 663–64. The Legislature enacted the TMLA's predecessor statute in 1977 for the express purpose of relieving a "crisis [having] a material adverse effect on the delivery of medical and health care in Texas." *West Oaks*, 371 S.W.3d at 177 (quoting

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people who don't, and I'll just say this: *never* get between these people when drink has been taken.").

Act of May 30, 1977, 65th Leg., R.S., ch. 817, § 1.02(6), 1977 TEX. GEN. LAWS 2039, 2040 (repealed 2003)); *Marks*, 319 S.W.3d at 663 (same). In 2003, when the Legislature codified the TMLA and amended the definition of a health care liability claim, it noted that the State was "facing another 'medical malpractice insurance crisis' and a corresponding 'inordinate[]' increase in the frequency of [health care liability claims] filed since 1995." *West Oaks*, 371 S.W.3d at 177 (quoting Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.11(a), 2003 TEX. GEN. LAWS 847, 884); *Marks*, 319 S.W.3d at 663 (same). The purpose of both the original statute and the 2003 amendments was to address crises affecting "medical and health care" and "medical malpractice insurance."

As Justice Medina observed in *Marks*, "given the object of the statute and the Legislature's express concern, it is apparent that the Legislature did not intend for standards of safety to extend to every negligent injury that might befall a patient." *Marks*, 319 S.W.3d at 664. Construing section 74.001(a)(13) to encompass all "safety" claims takes the statute far beyond the Legislature's stated purpose. For example, if a hospital visitor who is assaulted at night in the hospital's parking lot sues the hospital alleging that the hospital failed to provide adequate lighting and security, the visitor's claim would be a health care liability claim under the Court's holding *West Oaks*. Unless I assume that the Legislature intentionally avoids the use of the Oxford comma, I am aware of nothing in the TMLA that indicates their intent to accomplish something so far outside the stated purpose of the statute and its amendments. I cannot attribute such great weight to such an assumption.

So far, the Court's disagreements over the construction of the statute have been of little consequence, because each time we have held that a claim satisfied the "safety" component we have also held the claim satisfied the "health care" component or that the safety standards were directly

related to health care. *See West Oaks*, 371 S.W.3d at 181 (holding that hospital caregiver injured by mental health patient under his supervision asserted health care liability claims "based on claimed departures from accepted standards of health care"); *Marks*, 319 S.W.3d at 666 (holding that claim of recovering surgical patient injured when hospital bed footboard collapsed was a health care liability claim "[b]ecause the provision of a safe hospital bed was an inseparable part of the health care services provided during [the patient's] convalescence from back surgery"); *Diversicare*, 185 S.W.3d at 849 (concluding that claims against nursing home for failing to prevent sexual assault by another patient were "claims for breaches of the standard of care for a health care provider because the supervision of Rubio and the patient who assaulted her and the protection of Rubio are inseparable from the health care and nursing services provided to her").

Here too, Palit alleges that Mission Vista departed from safety standards that, in my view, are "directly related to health care," so these claims are health care liability claims under section 74.001(a)(13).[4] Thus, although I disagree with the Court's construction of the statute, I concur in the Court's judgment. In light of the difficulty that the Court has had in reaching a consensus about the meaning of this statute, and because I anticipate that the Court will one day be required to address claims based on safety standards that are not directly related to health care, I write separately to express and explain my disagreement with the Court's construction.

[4] As the Court agrees, Palit's claims "arise from an incident similar to that in *West Oaks*," *ante* at ___, and "[a]s in *West Oaks*, [Palit's] allegations fall under both the safety and health care components of [a health care liability claim]." *Ante* at ___. As to the safety claims issue, this case is essentially identical to *West Oaks*, and it was as unnecessary to address the issue in *West Oaks* as it is to do so here; or, alternatively, it is as necessary to do so here as it was to do so there. If addressing the issue here constitutes an "advisory" opinion, then the Court's addressing of the issue in *West Oaks* was also an advisory opinion and the issue remains unresolved, which is exactly why I have addressed it here.

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Jeffrey S. Boyd
Justice

OPINION DELIVERED: August 23, 2013

IN THE SUPREME COURT OF TEXAS

NO. 12-0451

PM MANAGEMENT-TRINITY NC, LLC D/B/A TRINITY CARE CENTER, PETITIONER,

v.

MICHAEL KUMETS, PAVEL KUMETS, AND STRUL KUMETS, INDIVIDUALLY AND AS NEXT FRIEND FOR YEVGENIYA KUMETS, RESPONDENTS

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

PER CURIAM

In this dispute, the trial court refused to dismiss a claim that a nursing home unlawfully discharged a resident in retaliation for complaints made by the resident's family. The court concluded that the claim was not a "health care liability claim" (HCLC) for which the Texas Medical Liability Act (TMLA) requires a supporting expert report. The court of appeals affirmed, with one justice dissenting in part. Because this retaliation claim was based on the same factual allegations on which one of the plaintiffs' HCLCs was based, we reverse the judgment of the court of appeals in part and affirm in part, and we remand the case to the trial court for dismissal and a determination of attorney's fees and costs of court pursuant to section 74.351(b) of the TMLA.

Yevgeniya Kumets was admitted to the Trinity Care Center nursing home to recover from a stroke. Yevgeniya's family members allege that the inadequate care she received at Trinity caused

her to suffer a second stroke. They also allege that Trinity discharged Yevgeniya from the home in retaliation for complaints that the family made about her care. The Kumetses sued Trinity, asserting claims for medical negligence; negligence per se; gross negligence; negligent hiring, supervision, management, and retention of employees; breach of fiduciary duty; breach of contract; violations of the Deceptive Trade Practices Act; fraudulent/negligent misrepresentation and billing; and retaliation.[1] The Kumetses asserted the retaliation claim under the Texas Health & Safety Code, which creates a statutory cause of action against a nursing facility that retaliates or discriminates against a resident or family member who makes a complaint or files a grievance concerning the facility. *See* TEX. HEALTH & SAFETY CODE § 260A.015(a).[2] A plaintiff who prevails on a statutory retaliation claim may recover injunctive relief, the greater of statutory or actual damages, exemplary damages, court costs, and attorney's fees. *Id*. § 260A.015(b).

After the Kumetses filed an expert report, Trinity argued that the expert report was deficient and asked the trial court to dismiss all of the claims pursuant to section 74.351(b) of the TMLA. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(b). The trial court agreed that the report was deficient and granted a thirty-day extension to cure the deficiencies. *See id.* § 74.351(c). The court later found the Kumetses' amended expert report deficient and signed an order dismissing all of their claims except for the retaliation claim. Trinity appealed the court's order, arguing that the retaliation claim

[1] The Kumetses also sued other defendants, but those claims are not before us.

[2] The Kumetses actually asserted the retaliation claim under section 242.1335 of the Texas Health & Safety Code, which was repealed in 2011 but remains applicable to claims, like the Kumetses', that accrued before September 28, 2011. *See* Act of June 28, 2011, 82d Leg., 1st C.S., ch.7, §§ 1.05(m), 1.05(p), 2011 Tex. Gen. Laws 5390, 5407. Because the Legislature re-enacted the statute without substantive changes as section 260A.015, we will cite to the current provision.

was also an HCLC that must be dismissed. The Kumetses cross-appealed, contending that their fraudulent billing claim was not an HCLC and therefore should not have been dismissed. The Kumetses did not challenge the trial court's finding that their remaining claims were HCLCs or the court's dismissal of those claims.

A divided panel of the court of appeals affirmed. 368 S.W.3d 711, 723. The court noted that under the TMLA, an HCLC must involve "injury to or death of the claimant[.]" TEX. CIV. PRAC. & REM. CODE § 74.001(a)(13). According to the majority, claims asserting pure economic loss do not meet this element of the definition. The court of appeals explained that the trial court reasonably could have concluded that the only "injury" arising from Yevgeniya's discharge was economic loss, and the court therefore affirmed the trial court's decision not to dismiss the retaliation claim. In addition, the court concluded that the trial court did not abuse its discretion by dismissing the fraudulent billing claim, because that claim was based on the same facts as the Kumetses' HCLCs.

The dissent agreed with the majority that the trial court properly dismissed the fraudulent billing claim but disagreed with the court's decision to affirm the trial court's denial of Trinity's motion to dismiss the retaliation claim. Like the majority, the dissent noted that, under our precedents, claims that are based on the same facts as HCLCs are themselves HCLCs and must be dismissed absent a sufficient expert report. *Yamada v. Friend*, 335 S.W.3d 192, 196–97 (Tex. 2010); *accord Turtle Healthcare Grp., L.L.C. v. Linan*, 337 S.W.3d 865, 868–69 (Tex. 2011) (per curiam). Unlike the majority, however, the dissent would have held that the Kumetses' retaliation claim was based on the same facts as one of the Kumetses' HCLCs and therefore should have been dismissed.

We agree with the dissent. Like the plaintiffs in *Yamada*, the Kumetses have not challenged the trial court's finding that their other claims were HCLCs or the court's dismissal of those claims. In support of their claim for breach of fiduciary duty, the Kumetses asserted that Trinity "retaliated against [Yevgeniya] once complaints were made about her poor treatment in violation of Texas law." For purposes of this case, this claim has been established to be an HCLC, and the Kumetses' claim for retaliatory discharge under the Health & Safety Code is based on the same factual allegations. As we explained in *Yamada*, the TMLA does not allow parties to circumvent its procedural requirements by claim-splitting or by any form of artful pleading. 335 S.W.3d at 196. When a plaintiff asserts a claim that is based on the same underlying facts as an HCLC that the plaintiff also asserts, both claims are HCLCs and must be dismissed if the plaintiff fails to produce a sufficient expert report. *Id.*

We do not decide in this case that a claim for retaliation or discrimination under the Health & Safety Code is always an HCLC, or even that the Kumetses' claim for breach of fiduciary duty was an HCLC. Because the Kumetses did not appeal the trial court's determination that their breach of fiduciary duty claim was an HCLC, we must accept for purposes of this case that it was. And because their retaliation claim was based on the same underlying facts, the trial court should have dismissed that claim as an HCLC as well.

Accordingly, without hearing oral argument, TEX. R. APP. P. 59.1, we grant the petition for review and reverse the court of appeals' judgment respecting the retaliation claim. We affirm the remainder of the court of appeals' judgment. We also remand to the trial court with orders to dismiss

the case and award appropriate attorney's fees and costs of court to Trinity. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(b).

OPINION DELIVERED: June 28, 2013

IN THE SUPREME COURT OF TEXAS

NO. 12-0501

TARA S. BRIGHTON F/K/A SYBIL B. KOSS, PETITIONER,

v.

GREGORY KOSS, RESPONDENT

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

PER CURIAM

Generally, a postjudgment motion is subsumed by a subsequent judgment that grants all of the relief requested in the motion. *Wilkins v. Methodist Health Care Sys.*, 160 S.W.3d 559, 563-64 (Tex. 2005). When subsumed by the subsequent judgment, the motion does not extend the appellate deadlines after the subsequent judgment. *Id.* at 562. But when a subsequent judgment does not grant all requested relief, the motion remains as a viable complaint about the subsequent judgment and extends the appellate deadlines after that judgment. *Id*.

This case involves the latter circumstance—a second judgment that did not grant all the relief requested in a motion that sought to modify the previous judgment. The court of appeals dismissed the appeal as untimely, observing that "[n]othing in the record reflects any postjudgment filings were made to extend the thirty-day deadline for filing the notice of cross-appeal." ___ S.W.3d ___, ___,

2012 WL 1032791, at *1 (Tex. App.—Dallas 2012) (mem. op.). But the court failed to notice that appellant timely filed a motion to modify the first judgment and that the trial court's second judgment did not grant all the relief requested by that motion. The motion to modify thus operated to extend the appellate timetable after the second judgment, making the filing of the notice of appeal timely. Because the court of appeals erred in dismissing the appeal, we reverse its judgment and remand the case to the court of appeals.

This appeal arises out of the divorce of Tara S. Brighton f/k/a Sybil B. Koss and Gregory Koss. Following a jury trial, the trial court signed the divorce decree on October 18, 2010. Thirty days later, Brighton filed a "Motion to Modify, Correct, or Reform Judgment."[1] Six days after that, Koss filed his notice of appeal.

On December 22, 2010, the trial court signed a second judgment, titled "Nunc Pro Tunc Final Decree of Divorce."[2] Brighton filed an affidavit of indigence on January 13, 2011, and her notice of appeal on March 7, 2011, seventy-five days after the trial court's second judgment. Brighton's appeal was docketed under the same cause number as the earlier appeal taken by her ex-

[1] Koss also filed a motion for new trial, but we cannot determine from the record whether it was timely. The district clerk stamped the document "filed" on November 18, 2010, however, the certificate of service and cover letter are dated November 11, 2010, twenty-four days after the trial court signed the original decree. The cover letter refers to the "enclosed" motion for new trial, suggesting that the motion may have been mailed. However, without the envelope, we cannot determine what day the motion was mailed and whether Koss used the United States Postal Service. *See* TEX. R. CIV. P. 5; *see also* TEX. R. APP. P. 26.1(a) (extending the appellate timetable when any party files a motion for new trial).

[2] Whether the second judgment actually corrected a clerical mistake and was thus properly label *nunc pro tunc* is immaterial to our decision because the second judgment was signed while the court retained plenary jurisdiction.

husband, Koss.[3] Meanwhile, the court reporter contested Brighton's affidavit of indigence, and the trial court, after a hearing, sustained the contest. Brighton then filed a second notice of appeal. In her second notice, Brighton complained the trial court erred by sustaining the reporter's contest because the contest and the hearing were untimely. *See* TEX. R. APP. P. 20.1.

The court of appeals initially docketed Brighton's second notice of appeal as a separate cause but subsequently consolidated it with the earlier appeals. In its consolidation order, the court stated that it would treat Brighton's notice of appeal of the court reporter's contest "as a motion to review the trial court's order sustaining the objection to [Brighton's] affidavit of indigence." Sometime after that, the court dismissed Brighton's appeal as untimely, while leaving Koss's appeal pending. ___ S.W.3d ___.

Brighton appealed the order dismissing her appeal, and we requested briefs on the merits. We subsequently abated the appeal as premature because of questions concerning the finality of the dismissal order. *See* TEX. R. APP. P. 27.2 (regarding premature filings). We asked the court of appeals for clarification, and the court obliged by severing Brighton's appeal from Koss's, thereby making its order dismissing Brighton's appeal a final judgment. *See* TEX. R. APP. P. 53.1 (requiring a final judgment as predicate for a petition for review in the Supreme Court). We thereupon reinstated Brighton's appeal to consider whether the court of appeals erred in dismissing her appeal to that court as untimely.

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[3] Koss's appeal in the court of appeals is styled, In the Interest of D.T.K., a minor child. The court of appeals has abated that appeal pending our determination in this cause.

Generally, a party must perfect its appeal by filing written notice in the trial court within thirty days after the judgment is signed. TEX. R. APP. P. 25.1, 26.1(a). That deadline is extended to ninety days by the filing of certain postjudgment motions, such as a motion for new trial or a motion to modify the judgment, during that initial thirty-day window. TEX. R. APP. P. 26.1(a)(1)-(2). When a party prematurely files a notice of appeal, our procedural rules treat the premature notice as filed subsequent to the order or judgment to which it applies. TEX. R. APP. P. 27.2; *see also* TEX. R. CIV. P. 306c (treating prematurely filed motions for new trial as filed subsequent to the signing of the judgment). Similarly, when a motion for new trial or motion to modify is filed before the final judgment is signed, we do not require the party to refile the complaint after the formal judgment to extend the appellate deadlines. *See Ryland Enter., Inc. v. Weatherspoon*, 355 S.W.3d 664, 666 (Tex. 2011) (per curiam) (citing *Gomez v. Tex. Dep't of Criminal Justice, Inst'l Div.*, 896 S.W.2d 176, 176-77 (Tex. 1995) (per curiam)) (treating motion for judgment notwithstanding the verdict as a prematurely filed motion to modify or motion for new trial). And when a court replaces an existing judgment during plenary power, but the new judgment fails to correct an error asserted in a previously filed postjudgment motion, the movant is not required to refile the motion to preserve the error, *Fredonia State Bank v. General American Life Insurance Co.*, 881 S.W.2d 279, 282 (Tex. 1994), or to extend the appellate deadlines, *Wilkins*, 160 S.W.3d at 562.

The second judgment, signed on December 22, 2010, restarted the appellate timetable. *See* TEX. R. CIV. P. 329b(h) (providing that the appellate timetable restarts when a trial court modifies the judgment in any respect); *Check v. Mitchell*, 758 S.W.2d 755, 756 (Tex. 1998) (per curiam) (holding

that any modification, even if immaterial or insubstantial, restarts the appellate timetable). The parties, however, disagree whether Brighton's previously filed motion to modify extended the appellate timetable after the second judgment. Koss argues that it did not because the second judgment granted Brighton all the relief she requested in the motion to modify. We disagree.

Brighton's motion to modify requested the trial court (1) to correct the original decree to identify the properties against which the equitable lien attaches; (2) to reform the decree to include repayment terms of the economic contribution award; and (3) to order Koss to sign a lien note and/or deed of trust to secure the equitable lien. The second judgment amended the first to include the properties against which the equitable lien was to attach but did not mention Brighton's motion or otherwise address its complaints. Because the second judgment did not correct all of the errors or omissions asserted in Brighton's previous motion to modify, the motion operated to extend the appellate timetable applicable to the second judgment. *See Lane Bank Equip. Co. v. Smith S. Equip., Inc.*, 10 S.W.3d 308, 314 (Tex. 2000) ("[A] timely filed postjudgment motion that seeks a substantive change in an existing judgment qualifies as a motion to modify under Rule 329b(g), thus extending . . . the appellate timetable.").

Under the extended timetable, Brighton's notice of appeal was timely, and the court of appeals erred by dismissing her appeal. *See Wilkins*, 160 S.W.3d at 562. Therefore, pursuant to Texas Rule of Appellate Procedure 59.1, we reverse the court of appeals' judgment without hearing oral argument and remand the cause to that court along with Brighton's request for review of the trial court's order sustaining the contest to her affidavit of indigence.

Opinion Delivered: August 23, 2013

IN THE SUPREME COURT OF TEXAS

NO. 12-0518

IN RE NESTLE USA, INC., RELATOR

ON PETITION FOR WRIT OF MANDAMUS

Argued September 18, 2012

JUSTICE HECHT delivered the opinion of the Court, joined by CHIEF JUSTICE JEFFERSON, JUSTICE MEDINA, JUSTICE GREEN, JUSTICE JOHNSON, and JUSTICE GUZMAN.

JUSTICE WILLETT delivered a dissenting opinion, joined by JUSTICE LEHRMANN.

Since first imposing a franchise tax in 1893, the Legislature has restructured it several times, drawing various distinctions among taxpayers with adjustments, deductions, and exemptions that have become elaborate. Petitioner in this original proceeding contends that the franchise tax now in place bears no reasonable relationship to its object, the value of the privilege of doing business in Texas, and therefore violates the Texas Constitution's mandate that "[t]axation shall be equal and

uniform",[1] the Fourteenth Amendment's Equal Protection and Due Process guarantees,[2] and the U.S. Constitution's Commerce Clause.[3] We conclude that petitioner's challenges are without merit.

I

A

Texas' first franchise tax, enacted in 1893, was $10 annually for "each and every private domestic corporation heretofore chartered or that may be hereafter chartered under the laws of this State, and each and every foreign corporation that has received or may hereafter receive a permit to do business under the laws of this State, in this State . . . ."[4] In 1897, the Legislature adopted a graduated rate that increased in steps with the amount of a corporation's capital stock.[5] The rate was significantly higher for foreign corporations.[6] In 1905, the Legislature changed to a graduated rate

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[1] TEX. CONST. art. VIII, § 1(a).

[2] U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

[3] U.S. CONST. art. I, § 8 ("The Congress shall have power . . . [t]o regulate Commerce . . . among the several States . . . .").

[4] Act approved May 11, 1893, 23d Leg., R.S., ch. 102, § 5, 1893 Tex. Gen. Laws 156, 158, *reprinted in 10 H.P.N. Gammel*, *The Laws of Texas 1822–1897*, at 586, 588 (Austin, Gammel Book Co. 1898), codified as TEX. REV. CIV. STAT. art. 5243i. The same statute imposed a gross premium receipts tax of 0.5%-1.25% on insurance companies, a $0.25/telephone tax on telephone companies, and a 0.25% tax on the capital stock or similar interests of certain railway car companies or unincorporated businesses. *Id.* §§ 1-4.

[5] Act approved April 30, 1897, 25th Leg., R.S., ch. 104, § 1, 1897 Tex. Gen. Laws 140, 141 *reprinted in 10 H.P.N. Gammel*, *The Laws of Texas 1822-1897*, at 1194-1195 (Austin, Gammel Book Co. 1898), amending TEX. REV. CIV. STAT. art. 5243i. For a domestic corporation with capital stock of: $50,000 or less, $10; over $50,000 but less than $100,000, $20; $100,000 or more but less than $200,000, $30; and $200,000 or more, $50. *Id*.

[6] *Id.* For a foreign corporation with capital stock: $25,000 or less, $25;$25,000 or more up to and including $100,000, $100; more than $100,000, $1 per $10,000. *Id*. The court in *Woessner v. H.T. Cottam & Co.*, 47 S.W. 678, 680 (Tex. Civ. App. 1898, writ denied), held that "[t]he statute, in so far as it attempts to lay a tax on interstate commerce, is unconstitutional and void."

that decreased in steps with the amount of a corporation's capital stock.[7] As before, the rate for foreign corporations was similar but higher.[8] Extensive amendments in 1907 kept the graduated rate for foreign corporations but adopted a mostly flat rate for domestic corporations, one based not only on authorized capital stock but in some instances on surplus and undivided profits as well.[9] And for the first time, the Legislature created exemptions — for

> corporations organized for the purpose of religious worship; or for providing places of burial not for private profit; or corporations organized for the purpose of holding agricultural fairs and encouraging agricultural pursuits, or for strictly educational purposes, or for purely public charity.[10]

The structure of the franchise tax continued to evolve. The distinction in rates between domestic and foreign corporations was abandoned in 1930.[11] In 1981, statutory provisions governing the franchise tax were codified in Chapter 171 of the Texas Tax Code.[12] The tax remained based on

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[7] Act approved March 1, 1905, 29th Leg., R.S., ch. 19, § 1, 1905 Tex. Gen. Laws 21, 22, *reprinted in 12 H.P.N. Gammel*, *The Laws of Texas*, at 887-889 (Austin, Gammel Book Co. 1905), amending TEX. REV. CIV. STAT. art. 5243i. For domestic corporations, the rate was $1 for each $2,000 of capital stock up to and including $100,000; plus $1 for each $10,000 of capital stock over $100,000, up to and including $1 million; plus $1 for each $20,000 of capital stock over $1 million, up to and including $10 million; plus $1 for each $50,000 of capital stock over $10 million. *Id.*

[8] *Id.* For foreign corporations, the rate was $1 for each $1,000 of capital stock up to $100,000; plus $1 for each $5,000 of capital stock over $100,000, up to and including $1 million; plus $1 for each $20,000 of capital stock over $1 million, up to and including $10 million; plus $1 for each $50,000 of capital stock over $10 million. *Id.*

[9] Act approved May 16, 1907, 30th Leg., R.S., ch. 23, §§ 1-2, 1907 Tex. Gen. Laws 502, 502-503, *reprinted in 13 H.P.N. Gammel*, *The Laws of Texas*, at 502, 502-503 (1907). The annual tax for domestic corporations was $0.50 for each $1,000 of authorized capital stock up to and including $1 million, or for each $1,000 of issued stock plus surplus and undivided profits, if more than the authorized capital stock. For authorized capital over $1 million the rate lowered to $0.25 per $1,000. The 1897 structure, with different rates, applied to foreign corporations. *Cf. supra* note 6.

[10] *Id.* § 13, 1907 Tex. Gen. Laws at 507.

[11] Act of March 20, 1930, 41st Leg., 5th C.S., ch. 68, § 1, 1930 Tex. Gen. Laws 220, 220, amending TEX. REV. CIV. STAT. art. 7084.

[12] *See* Act of May 31, 1981, 67th Leg., R.S., ch. 389, § 1, 1981 Tex. Gen. Laws 1490, 1691-1710, codifying TEX. TAX CODE §§ 171.001-.401.

a corporation's stated capital and surplus,[13] but the rate was a flat .425%, with some exceptions.[14] Over the years, many exemptions were added to those created in 1907 — for railway terminal corporations with no annual net income;[15] savings and loan associations,[16] credit unions,[17] and banks;[18] open-end investment companies;[19] marketing associations[20]; lodges[21]; development corporations;[22] various kinds of cooperative corporations;[23] various nonprofits;[24] corporations with

[13] *Id.* § 171.101.

[14] *Id.* § 171.002. The minimum tax was $55. *Id.* A lower rate was available to certain corporations that did not use public highways by authority of a certificate of convenience and necessity issued by the Railroad Commission, *id.* § 171.003, and a corporation with less than $1 million in assets could elect to be taxed on its assets, *id.* § 171.004.

[15] *Id.* § 171.053.

[16] *Id.* § 171.054.

[17] *Id.* § 171.077.

[18] *Id.* § 171.078.

[19] *Id.* § 171.055.

[20] *Id.* § 171.069.

[21] *Id.* § 171.070.

[22] *Id.* § 171.074.

[23] *Id.* §§ 171.071 (farmers), 171.073 (laundry), 171.075 (co-ops generally), 171.076 (credit), 171.079 (electric co-ops), & 171.080 (telephone co-ops).

[24] *Id.* §§ 171.063 (federally tax-exempt), 171.064 (organized for conservation purposes), 171.065 (organized to provide water supply or sewer services), 171.066 (involved with city natural gas facility), 171.067 (organized to provide convalescent homes for elderly), & 171.068 (organized to provide cooperative housing).

a business interest in solar energy devices;[25] certain homeowners' associations;[26] and emergency medical service corporations.[27]

In 1991, the Legislature shifted the primary basis of the franchise tax profoundly, from capital to "net taxable earned surplus" — *i.e.*, income.[28] Taxable earned surplus was based on an entity's "reportable federal taxable income", with various adjustments and deductions.[29] For example, a corporation's reportable federal taxable income was after federal Schedule C special deductions but before net operating loss deductions, and excluded dividends from foreign affiliates but added officers' and directors' compensation. *Id.* Special deductions were permitted "enterprise projects"[30] and solar energy devices.[31] No new exemptions were created, and the exemption for savings and loan associations was revoked.[32] (The exemption for banks had been repealed in 1984,[33] but the

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[25] *Id.* § 171.056.

[26] Act of June 1, 1981, 67th Leg. R.S., ch. 752, § 4, 1981 Tex. Gen. Laws 2750, 2758, codified as TEX. TAX CODE § 171.082.

[27] *Id.* § 14, codified as TEX. TAX CODE § 171.083.

[28] Act of Aug. 13, 1991, 72nd Leg., 1st C.S., ch. 5, §§ 8.01-.27, 1991 Tex. Gen. Laws 134, 152-167. *See* Brandon Janes & Steve Moore, *The New Texas Franchise Tax*, 54 TEX. B.J. 1108, 1108 (1991) ("In effect, the new legislation adds to the previous system of taxing capital a Texas corporate income tax.").

[29] Act of Aug. 13, 1991, 72nd Leg., 1st C.S., ch. 5, § 8.09, adding TEX. TAX CODE § 171.110.

[30] *Id.* § 8.051, amending TEX. TAX CODE § 171.1015.

[31] *Id.* § 8.07, amending TEX. TAX CODE § 171.107(b).

[32] *Id.* § 8.24(2), repealing TEX. TAX CODE § 171.054.

[33] Act of July 3, 1984, 68th Leg., 2nd C.S., ch. 31, art. 3, part B, § 1, 1984 Tex. Gen. Laws 193, 212.

exemption for credit unions remained, and exemptions had been added in 1987 for certain trade show participants[34] and recycling operations.[35])

B

The current franchise tax is the product of further legislative restructuring in 2006,[36] with a few amendments since then. The tax is still based primarily on revenue and only secondarily on capital, and now applies to every for-profit entity doing business or chartered in Texas that is distinct from its owners (*i.e.*, not a sole proprietorship or a general partnership directly owned by an individual),[37] excluding certain passive entities, trusts, estates, escrows, and a few other such entities.[38] But the numerous exemptions created over the years remain.[39] Affiliated entities engaged in a unitary business must report as a group.[40]

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[34] Act of May 31, 1987, 70th Leg., ch. 778, § 1, 1987 Tex. Gen. Laws 2761, 2761, codified as TEX. TAX CODE § 171.084.

[35] Act of May 29, 1989, 71st Leg., ch. 641, § 3, 1989 Tex. Gen. Laws 2123, 2124, codified as TEX. TAX CODE § 171.085.

[36] Act of May 2, 2006, 79th Leg., 3d C.S., ch. 1, 2006 Tex. Gen. Laws 1, 1-40, codified as TEX. TAX CODE § 171 .

[37] The reason for this exclusion is that "a tax on the net incomes of natural persons, including a person's share of partnership and unincorporated association income, must [be] approved... in a statewide referendum". TEX. CONST. art. VIII, § 24(a). We rejected an argument that the franchise tax is such a tax in *In re Allcat Claims Serv., L.P.*, 356 S.W.3d 455, 470 (Tex. 2011).

[38] TEX. TAX CODE §§ 171.001, 171.0002.

[39] *Id.* §§ 171.052-.088.

[40] *Id.* §§ 171.0001(7) (defining "combined group"), 171.0001(17) (defining "unitary business"), & 171.1014 (requiring combined group reporting).

The tax is calculated according to the following formula:

Total Revenue

- General Deduction: the greater of either the Cost of Goods Sold, Compensation, or 30%

= Margin

x Percentage of gross receipts from Texas business

= Taxable Margin

x Tax Rate (0.5% for entities primarily engaged in wholesale or retail trade, 1% for all others)

= Franchise Tax

Total Revenue is income reported to the federal IRS with various deductions, limitations, and exceptions.[41] For example, all taxpayers may deduct bad debts expensed for federal income tax purposes[42] and certain flow-through funds.[43] Specific deductions include sales commissions to non-employees,[44] wholesaler rebates to pharmacy cooperatives,[45] payments to artists by live event promotion companies,[46] payments for labor and materials by destination management companies,[47]

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[41] *Id.* §§ 171.101, 171.1011.

[42] *Id.* § 171.1011(c)(1)(B)(i), (c)(2)(B)(i), (c)(3).

[43] TEX. TAX CODE § 171.1011(f)-(g).

[44] *Id.* § 171.1011(g)(1).

[45] *Id.* § 171.1011(g-4).

[46] *Id.* § 171.1011(g-5).

[47] *Id.* § 171.1011(g-6).

payments to delivery subcontractors by courier and logistics companies,[48] client expenses by management companies,[49] and certain plan payments to health care providers.[50] Lawyers may deduct $500 for each case handled pro bono.[51]

A taxpayer may elect one of three General Deductions.[52] One, the Cost of Goods Sold, includes "all direct costs of acquiring or producing goods",[53] some indirect costs like insurance, utilities, and quality control, and up to 4% of other "indirect or administrative overhead costs".[54] Public lending institutions and lessors of motor vehicles, heavy construction equipment, and rolling stock may include certain other expenses in their Cost of Goods Sold.[55] An alternative, Compensation, includes wages and benefits to owners, partners, officers, directors, and employees, but not independent contractors.[56] The amount per person per year is capped at $300,000.[57] In lieu of either of these deductions, a taxpayer may choose simply to deduct 30% of its Total Revenue.[58]

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[48] *Id.* § 171.1011(g-7).

[49] TEX. TAX CODE § 171.1011(m-1).

[50] *Id.* § 171.1011(n).

[51] *Id.* § 171.1011(g-3)(3).

[52] *Id.* § 171.101(a).

[53] *Id.* § 171.1012(a)(1), (c).

[54] *Id.* § 171.1012(d), (f).

[55] TEX. TAX CODE § 171.1012(k), (k-1).

[56] *Id.* § 171.1013(b).

[57] *Id.*§ 171.1013(c).

[58] *Id.* § 171.101(a)(1)(A).

Subtracting a General Deduction from Total Revenue yields Margin, which must then be apportioned, based on the percentage of the taxpayer's total gross receipts earned from business done in Texas.[59] From the result, Taxable Margin, a taxpayer may deduct part of the cost of a solar energy device[60] and a clean coal project.[61]

The standard Tax Rate is 1%, but for a taxpayer "primarily engaged in wholesale or retail trade", that rate is only 0.5%.[62] To qualify for the lower rate, a taxpayer's retail/wholesale revenue must exceed its revenue from other business and must come mostly from the sale of products produced by others.[63] There are also discounts for small businesses with total revenue below $900,000.[64] And a taxpayer with no more than $10 million total revenue may elect a rate of 0.575% of Total Revenue without taking the General Deduction.[65]

C

With its 2006 revisions to the franchise tax, the Legislature provided that "[t]he supreme court has exclusive and original jurisdiction over a challenge to the constitutionality of this Act or

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[59] *Id.* §§ 171.101(a)(2), 171.106(a).

[60] *Id.* § 171.107.

[61] TEX. TAX CODE § 171.108.

[62] *Id.* § 171.002(a), (b).

[63] *Id.* § 171.002(c). The taxpayer also must not provide retail or wholesale utilities.

[64] *Id.* § 171.0021.

[65] *Id.* § 171.1016.

any part of this Act and may issue injunctive or declaratory relief in connection with the challenge."[66] Pursuant to this provision, petitioner Nestle USA, Inc., initiated this proceeding in this Court.

Nestle manufactures and distributes food and beverages in the United States. Although Nestle's business in Texas is confined to wholesale and retail activities, its manufacturing business in other states subjects it to the 1% Texas franchise tax rate, rather than the lower 0.5% rate applicable to wholesalers and retailers. Also, Nestle and its 32 affiliates, required to report as a group, must together choose a General Deduction that does not benefit each. If the entities were allowed to report separately, each could choose the most beneficial General Deduction. And Nestle receives no benefit from other franchise tax deductions and exemptions applicable to other businesses.

Nestle paid its franchise taxes through 2011 without protest to the Comptroller but challenged the constitutionality of the tax in this Court.[67] We held that payment under protest was a jurisdictional prerequisite to its challenge and dismissed the proceeding.[68] Nestle then paid the $8,682,998.99 due for 2012 under protest and re-filed its challenge.

Nestle contends that the franchise tax must be measured by its object, the privilege of doing business in Texas, but because of its many deductions and exemptions, the tax assessed bears no reasonable relationship to the value of the privilege to the taxpayer and treats similarly situated taxpayers differently. For these reasons, Nestle asserts, the franchise tax violates the Texas

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[66] Act of May 2, 2006, 79th Leg., 3d C.S., ch. 1, § 24, 2006 Tex. Gen. Laws 1, 40.

[67] *In re Nestle USA, Inc.* 359 S.W.3d 207 (Tex. 2012).

[68] *Id.* at 208.

Constitution's Equal and Uniform Clause,[69] as well as the Fourteenth Amendment's Equal Protection and Due Process guarantees.[70] Further, Nestle argues, because the franchise tax is higher for taxpayers whose manufacturing business is outside Texas, the tax discriminates against interstate commerce in violation of the Commerce Clause of the United States Constitution.[71]

D

Nestle characterizes its constitutional challenges as both facial and as-applied, though it does not attempt to specify which is which. The State[72] argues that the Court has no jurisdiction to consider Nestle's as-applied challenges, but the State, too, makes no effort to identify them.

In re Allcat Claims Service, L.P., an original proceeding like this one, also involved constitutional challenges to the franchise tax that the petitioner characterized as both facial and as-applied.[73] We reiterated that while the Legislature is empowered to confer original jurisdiction on this Court in cases involving "questions which are of general public interest and call for a speedy determination", it lacks authority to do so in cases for which there is no "strong and special reason for the exercise of this extraordinary original jurisdiction" and cases "dependent upon the

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[69] *Id.* at 208. TEX. CONST. art. VIII, § 1(a).

[70] U.S. CONST. amend. XIV, § 1.

[71] U.S. CONST. art. I, § 8 ("The Congress shall have power . . . [t]o regulate Commerce . . . among the several States . . . .").

[72] Nestle names as respondents the Comptroller of Texas and the Attorney General of Texas. Joining respondents in their brief, the State calls itself the real party in interest. The positions of the three in the case are identical, and we refer to them together as the State.

[73] 356 S.W.3d 455, 457 (Tex. 2011).

determination of any doubtful question of fact".[74] We held that the legislative grant of "jurisdiction to consider [a] facial challenge to the . . . constitutionality" of the franchise tax was valid but did not extend to "challenges to how the Comptroller assesses, enforces, or collects the franchise tax" in individual situations,[75] the latter being of less public importance and often involving factual disputes.

The State argues that Nestle's as-applied challenges to the franchise tax fall into this latter category simply because they are as-applied. But "the line between facial and as-applied challenges is not so well defined that it has some automatic effect",[76] and in any event, it is not the line we drew in *Allcat*. Nestle's challenges, striking at the foundations of a tax on which the State heavily depends for revenue, affect not only millions of taxpayers but the public at large. The importance to the state fisc of quickly and finally resolving such challenges is obviously the "strong and special reason" the Legislature conferred original, exclusive jurisdiction on this Court.[77] And unlike some of the petitioner's contentions in *Allcat*, Nestle's challenges do not require a resolution of disputed facts; all material facts are established. Based on *Allcat*, we clearly have jurisdiction to consider all Nestle's claims.

To which we now turn: first to the Equal and Uniform challenge; next to Equal Protection; then to Due Process; and finally to the Commerce Clause.

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[74] *Allcat*, 356 S.W.3d at 461 n.6 (quoting *Love v. Wilcox*, 28 S.W.2d 515, 519 (Tex. 1930)).

[75] *Id.* at 463, 470-471 (Tex. 2011).

[76] *See In re Cao*, 619 F.3d 410, 439 (5th Cir. 2010) (en banc) (Jones, C.J., concurring in part and dissenting in part) (internal citation and quotations omitted); *see also* Scott A. Keller & Misha Tseytlin, *Applying Constitutional Decision Rules Versus Invalidating Statutes in Toto*, 98 VA. L. REV. 301, 312 (2012) ("courts remain hopelessly befuddled in this area").

[77] *Allcat*, 356 S.W.2d at 461 n.6.

II

A

The Texas Constitution has always provided that "[t]axation shall be equal and uniform".[78] Equality and uniformity are characteristics of a relation between or among multiple objects. A $100 tax on each landowner, irrespective of the value of his property, is equal and uniform as a poll tax, but not as an ad valorem tax. The Equal and Uniform requirement does not itself specify the objects on which it operates. It says only that taxation — not taxes — must be equal and uniform, indicating that it is the process, not each individual result, that must satisfy the requirement.

A constitutional provision "must be construed in light of conditions existing at the time it was adopted."[79] We have found nothing in the history of the adoption of the Equal and Uniform Clause in 1845, or in any of the several Constitutions since, to indicate its derivation or to illumine the framers' and ratifiers' intentions as to its meaning. In American law, the first use of the phrase "equal and uniform" with reference to taxation appears to have been in the Tennessee Constitution of 1796.[80] Although it became popular in the nineteenth century for states to adopt some

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[78] TEX. CONST. art. VIII, § 1(a); TEX. CONST. OF 1876, art. VIII, § 1; TEX. CONST. OF 1869, art. XII, § 19; TEX. CONST. OF 1866, art. VII, § 27; TEX. CONST. OF 1861, art. VII, § 27; TEX. CONST. OF 1845, art. VII, § 27.

[79] *In re Allcat Serv., L.P.*, 356 S.W.3d 455, 466 (Tex. 2011) (citation omitted).

[80] *See* 2 WADE NEWHOUSE, CONSTITUTIONAL UNIFORMITY AND EQUALITY IN STATE TAXATION 1704 (2d ed. 1984); William L. Matthews, Jr., *The Function of Constitutional Provisions Requiring Uniformity in Taxation*, 38 KY. L.J. 31, 41 (1949).

constitutional requirement for tax uniformity,[81] the genesis of the idea is obscure.[82] One commentator writes:

> These uniformity provisions in the state constitutions had their immediate origins in an attempt to remove inequalities resulting from adoption by the states of the general property tax with its ever-expanding tax base and, in some instances, in the mere acceptance of such provisions from other states. They emerged by way of constitutional limitations rather than by statute because their origin coincided with a general movement to restrict the power of the legislatures at a time when the country was undergoing great growth in land settlement and in the initial change from an agricultural to a commercial and industrial economy.[83]

The best indication of the meaning of Texas' Equal and Uniform Clause lies in the provisions accompanying it. The 1845 Constitution provided:

> Taxation shall be equal and uniform throughout the State. All property in this State shall be taxed in proportion to its value, to be ascertained as directed by law; except such property as two-thirds of both Houses of the Legislature may think proper to exempt from taxation. The Legislature shall have power to lay an income tax; and to tax all persons pursuing any occupation, trade, or profession. Provided, that the term occupation, shall not be construed to apply to pursuits either agricultural or mechanical.[84]

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[81] One scholar notes that while only six of the original states had constitutional provisions regarding uniform taxation, by the end of the nineteenth century, 41 of 44 did. *See* NEWHOUSE, *supra* note 81 at 1716; *See also* Matthews, *supra* note 80 at 43. But the provisions "var[ied] considerably in their phraseology". THOMAS M. COOLEY, THE LAW OF TAXATION § 253 (4th ed. 1924). The types of provisions are categorized in various ways. Cooley lists "[v]ery general provisions", "[p]rovisions requiring taxes to be in 'proportion' or 'proportional' to value", "[p]rovisions merely requiring taxes to be uniform", "[p]rovisions requiring taxes to be uniform 'upon the same class of subjects'", and "[p]rovisions requiring taxes to be both 'equal' and 'uniform'". *Id. See also* 1 WADE NEWHOUSE, CONSTITUTIONAL UNIFORMITY AND EQUALITY IN STATE TAXATION 1, 17-18 (2d ed. 1984) (listing twelve types of uniformity clause).

[82] *See* Matthews, *supra* note 80, at 49 ("[H]istorically the origins of the idea of uniformity in taxation are obscure.").

[83] *Id.* at 49-50.

[84] TEX. CONST. OF 1845, art. VII, § 27.

A virtually identical provision was included in the Constitutions of 1861, 1866, and 1869.[85] The Constitution of 1876 expanded the provision into two sections, adding that "[a]ll occupation taxes shall be equal and uniform upon the same class of subjects", and replacing the authorization of the Legislature to exempt property from taxation with specific, exclusive exemptions.[86] The sections have since been rewritten and now provide, as relevant for our purposes:

> Sec. 1. (a) Taxation shall be equal and uniform.
>
> (b) All real property and tangible personal property in this State, unless exempt as required or permitted by this Constitution, . . . shall be taxed in proportion to its value, which shall be ascertained as may be provided by law.
>
> (c) The Legislature may . . . impose occupation taxes . . . [and] may also tax incomes of both natural persons and corporations . . . . Persons engaged in mechanical and agricultural pursuits shall never be required to pay an occupation tax.
>
> Sec. 2. (a) All occupation taxes shall be equal and uniform upon the same class of subjects . . . .[87]

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[85] TEX. CONST. OF 1861, art. VII, § 27; TEX. CONST. OF 1866, art. VII, § 27; TEX. CONST. OF 1869, art. XII, § 19.

[86] "SECTION 1. Taxation shall be equal and uniform. All property in this State, whether owned by natural persons or corporations, other than municipal, shall be taxed in proportion to its value, which shall be ascertained as may be provided by law. The Legislature may impose a poll tax. It may also impose occupation taxes, both upon natural persons and upon corporations, other than municipal, doing any business in this State. It may also tax incomes of both natural persons and corporations, other than municipal, except that persons engaged in mechanical and agricultural pursuits shall never be required to pay an occupation tax . . . .

"SEC. 2. All occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the tax; but the Legislature may, by general laws, exempt from taxation public property used for public purposes; actual places of religious worship; places of burial not held for private or corporate profit, all buildings used exclusively and owned by persons or associations of persons for school purposes, (and the necessary furniture of all schools), and institutions of purely public charity; and all laws exempting property from taxation other than the property above mentioned, shall be void."

TEX. CONST. art. VIII, §§ 1-2.

[87] TEX. CONST. art. VIII, §§ 1(a)-(c), 2(a).

The two sections also provide for numerous tax exemptions.[88]

> "No provision in the constitution should be read or construed in isolation."[89]
>
> The Constitution must be read as a whole, and all amendments thereto must be considered as if every part had been adopted at the same time and as one instrument, and effect must be given to each part of each clause . . . . Different sections, amendments, or provisions of a Constitution which relate to the same subject-matter should be construed together and considered in the light of each other.[90]

We read the provisions following the Equal and Uniform Clause as examples, not exceptions. A property tax is equal and uniform only if it is in proportion to property value. But exemptions do not destroy equality and uniformity, nor do occupation tax classifications, and even an income tax, with its characteristic adjustments and deductions, can be equal and uniform.

Accordingly, we have held that taxes on real and personal property must be uniform across all types of property,[91] but that "[t]he Legislature's authority to make classifications in levying occupation, use, and sales taxes unquestionably is broader than its authority to do so with respect to ad valorem taxes".[92] We have allowed occupation taxes to differ between occupations, upholding a tax that was higher for oil wholesalers than for other wholesalers.[93] We explained that "[m]erchants may be divided into wholesalers and retailers, and, if there be reasonable grounds, these

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[88] *Id.*

[89] *Vinson v. Burgess*, 773 S.W.2d 263, 265 (Tex. 1989).

[90] *Collingsworth Cnty. v. Allred*, 40 S.W.2d 13, 15 (Tex. 1931) (citations omitted).

[91] *Enron Corp. v. Spring Indep. Sch. Dist.*, 922 S.W.2d 931, 935 (Tex. 1996) (citing *Lively v. Mo., K. & T. Ry.*, 120 S.W. 852, 856 (Tex. 1909)).

[92] *Enron Corp.*, 922 S.W.2d at 936.

[93] *Tex. Co. v. Stephens*, 103 S.W. 481, 485 (Tex. 1907).

may be further divided according to the particular classes of business in which they may engage."[94] We have also held that an occupation tax is equal and uniform even though the tax increased with each additional store in a chain because, "[a]s the number of stores increases, the differences in the methods of doing business increase."[95] And "we have long recognized that exact uniformity and equality is unattainable."[96]

It is important to note that classifying taxpayers for purposes of an occupation tax is not an exception to the Equal and Uniform Clause but a consequence of it. The value of an occupation derives not from the fact that it involves activity — a mere expenditure of energy — but from its nature, pursuits, and rewards. In that sense, valuation is the same as for real property. Just as the value of a parcel of land depends on it characteristics, like location, use, and potential, so the value of an occupation depends on its nature.

One scholarly treatise concludes that while constitutional uniform taxation provisions generally require that property taxes be based on property values without distinctions, for nonproperty taxes, the uniformity which is required has always been stated as being a uniformity within classes.[97] Consistent with this conclusion, we note that the Constitutional Convention of 1845 considered and rejected an amendment to the Equal and Uniform Clause that would have required

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[94] *Id.*

[95] *Hurt v. Cooper*, 110 S.W.2d 896, 903 (Tex. 1937).

[96] *Enron Corp.* 922 S.W.2d at 935.

[97] NEWHOUSE, *supra* note 80 at 1723.

any license or income tax to be "a uniform ad valorem tax" based on the amount of money involved.[98] The framers thus did not preclude classifications for all non-property taxes.

B

The Constitution does not mention a franchise tax, but it is very similar to an occupation tax. In fact, *Black's Law Dictionary* defines each the same way: a "tax imposed [for or on] the privilege of carrying on a business".[99] That privilege cannot be valued apart from its use, whether in an occupation or in a business, to the extent the two can be distinguished. It follows that classifications necessary to assure equality and uniformity in occupation taxes are equally necessary for franchise taxes.

From the implementation of the Texas franchise tax, nothing could be clearer. Except for its first four years as a poll tax, from 1893 to 1897, it has been structured on classifications.[100] In 1897, there were only two: whether a corporation was domestic or foreign, and the amount of its capital.[101] To these the Legislature added several exemptions in 1907.[102] Over the years, the Legislature increased the number of exemptions, added adjustments and deductions, and shifted the

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[98] Journals of the Convention, Assembled at the City of Austin on the Fourth of July, 1845, for the Purpose of Framing a Constitution for the State (Austin, Tex., 1845) ("And further provided, That such income or license tax shall not exceed in amount what would be a uniform ad valorem tax upon the sum taxed as income, or stock vested in such occupation, trade or profession").

[99] *Compare* BLACK'S LAW DICTIONARY 1595 (9th ed. 2009) (franchise tax definition) *with id.* at 1596 (occupation tax definition).

[100] *Supra* notes 4-5 and accompanying text.

[101] *Supra* notes 5-6 and accompanying text.

[102] *Supra* notes 9-10 and accompanying text.

basis of the tax from capital to income. But while the differentiations made in the application of the tax have unquestionably increased in complexity, their nature as classifications to assist in achieving tax equality and uniformity has not.

Four other states — Louisiana, Mississippi, Nevada, and West Virginia — have constitutional tax uniformity provisions similar enough to ours to offer guidance.[103] All four interpret their provisions to allow classifications in taxes on the privilege of doing business.[104]

C

Having concluded that the Equal and Uniform Clause permits classifications in the franchise tax, we next consider what limitations the Clause imposes on the Legislature in providing such classifications. The State argues that "the Legislature has wide latitude to pursue multiple policy goals through the creation of rational classifications within tax legislation."[105] We think the argument cuts much too wide a swath; it would reduce the Equal and Uniform Clause to a

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[103] LA. CONST. ART. 7 § 4(A) ("Equal and uniform taxes may be levied on net incomes, and these taxes may be graduated according to the amount of net income."); MISS. CONST. art. IV, § 112 ("Taxation shall be uniform and equal throughout the state. All property not exempt from ad valorem taxation shall be taxed at its assessed value."); NEV. CONST. art. 10, § 1(1) ("The legislature shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, real, personal and possessory, except mines and mining claims, which shall be assessed and taxed only as provided in section 5 of this article."); W. VA. CONST. art. 10, § 1 ("[T]axation shall be equal and uniform throughout the state, and all property, both real and personal, shall be taxed in proportion to its value").

[104] *Mire v. City of Lake Charles*, 540 So.2d 950, 956 (La. 1989) (upholding a tax on attorneys' gross receipts against the challenge that the minimum and maximum set on this tax discriminated against small practitioners); *Peterson v. Sandoz*, 451 So.2d 216 (Miss. 1984) (upholding a tax imposed on dealers of bail bonds but not other types of bonds); *Edwards v. City of Reno*, 742 P.2d 486 (Nev. 1987) (upholding a tax that applied differently to peddlers than to solicitors because peddlers are more mobile and thus likely to avoid other types of taxes); *Appalachian Power Co. v. State Tax Dep't*, 466 S.E.2d 424, 447 (W.Va. 1995) ("For taxes other than those levied on property, [the constitution] merely requires . . . that taxes be equal within each class of persons or businesses taxed, and (presumably) that there be some reasonable basis for the Legislature's classification scheme.").

[105] Brief for Respondent 1.

prohibition against irrational legislation. The Legislature may pursue policy goals through tax legislation, but only goals related to the taxation. The franchise tax may be used to advance policies relating to doing business in Texas, but it cannot be used, for example, to circumvent the requirement that the ad valorem property tax be based strictly on property value. Further, tax classifications must not only be rational but must attempt to group similar things and differentiate dissimilar things. Further, the franchise tax's classifications must relate to differences in doing business that affect the value of the privilege. "The granting of the privilege to transact business in this state confers economic benefits, including the opportunity to realize gross income and the right to invoke the protection of local law. The Texas franchise tax is a tax on the value of this privilege."[106] The Tax Commission responsible for developing the 2006 amendments to the franchise tax confirmed that purpose by stating: "The clear intention of the law's original framers — that the franchise tax should be imposed in exchange for the state's liability shield — remains the guiding light for the Commission's recommendation."[107] For this reason, the Commission explained, it rejected net worth as a basis for the franchise tax because net worth is not a measure of a business's activity in Texas.[108]

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[106] *Bullock v. Nat'l Bancshares Corp.*, 584 S.W.2d 268, 270 (Tex. 1979) (citations omitted). *See also Gen. Dynamics Corp. v. Bullock*, 547 S.W.2d 255, 257 (Tex. 1976) (stating that it "was the purpose of the Legislature to levy against the corporation a tax commensurate with the value of the privilege granted") (citation and internal quotation marks omitted).

[107] TEX. TAX REFORM COMM'N, TAX FAIRNESS: PROPERTY TAX RELIEF FOR TEXANS 18 (2006).

[108] *Id*.

Bullock v. Sage Energy Co.[109] provides an example of an unreasonable classification in the franchise tax. By rule, intangible development costs ("IDCs") were excluded from capital, on which the franchise tax was based at the time, if expensed on the taxpayer's books, but under federal law, Sage Energy, a publicly traded company, was required to capitalize IDCs.[110] As a result of a federal accounting requirement, unrelated to doing business in Texas, and not imposed on other companies engaged in the same business, Sage Energy's franchise tax was higher.[111] The court held that this violated the Equal and Uniform Clause.[112] Nestle points to language in the court's opinion — that "taxation cannot be uniform unless the value of all property is ascertained by the same standard"[113] — as supporting its position that the Equal and Uniform Clause does not permit any classifications in the franchise tax. But the court's point in *Sage Energy* was not that all classifications in the franchise tax are impermissible, only that a classification based on federal accounting requirements was invalid because it bore no relation to doing business in Texas.[114]

Nestle argues that no classification or differentiation in the application of the franchise tax, unrelated to the value of the privilege of doing business in Texas, is permitted by the Equal and Uniform Clause. While we agree that a classification in a tax must be related to the object of the tax,

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[109] 728 S.W.2d 465 (Tex. App.–Austin 1987, writ ref'd, n.r.e.).

[110] *Id.* at 466-467

[111] *Id.*

[112] *Id.* at 467-468 (citation omitted).

[113] *Id.* at 468.

[114] *Id.*

we believe that the Legislature must have discretion in structuring tax laws. This is especially true when the object of the tax — occupations or the privilege of doing business in the state — is not easily or exactly valued. "There is always a presumption of constitutional validity with regard to legislation and it is especially strong in respect to statutes relating to taxation."[115] With this in mind, we turn to Nestle's particular challenges.

D

Nestle attacks classifications in the current franchise tax. For example, it argues, there is "no apparent reason" to include employee wages in the General Deduction for Compensation but exclude payments to independent contractors for the same work. But the Legislature could certainly conclude that employers' burdens — like compensation, unemployment insurance, and vicarious liability — are greater than those for a business whose work is done by independent contractors. Nestle argues that a taxpayer whose Texas business is exclusively wholesale and retail trade should not be taxed at a higher rate because it has a manufacturing business outside Texas. But the Legislature could conclude, as the Tax Commission indicated, that such a taxpayer's Texas business would benefit from its manufacturing activities out-of-state.[116] For the same reason, the Legislature could conclude that affiliated entities should be required to file as a group.

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[115] *Vinson v. Burgess*, 773 S.W.2d 263, 266 (Tex. 1989) (internal quotation marks omitted); *see also Walters v. City of St. Louis*, 347 U.S. 231, 237-238 (1954) (noting that, when a state tax's validity is challenged, "every presumption in its favor is indulged") (citation and internal quotation marks omitted).

[116] TEX. TAX REFORM COMM'N, TAX FAIRNESS: PROPERTY TAX RELIEF FOR TEXANS 19 n.4 (2006) ("[B]usinesses . . . engaged primarily in wholesale or retail activities[] would pay 0.5% in recognition of the low profit margins that are basic to the industry"). *See also Great Atl. & Pac. Tea Co. v. Grosjean,* 301 U.S. 412, 424-425 (1937) (explaining that out-of-state stores increase the value of the privilege of doing business within a state by giving a competitive advantage to chain stores within the state).

Nestle complains that the myriad exemptions and special deductions allowed by the franchise tax are arbitrary and not reasonably related to the privilege of doing business in Texas. Nestle points to the exclusion from Cost of Goods Sold allowed for rental expenses of heavy construction equipment, motor vehicles, and rolling stock. But in the House floor debate in 2006, legislators expressed concern that lessors of construction equipment would be treated unequally without the exclusion because they do not sell goods and have few employees, and their General Deduction for Cost of Goods Sold or Compensation would be unfairly low.[117] What Nestle criticizes as a departure from uniformity is actually an attempt to treat like taxpayers alike.

Nestle does not challenge each and every deduction and exemption. It argues that their inclusion in the franchise tax structure shows that the tax is not reasonably related to its object, the privilege of doing business in Texas. From the examples it cites, we disagree. Rather, we conclude that the Legislature's structuring of the franchise tax is reasonably related to its object. Nestle has not established that the franchise tax violates the Equal and Uniform Clause.

III

Nestles concedes, and we agree, that a failure of its challenge based on the Equal and Uniform Clause forecloses its Equal Protection challenge. The Fourteenth Amendment's Equal Protection Clause does not require that property taxes be imposed without classification.[118] "It

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[117] *See, e.g.,* Debate on Tex. H.B. 3 on the Floor of the House, 79th Leg., 3rd C.S., Amendment No. 37, Part 6, minute 29 (April 24, 2006) ("these capital intensive industries deserve the same treatment that other capital intensive industries get"), *available at* http://www.house.state.tx.us/video-audio/chamber/#79.

[118] *Allegheny Pittsburgh Coal v. Webster Cnty.*, 488 U.S. 336, 344-345 (1989) (explaining that the Equal Protection Clause would allow a state to "divide different kinds of property into classes and assign to each class a different tax burden" but that the West Virginia equal and uniform clause required that "all property of the kind held by petitioners shall be taxed at a rate uniform throughout the State according to its estimated market value.").

simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike."[119] The Equal and Uniform Clause is more strict. Having concluded that the Legislature had a rational basis for structuring the franchise tax the way it did, we hold that it did not violate Equal Protection in doing so.

IV

Due Process requires that "the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state."[120] The relation must be to the activity itself, not merely to the company.[121] We have concluded that classifications in the franchise tax are reasonably related to the privilege of doing business in Texas. Our analysis is similar to that employed by the United States Supreme Court in *Ford Motor Co. v. Beauchamp*, where a company complained that it was paying more franchise tax because of its manufacturing outside Texas even though it did no manufacturing within Texas.[122] Noting that the Texas franchise tax "is obviously payment for the privilege of carrying on business in Texas", the Supreme Court held that the franchise tax did not violate due process because in "a unitary enterprise, property outside the state, when correlated in use with property within the state, necessarily affects the worth of the privilege within the state."[123] For the same reasons, we conclude that Nestle's Due Process challenge fails.

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[119] *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (citation omitted).

[120] *Wis. v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940).

[121] *Allied-Signal, Inc. v. Dir., Div. of Taxation*, 504 U.S. 767, 778 (1992).

[122] 308 U.S. 331, 333-334 (1939).

[123] *Id*. at 334, 336.

V

The United States Supreme Court has long held that the Commerce Clause's express grant to Congress of the power to "regulate Commerce . . . among the several states" also contains a negative command – known as the negative or dormant Commerce Clause – that prohibits certain state taxation even when Congress has failed to legislate on the subject.[124] In this case, the higher tax rate for manufacturing would violate the dormant Commerce Clause if it: "(1) applies to an activity lacking a substantial nexus to the taxing State; (2) is not fairly apportioned; (3) discriminates against interstate commerce; or (4) is not fairly related to the services provided by the State."[125] Nestle claims that the manufacturing rate discriminates against interstate commerce and is not fairly related to the services provided by Texas.

The manufacturing rate does not discriminate against interstate commerce. Taxes do not discriminate when the differing rate stems "solely from differences between the nature of their businesses, not from the location of their activities."[126] That is the case here. Location is not the basis for different treatment because in-state companies that manufacture will pay the same rate as Nestle and out-of-state companies that do only wholesaling and retailing will qualify for the lower rate. Nestle's discrimination argument is similar to the argument that failed in *Exxon Corp. v.*

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[124] *Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179-80 (1995); *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 310-311 (1994); *Quill Corp v. North Dakota*, 504 U.S. 298, 309 (1992).

[125] *Jefferson Lines, Inc.*, 514 U.S. at 179-80 (explaining and applying the four-part test first adopted in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977)); *Barclays Bank*, 512 U.S. at 310-311 (1994).

[126] *Amerada Hess Corp.v. Dir., Div. Of Taxation*, 490 U.S. 66, 78 (1989) (citation omitted).

Governor of Maryland.[127] *Exxon* held that a law prohibiting oil producers from retailing in Maryland does not discriminate against interstate commerce. An outright prohibition is more suspect than a higher tax rate. The Supreme Court based its *Exxon* decision in part on the fact that interstate retailers that do not produce are free to compete with local retailers.[128] That is also true in this case.

The manufacturing rate is fairly related to the services provided by Texas. In *Oklahoma Tax Commission v. Jefferson Lines, Inc*., the Supreme Court stated that the fair relation test "asks only that the measure of the tax be reasonably related to the taxpayer's presence or activities in the State".[129] The Supreme Court upheld a state bus-ticket tax that applied the same rate to the ticket price regardless of how much of that trip would occur within the state.[130] The Court explained that it need not do a detailed accounting of the services provided or ensure that the tax is limited to offsetting the public costs generated by the taxed activity.[131] Just as the tax in *Jefferson Lines* did not need to precisely align the tax rate with the value of the roads provided by the state, the franchise tax need not precisely align the tax rate with the value of the Privilege. It is enough that manufacturing outside of the state will often increase the value of doing business within the state,

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[127] 437 U.S. 117, 125-129 (1978).

[128] *Id*. at 126.

[129] 514 U.S. 175, 200 (1995) (citation omitted).

[130] *Id*. at 199–200.

[131] *Id*. at 199.

just as it was enough that out-of-state stores in a chain often increase the "advantages and capacities" of stores within the state.[132]

* * *

Accordingly, Nestle's petition is denied.

Nathan L. Hecht
Justice

OPINION DELIVERED: October 19, 2012

[132] *Great Atl. & Pac. Tea Co. v. Grosjean*, 301 U.S. 412, 425 (1937).

IN THE SUPREME COURT OF TEXAS

NO. 12-0518

IN RE NESTLE USA, INC., RELATOR

ON PETITION FOR WRIT OF MANDAMUS

JUSTICE WILLETT, joined by JUSTICE LEHRMANN, dissenting.

For the reasons explained in my separate writing in *In re Allcat Claims Service, L.P.*,[1] I believe the Court lacks exclusive original mandamus jurisdiction in taxpayers' constitutional challenges like this. In my view, the Court has stretched our mandamus jurisprudence beyond its constitutional and prudential limits. I would reaffirm those purposeful curbs on judicial power, not redefine them.

Mandamus is not a jurisdictional talisman to conjure instant Supreme Court review. As a constitutional matter, we cannot exercise original jurisdiction that the Constitution does not permit; as a statutory matter, the Tax Code disallows taxpayer suits like this; and as a prudential matter, deciding whether a statute is constitutional is simply not the stuff of mandamus.

All in all, because I believe the Court has disregarded settled doctrines to remake the mandamus remedy into something more ordinary than extraordinary, I respectfully dissent.

[1] 356 S.W.3d 455, 474–93 (Tex. 2011).

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Don R. Willett
Justice

OPINION DELIVERED: October 19, 2012

IN THE SUPREME COURT OF TEXAS

NO. 12-0539

KEVIN T. MORTON, PETITIONER,

v.

HUNG NGUYEN AND CAROL S. NGUYEN, RESPONDENTS

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

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

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

Chapter 5, Subchapter D of the Texas Property Code imposes various conditions and disclosure requirements on sellers entering into contracts for deed—also known as "executory contracts for the conveyance of real property." *See* TEX. PROP. CODE §§ 5.061–.085. A seller's failure to comply with Subchapter D's requirements entitles a buyer to "cancel and rescind" a contract for deed and "receive a full refund of all payments made to the seller." *E.g.*, *id.* § 5.069(d)(2). The primary issue in this case is whether a buyer who exercised the statutory right to cancel and rescind a contract for deed must restore to the seller all benefits the buyer received under the contract. We hold that Subchapter D's cancellation-and-rescission remedy contemplates

mutual restitution of benefits among the parties. Thus, we conclude that the buyers here must restore to the seller supplemental enrichment in the form of rent for the buyers' interim occupation of the property upon cancellation and rescission of the contract for deed. We reverse the court of appeals' judgment, in part, and remand the case to the trial court for proceedings consistent with this opinion.

I. Background

In January 2007, Kevin Morton, as seller, and Hung and Carol Nguyen, as buyers, entered into a contract for deed. The contract required the Nguyens to make a $5,000 down payment and monthly installments of $1,533.90 for approximately thirty-five years before obtaining the deed. The contract provided for an initial interest rate of 8.875%. After five years, the interest rate was set to escalate yearly by 1% until it reached 12.875%. The transaction was purportedly structured to encourage the Nguyens to seek out a new financing arrangement in a few years after rebuilding their credit. The Nguyens also agreed to pay for homeowners' insurance, property taxes, and homeowners' association fees. The Nguyens made payments for almost three years. During this time, Morton sent the Nguyens an annual statement that reported the amount of interest paid each year and the balance remaining under the contract. However, Morton did not provide the Nguyens with all of the information in the annual statement required by section 5.077 of the Property Code. *See* TEX. PROP. CODE § 5.077(b) (providing that the annual statement must include, *inter alia*, the amount paid under the contract and the number of payments remaining under the contract).

In November 2009, the Nguyens notified Morton that they were exercising their statutory right to cancel and rescind the contract for deed. The Nguyens demanded return of all thirty-four monthly payments, the down payment, and the taxes and insurance premiums they paid during the

contract's term. Morton ordered the Nguyens out of the house and allegedly began to harass the Nguyens by demanding payments under the contract and demanding that they immediately vacate the property. Morton then sued the Nguyens for breach of contract. The Nguyens counterclaimed, seeking monetary damages, rescission, and statutory damages due to alleged violations under the Property Code, the Finance Code, and the Deceptive Trade Practices Act (DTPA). Morton asserted various affirmative defenses to the Nguyens' counterclaims and alleged that he was entitled to a setoff in the amount of the fair market rental value of the property for the time the Nguyens occupied the house.

Following a bench trial, the trial court found that Morton failed to comply with various sections of Subchapter D pertaining to disclosures in contract-for-deed transactions. As a matter of law, the trial court found that Morton's good-faith defense based on *Flores v. Millennium Interests, Ltd.*, 185 S.W.3d 427 (Tex. 2005), did not apply to the Nguyens' counterclaim for liquidated damages under section 5.077 of the Property Code. The trial court rendered judgment in favor of the Nguyens, awarding the Nguyens the following: (1) $63,693.47 in actual damages—which included all payments the Nguyens made under the contract for deed, their down payment, insurance payments, tax payments, and the value of improvements—for cancellation and rescission of the contract for deed under Subchapter D; (2) $160,000 as liquidated damages for violation of section 5.077 of the Property Code; (3) $300 as the statutory remedy for Finance Code violations; (4) $10,000 for mental anguish damages; (5) $67,020 in attorney's fees; and (6) $696.74 in costs. Both parties appealed.

The court of appeals reversed the trial court's judgment on liability for the statutory penalty under section 5.077 of the Property Code and remanded that issue to the trial court to determine whether Morton made a "good faith attempt to inform [the Nguyens] of the current status of their contractual relationship," as laid out in *Flores*. 369 S.W.3d 659, 668–69 (Tex. App.—Houston [14th Dist.] 2012) (quoting *Flores*, 185 S.W.3d at 443). The court of appeals also reversed the $300 awarded for Finance Code violations because the trial court's findings of fact did not support the award. *Id.* at 676. Finally, the court of appeals affirmed the portion of the trial court's judgment awarding the Nguyens rescission and restitution under the Property Code, attorney's fees, and mental anguish damages. *Id.* at 674, 677. Only Morton petitioned this Court for review, arguing that the court of appeals erred by (1) denying him mutual restitution upon cancelling and rescinding the contract for deed, and (2) affirming the awards of attorney's fees and mental anguish damages after reversing the only claims that could support such awards. The Nguyens do not challenge the court of appeals' judgment related to the section 5.077 claim or the claim for damages under the Finance Code, so we do not address them. We address the challenged issues in turn.

II. Subchapter D's Cancellation-and-Rescission Remedy

We begin by noting that the court of appeals erred by holding that Morton waived the issue as to whether Subchapter D's cancellation-and-rescission remedy incorporates the common law requirement of mutual restitution. Morton's briefing at the court of appeals was sufficient under Rule 38.1(i) of the Texas Rules of Appellate Procedure to warrant consideration of the issue. *See* TEX. R. APP. P. 38.1(i); *see also Republic Underwriters Ins. Co. v. Mex-Tex, Inc.*, 150 S.W.3d 423, 427 (Tex. 2004) ("[W]e have instructed the courts of appeals to construe the Rules of Appellate

Procedure reasonably, yet liberally, so that the right to appeal is not lost by imposing requirements not absolutely necessary to effect the purpose of a rule." (quoting *Verburgt v. Dorner*, 959 S.W.2d 615, 616–17 (Tex. 1997))). Morton argued in his opening brief that if the Nguyens were entitled to rescission and restitution, then he was entitled to a setoff for the value the Nguyens received for their occupancy of the house. He provided citations to three cases that discussed recovery of the value of the use and occupation of land upon rescission. Morton also addressed the issue more thoroughly and cited to additional authority in his reply brief. Finally, as Morton pointed out in his motion for rehearing, he did not have the benefit of this Court's decision in *Cruz v. Andrews Restoration, Inc.*, 364 S.W.3d 817 (Tex. 2012), at the time he filed his briefs in the court of appeals. The court of appeals had the opportunity to review *Cruz* and did so in reference to the common law restitution requirements of notice and tender. 369 S.W.3d at 671 (citing *Cruz*, 364 S.W.3d at 825–27). The court of appeals should have also addressed the issue here related to mutual restitution. Rather than remanding to the court of appeals to address Morton's issue, we address this issue in light of our decision in *Cruz*.

A contract for deed, unlike a typical secured transaction involving a deed of trust, is a financing arrangement that allows the seller to maintain title to the property until the buyer has paid for the property in full. *See Flores*, 185 S.W.3d at 429. Under Subchapter D, real estate transactions involving contracts for deed require the seller to make certain disclosures and provide certain notices. *See, e.g.*, TEX. PROP. CODE §§ 5.069, .070, .072, .085. Various sections in Subchapter D entitle a buyer to "cancel and rescind" the contract for deed and "receive a full refund of all payments made to the seller" if the seller fails to comply with the disclosure and notice requirements. *See, e.g.*,

id. §§ 5.069(d), .070(b), .072(e). For instance, if the seller fails to comply with disclosure requirements related to property that is encumbered by an existing lien, then the buyer can "cancel and rescind" the contract for deed and receive from the seller "all payments of any kind made to the seller under the contract" and reimbursement for (1) taxes paid by the buyer, and (2) the value of any improvements made to the property by the buyer. *Id.* § 5.085(c)(2).

Morton argues that Subchapter D's cancellation-and-rescission remedy incorporates the common law principle of mutual restitution, which requires buyers under a contract for deed to restore the benefits they received under the rescinded contract. The Nguyens, on the other hand, argue that the Legislature did not intend to codify in Subchapter D the common law principle of the equitable remedy of rescission. We addressed a similar issue within the context of the DTPA in *Cruz*, and our analysis in that case instructs the issue presented here. *See Cruz*, 364 S.W.3d at at 824–26.

In *Cruz*, a consumer sought the remedy of "restoration" under section 17.50 of the Business and Commerce Code for alleged DTPA violations. *Id.* at 823. Subsection 17.50(b)(3) provides that a consumer may obtain "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). The consumer argued that section 17.50's restoration remedy did not incorporate the common law principle of rescission, which necessarily includes mutual restitution. *See Cruz*, 364 S.W.3d at 825. Therefore, the consumer averred, he was entitled to all the money paid by him (or on his behalf) under the agreement, without surrendering any benefits that he had received—even though such an approach would give the consumer a windfall. *Id.* at 823, 826. We

disagreed with the consumer's position, in part, holding that section 17.50's restoration remedy contemplates mutual restitution, but not the wholesale adoption of all the common law rescission requirements. *Id.* at 826. We reach the same conclusion in this case.

Our analysis begins with Subchapter D's text, which provides that a buyer's remedy for the seller's noncompliance with certain disclosure requirements is "to cancel and rescind the executory contract and receive a full refund of all payments made to the seller." *See* TEX. PROP. CODE §§ 5.069(d)(2), .070(b)(2), .072(e)(2), .085(c)(2). As we recognized in *Cruz*, rescission is the common name for the composite remedy of rescission and restitution. *Cruz*, 364 S.W.3d at 825 (citing RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 54 cmt. a (2011)); *see also* BLACK'S LAW DICTIONARY 1420–21 (9th ed. 2009) (providing that "rescission" is "[a] party's unilateral unmaking of a contract for a legally sufficient reason . . . generally available as a remedy . . . and is accompanied by restitution of any partial performance, thus restoring the parties to their precontractual positions"). It is a term that requires each party to "restore[] property received from the other," or in other words, mutual restitution. *Cruz*, 364 S.W.3d at 825–26. In line with *Cruz*, we conclude that the Legislature intended Subchapter D's cancellation-and-rescission remedy to also contemplate the common law element of mutual restitution.

The Nguyens and the dissent argue that the statutory scheme in Subchapter D compels a different result than that reached in *Cruz*. We disagree. Like the DTPA's restoration remedy, Subchapter D's cancellation-and-rescission remedy is not intended to be punitive—it merely

provides the buyer the option of unwinding the transaction.[1] *See Cruz*, 364 S.W.3d at 826. Allowing a buyer to recover all benefits bestowed upon the seller upon rescission without also requiring the buyer to surrender the benefits that he received under the contract would result in a windfall inconsistent with the general nature of Subchapter D's cancellation-and-rescission remedy. *See id.* at 825–26. "[R]escission is not a one-way street." *Id.* at 825. Rather, as we explained in *Cruz*, "[recission] requires a mutual restoration and accounting, in which each party restores property received from the other." *Id.* at 825–26 (citing RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 37 cmt. d (2011)). A seller's wrongdoing does not excuse the buyers from counter-restitution under the circumstances of this case. *See id.* at 826. But here, as in *Cruz*, we similarly hold that notice and restitution or a tender of restitution are not prerequisites to the cancellation-and-rescission remedy under Subchapter D, as long as the affirmative relief to the buyer can be reduced by (or made subject to) the buyer's reciprocal obligation of restitution. *See id.* at 827 (citing RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 54(5) (2011)).

The dissent concludes that the statutory language "and receive a full refund of all payments made to the seller" evidences the Legislature's intent not to incorporate the common law elements

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[1] As recognized by the dissent, we have held that the liquidated damages provisions in sections 5.077 and 5.079 of Subchapter D are indeed punitive. ___ S.W.3d at ___ (Boyd, J., dissenting) (citing *Flores*, 185 S.W.3d at 432–33); *see also* TEX. PROP. CODE §§ 5.077(d) (providing liquidated damages and attorney's fees if a seller fails to provide a buyer with an annual statement), .079(b) (providing liquidated damages and attorney's fees if a seller fails to comply with certain title-transfer requirements). Yet this fact does not compel a conclusion that *all* of Subchapter D's remedies were intended to be punitive. *Cf. Cruz*, 364 S.W.3d at 826 (recognizing that the DTPA claims are generally punitive but that "[r]estoration is different"). In addition, we note that sections of Subchapter D that allow a buyer to cancel and rescind a contract for certain violations also make those same violations actionable under the DTPA. *See, e.g.*, TEX. PROP. CODE §§ 5.069(d)(1), .070(b)(1), .072(e)(1), .085(c)(1). We disagree with the Nguyens and the dissent that Subchapter D's cancel-and-rescind remedy should be treated differently than the DTPA's restoration remedy that we characterized as non-punitive in *Cruz*.

of rescission. ___ S.W.3d at ___; *see, e.g.*, TEX. PROP. CODE §§ 5.069(d), .070(b), .072(e). In reaching this conclusion, the dissent misconstrues the term "full refund" as being a one-sided transaction when, in reality, a refund in a typical transactional setting contemplates both parties giving back what they received.[2] *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1910 (2002) (defining "refund" as "to give or put back" and "to return (money) in restitution"). This language is consistent with our construction requiring the mutual restoration of benefits. In contract-for-deed transactions, the buyer cannot give back the title to the property in exchange for "a full refund of all payments made to the seller" because the buyer receives title only after all payments have been made. *See Flores*, 185 S.W.3d at 429. Instead, the buyer must return what it received under the contract for deed at that time—the occupation of the property. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 37 cmt. d (2011) ("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."); *Cruz*, 364 S.W.3d at 825–26 (citing same). While the buyer remains entitled to "a full refund of all payments made to the seller," cancellation and *rescission* of a contract also requires that the buyer restore to the seller the value of the buyer's occupation of the property.

Because the trial court did not consider the value of the Nguyens' interim occupation of the property, we remand the case to the trial court to determine the Nguyens' liability for the rental value of the property during their occupation.

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[2] For example, if a retail store has a policy that entitles a buyer to a full refund for a defective product, surely no logical consumer would think that he or she is entitled to *both* the product and a refund of the price paid for the product simply because the policy entitles the consumer to a "full refund of the purchase price."

III. Attorney's Fees and Mental Anguish Damages

We turn next to Morton's issue concerning the awards of attorney's fees and mental anguish damages. Morton argues that the Nguyens are not entitled to either attorney's fees or mental anguish damages because no claims supporting the awards survived the court of appeals' judgment. We agree. The trial court found that Morton's conduct violated various sections of Subchapter D and constituted statutory fraud in a real estate context. The trial court then utilized those findings to afford the Nguyens the maximum recovery by rendering judgment on the Subchapter D violations and Finance Code violations, which included an award of $67,020 in attorney's fees. On appeal, the court of appeals reversed the only two causes of action that supported an award of attorney's fees—the claim for liquidated damages under section 5.077 of the Property Code and the Finance Code claims. *See* 369 S.W.3d at 669, 676. Because no remaining cause of action supports an award of attorney's fees, the court of appeals should have also reversed the award of attorney's fees predicated on the section 5.077 claim and the Finance Code claims. *Cf. Parkway Co. v. Woodruff*, 901 S.W.2d 434, 441 (Tex. 1995) (reversing an award of attorney's fees when the only cause of action that supported the award was reversed on appeal). To the extent that the Nguyens prevailed on their section 5.077 claim on remand or elected to recover under their alternative statutory fraud theory, the trial court could award attorney's fees based on either of those causes of action. *See* TEX. PROP. CODE § 5.077(c) (providing for reasonable attorney's fees); *see also* TEX. BUS. & COM. CODE § 27.01(e) (providing for reasonable and necessary attorney's fees for claims of statutory fraud in

real estate transactions); *Boyce Iron Works v. Sw. Bell Tel. Co.*, 747 S.W.2d 785, 787 (Tex. 1988) (holding that a "[prevailing] party may seek recovery under an alternative theory if the judgment is reversed on appeal").

For similar reasons, we conclude that the court of appeals should have also reversed the award for mental anguish damages when it reversed the trial court's judgment for damages under the Finance Code. *Cf. Parkway*, 901 S.W.2d at 441. The Nguyens' pleadings demonstrate that they sought mental anguish damages only for the Finance Code violations and DTPA claims. The trial court did not find that Morton violated the DTPA, and the court of appeals reversed the award for damages under the Finance Code. *See* 369 S.W.3d at 676. Accordingly, no cause of action supports an award of mental anguish damages. Because the Nguyens' pleadings do not support an award for mental anguish damages under any other claim, the court of appeals should have also reversed the award in conjunction with reversal of the Finance Code claim.[3] *See* TEX. R. CIV. P. 301 (providing that a "judgment of the court shall conform to the pleadings").

IV. Conclusion

Accordingly, we grant Morton's petition for review and, without hearing oral argument, TEX. R. APP. P. 59.1, we reverse the portion of the court of appeals' judgment affirming the trial court's

[3] The court of appeals held that Morton waived the issue because he did not argue "that the trial court could not have awarded mental anguish damages in conjunction with [the Property Code] violations." 369 S.W.3d at 676. Even assuming the Nguyens pled for mental anguish damages for the Subchapter D claims, we are not convinced that mental anguish damages are recoverable for the Property Code violations found by the trial court in this case.

awards of actual damages for cancellation and rescission, mental anguish damages, and attorney's fees, and we remand the case to the trial court for proceedings consistent with this opinion.

_____

Paul W. Green
Justice

OPINION DELIVERED: August 23, 2013

IN THE SUPREME COURT OF TEXAS

NO. 12-0539

KEVIN T. MORTON, PETITIONER,

v.

HUNG NGUYEN AND CAROL S. NGUYEN, RESPONDENTS

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

JUSTICE BOYD, joined by JUSTICE WILLETT and JUSTICE LEHRMANN, concurring in part and dissenting in part.

The Court is bothered that a literal application of Subchapter D of Chapter 5 of the Texas Property Code "result[s] in a windfall" to purchasers under an executory contract. *Ante* at ___. But our task here is to apply the statute as written, and it is not within our power or our role to resolve the Court's concern. As the Court has said repeatedly, even quite recently:

- "The aim of statutory construction is to determine and give effect to the Legislature's intent[.]" *CHCA Woman's Hosp., L.P., v. Lidji*, — S.W.3d —, —, 2013 WL 3119577, at *3 (Tex. June 21, 2013);

- It is "cardinal law" that we begin with the plain language and common meaning of the words in the statute. *Traxler v. Entergy Gulf States, Inc.*, 376 S.W.3d 742, 747 (Tex. 2012);

- We "begin (and often end) with the Legislature's chosen language," *Christus Health Gulf Coast v. Aetna, Inc.*, 397 S.W.3d 651, 653 (Tex. 2013), because "the truest manifestation of what lawmakers intended is what they enacted." *Combs v. Roark Amusement & Vending, L.P.*, — S.W.3d —, —, 2013 WL 855737, at *2 (Tex. March 8, 2013);

- The Legislature's "voted-on language is what constitutes the law, and when a statute's words are unambiguous and yield but one interpretation, 'the judge's inquiry is at an end.'" *Id.* (quoting *Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson*, 209 S.W.3d 644, 651–52 (Tex. 2006)); and

- "[U]nambiguous text equals determinative text (barring an absurd result)." *In re Office of Attorney Gen.*, — S.W.3d —, —, 2013 WL 854785, at *4 (Mar. 8, 2013).[1]

We have announced these principles of statutory construction not because we always agree with the Legislature's policy choices or because it is easier to avoid making policy choices ourselves. To the contrary, applying the Legislature's policy choices is often the most difficult part of the judiciary's job, particularly when we disagree with those choices. But "we do not pick and choose among policy options on which the Legislature has spoken." *F.F.P. Operating Partners, L.P. v. Duenez*, 237 S.W.3d 680, 690 (Tex. 2007). Upholding the Legislature's policy choices is foundational to the judiciary's role within the constitutional separation of powers among the three branches, and necessary to protect the liberty that our unique system of government guarantees. The philosopher Montesquieu explained long ago:

> [T]here is no liberty if the powers of judging be not separated from the legislative and executive powers. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be the legislator. Were it joined to the executive power, the judge might behave with all the violence of the oppressor.

[1] *See also, e.g.*, *Rachal v. Reitz*, — S.W.3d. —, —, 2013 WL 1859249, at *3 (Tex. May 3, 2013); *Prairie View A&M Univ. v. Chatha*, 381 S.W.3d 500, 507, 511 (2012); *Tex. Mut. Ins. Co. v. Ruttiger*, 381 S.W.3d 430, 452 (Tex. 2012); *In re Lopez*, 372 S.W.3d 174, 176 (Tex. 2012);*Molinet v. Kimbrell*, 356 S.W.3d 407, 411 (Tex. 2011); *Am. Zurich Ins. Co. v. Samudio*, 370 S.W.3d 363, 368 (Tex. 2012); *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011).

C. MONTESQUIEU, THE SPIRIT OF LAWS 202 (T. Nugent trans., D. Carrithers ed. 1977) (T. Nugent trans. 1st ed. 1750).

In the present case, a majority of the Court holds that a purchaser's recovery under Subchapter D of Chapter 5 of the Texas Property Code must be reduced by the value of the benefits the purchaser received from the seller. That may be good policy, but the Code repeatedly states that the purchaser is entitled to "receive a *full* refund of *all payments* made to the seller." TEX. PROP. CODE §§ 5.069(d)(2), 5.070(b)(2), 5.072(e)(2) (emphases added). Because I cannot join the Court's holding without ignoring this language altogether, I respectfully dissent from this part of the Court's opinion.

I.
Statutory Remedy under the Property Code

In Subchapter D of Chapter 5 of the Texas Property Code, the Legislature has provided that a seller's failure to make certain disclosures before entering into an executory contract for conveyance of real property (i.e., a contract for deed)

> *entitles* the purchaser to cancel and rescind the executory contract and receive a *full* refund of *all payments* made to the seller.

TEX. PROP. CODE §§ 5.069(d)(2), 5.070(b)(2), 5.072(e)(2) (emphases added). The seller's violation of yet another provision

> *entitles* the purchaser to cancel and rescind the executory contract and receive from the seller:
>
> (A) the return of *all payments* of *any kind* made to the seller under the contract; and
>
> (B) reimbursement for:

(i) any payments the purchaser made to a taxing authority for the property; and

(ii) the value of any improvements made to the property by the purchaser.

Id. §§ 5.085(c)(2) (emphases added).

Despite this unambiguous language, the Court holds that a seller's violation of these statutes does not entitle the purchaser to receive "a full refund of all payments made to the seller" or "the return of all payments of any kind made to the seller." Instead, the Court holds that the purchaser is entitled to receive the difference between the payments the purchaser made and the "value of the [purchaser's] interim occupation of the property." *Ante* at ___. Because, in the Court's view, the purchaser is "liab[le] for the rental value of the property during their occupation," *id.*, the purchaser cannot receive "a *full* refund of *all* payments made to the seller." For the reasons discussed below, I believe the Court has strayed from both its role and its principles of statutory construction in this case.

A. No Punitive Purpose?

First, the Court asserts that its construction of the statute is appropriate because the statute's "cancellation-and-rescission remedy is not intended to be punitive." *Ante* at ___. Ignoring for a moment the lack of support for this assertion, and the precedent to the contrary, the best indication of what the Legislature intended is found in the words the Legislature chose. *See, e.g.*, *Combs*, — S.W.3d at —, 2013 WL 855737, at *2. It is true that, when a statute that requires certain conduct is "silent on the effect of noncompliance, we must consider the purpose of the statute" to determine the consequences of the violation. *Hines v. Hash*, 843 S.W.2d 464, 468 (Tex. 1992); *see also AHF-Arbors at Huntsville I, LLC v. Walker Cnty. App. Dist.*, ___ S.W.3d ___, ___ 2012 WL 2052948,

at *3 (Tex. June 8, 2012) (quoting *Hines*). But here, the Legislature is not silent on the effect of a seller's noncompliance with the statute: it expressly states that, when the seller fails to comply with the statute, the purchaser is entitled to "a full refund of all payments made to the seller." Regardless of whether the Legislature intended this relief to be "punitive," it is the relief the Legislature expressly provided and thus the relief that the courts must award.

In any event, the Court provides no support for its assertion that the Legislature does not intend this statute's remedies to be "punitive."[2] This Court has previously held that Subchapter D's liquidated damages provision is, in fact, "penal in nature" and "punitive rather than compensatory." *Flores v. Millennium Interests, Ltd.*, 185 S.W.3d 427, 433–34 (Tex. 2005). The Court also previously noted that the severity of the statute's damages formula "would in many instances impose a fine far beyond the damages that a purchaser is likely to suffer." *Brown v. De La Cruz*, 156 S.W.3d 560, 566 (Tex. 2004).

Finally, even if the Legislature did not intend sections 5.069, 5.070, and 5.072 to be punitive in nature, I am not convinced that permitting recovery of "all payments made to the seller" is

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[2] The Court states, "Like the [Texas Deceptive Trade Practices–Consumer Protection Act's (DTPA)] restoration remedy, Subchapter D's cancellation-and-rescision remedy is not intended to be punitive—it merely provides the buyer the option of unwinding the transaction," citing *Cruz v. Andrews Restoration, Inc.*, 364 S.W.3d 817, 826 (Tex. 2012). *Ante* at ___. In *Cruz*, the Court held that the "restor[ation]" provision of the DTPA, section 17.50(b)(3), was not punitive because "'punishment'" under the DTPA "is accomplished through the statute's liability and damages provision—prohibiting deceptive practices and allowing recovery of actual damages, mental anguish damages, treble damages for knowing violations, and attorney's fees." *Id.*; *see also* TEX. BUS. & COM. CODE § 17.50(b)(1) (authorizing the award of economic damages plus mental anguish damages and treble damages when appropriate); *id.* § 17.50(d) (attorney's fees). *Cruz* did not hold, or indicate in any way, that the provisions of Subchapter D are non-punitive in nature, *see Cruz*, 364 S.W.3d at 826, and the Property Code provisions at issue here *are* the statute's liability and damages provisions (though they are expressly nonexclusive). *See* TEX. PROP. CODE §§ 5.069(d)(2), 5.070(b)(2), 5.072(e)(2). In addition to the differences discussed below, this demonstrates yet another significant difference between the statute at issue in *Cruz*—which provided for additional relief on top of damages designed to make the claimant whole—and the statute here—which provides for return of all payments made under the invalid contract.

inherently punitive. Although violation of these provisions constitutes a "false, misleading, or deceptive act or practice" under the Texas Deceptive Trade Practices–Consumer Protection Act (DTPA), *see* TEX. PROP. CODE §§ 5.069(d)(1), 5.070(b)(1), 5.072(e)(1), some claimants entitled to recover under the Property Code will not also recover under the DTPA, as this case demonstrates. Claimants who, like the Nguyens, recover only under sections 5.069, 5.070, or 5.072 do not receive the benefit of the DTPA's provisions for recovery of actual damages, much less the DTPA's more punitive provisions.[3] *See id.* §§ 5.069, 5.070, 5.072. Unlike the liquidated damages provided under section 5.077, *see id.* § 5.077(c), (d) (providing liquidated damages of up to $250 per day, capped by total property value), it is not "obvious[]" that recovery of the amounts paid under a contract for deed obtained in violation of sections 5.069, 5.070, and 5.072 "bears no relation to the harm caused" by the wrongful contract. *See Flores*, 185 S.W.3d at 433 (construing TEX. PROP. CODE § 5.077).

Regardless of whether or how "punitive" the statute may be, I see no need to consider legislative history or to argue about the statute's unstated "purpose" when its stated effect is clear. If the Legislature's words are the "surest guide" to the Legislature's intent, *see Traxler*, 376 S.W.3d at 747, I can only conclude here that the Legislature *specifically intended* that purchasers receive "a *full* refund of *all* payments made to the seller."

B. "Rescind" Trumps All?

Second, the Court reasons that, by using the word "rescind," the Legislature "intended Subchapter D's cancellation-and-rescission remedy to also contemplate the common law element

[3] Because the Nguyens did not recover under the DTPA, they could not seek an order under section 17.50(b)(3)—the provision at issue in *Cruz*. *See Cruz*, 364 S.W.3d at 823.

of mutual restitution." *Ante* at ___. I agree that, generally, we could presume that the Legislature knows and intends the common meaning of a word like "rescind," but in construing this statute we "must give effect to *every* word, clause, and sentence" that the Legislature has used. *In re Office of Attorney Gen.*, — S.W.3d at —, 2013 WL 854755, at *4 (emphasis added). Here, the Legislature stated that a purchaser is entitled "to cancel and rescind the executory contract *and receive a full refund of all payments made to the seller*." TEX. PROP. CODE §§ 5.069(d)(2), 5.070(b)(2), 5.072(e)(2) (emphasis added).

If the Legislature had intended that the purchaser be entitled only to "the common law element of mutual restitution," *ante* at ___, then the Legislature should (and, I must conclude, would) have ended these statutory provisions after the reference to the "executory contract," omitting the phrase "and receive a full refund of all payments made to the seller" completely. The Legislature did not omit that phrase, but the Court has done so for it. Because "every word or phrase in a statute is presumed to have been intentionally used with a meaning and a purpose," *In re Allen*, 366 S.W.3d 696, 706 (Tex. 2012) (quoting *State v. K.E.W.*, 315 S.W.3d 16, 21 (Tex. 2010)), we may not read that language out of this statute. *See also Perkins v. State*, 367 S.W.2d 140, 146 (Tex. 1963) ("[I]t is settled that every word in a statute is presumed to have been used for a purpose; and a cardinal rule of statutory construction is that each sentence, clause and word is to be given effect if reasonable and possible."). In my view, the Legislature's use of the word "rescind" does not give us license to ignore the rest of what the Legislature said.

C. *Cruz* Controls?

Third, the Court relies—incorrectly, I believe—on *Cruz v. Andrews Restoration, Inc*., 364 S.W.3d 817, 826 (Tex. 2012). In *Cruz*, we interpreted a provision of the DTPA in which the Legislature provided that a court may "*restore to any party* to the suit money or property, real or personal, which may have been acquired *in violation of this subchapter*." TEX. BUS. & COM. CODE § 17.50(b) (emphases added). Reasoning that (1) the words "restore" and "restitution" share "the same root," (2) "[r]escission is merely the 'common, shorthand name' for the composite remedy of rescission and restitution," and (3) "rescission is not a one-way street" but instead "requires a mutual restoration and accounting," the Court concluded in *Cruz* that the Legislature intended that an order "restoring" property to a DTPA consumer must also deduct from that award the value of any benefits the consumer received. 364 S.W.3d at 825–26.

I do not agree that *Cruz* controls our decision in this case. The statute in *Cruz* authorized "restoration," and not just to the consumer, but "to any party to the suit." TEX. BUS. & COM. CODE § 17.50(b)(3). By contrast, the statutes here dictate that the "purchaser . . . receive a full refund of all payments made to the seller." TEX. PROP. CODE §§ 5.069(d)(2), 5.070(b)(2), 5.072(e)(2). And, more importantly, the statute in *Cruz* authorized restoration only of amounts "acquired in violation" of the statute. TEX. BUS. & COM. CODE § 17.50(b)(3). By contrast, the statute here requires a "full refund of all payments made to the seller." TEX. PROP. CODE §§ 5.069(d)(2), 5.070(b)(2), 5.072(e)(2).

In short, the Court's construction of the DTPA provision in *Cruz* may have been consistent with the language of that statute, but that same construction is not consistent with the entirely

dissimilar language of the statute at issue here. Because the Legislature's language matters, our construction of very different statutory language in *Cruz* is of no help here.

D. "Rescind" doesn't mean "rescission"?

Finally, the Court confirms its unwillingness to allow the language of the statute to control the outcome of this case when it concludes that "notice and restitution or a tender of restitution," which are prerequisites to the common law remedy of rescission, "are not prerequisites to the cancellation-and-rescission remedy under Subchapter D, as long as the affirmative relief to the buyer can be reduced by (or made subject to) the buyer's reciprocal obligation of restitution." *Ante* at ___. In other words, having decided that the Legislature's use of the word "rescind" justifies ignoring the statute's refund-of-all-payments provision, the Court then concludes that, actually, the Legislature doesn't really mean "rescind" or "rescission" at all. Instead, it means "restitution," or what the Court calls "the common law element of mutual restitution." *Id.* at ___. Surely, if that's what the Legislature meant, it could have said so. In my view, the Court has at this point gone from interpreting a law to making a law, because it believes restitution is a proper remedy, but rescission (with its inconvenient notice and tender prerequisites) is not. In doing so, the Court has demonstrated why its conclusion is wrong to begin with.

II.
Conclusion

Our principles of statutory construction require the Court to focus on the Legislature's words to determine the Legislature's intent. We do this not because we agree with the Legislature's policy choices—sometimes, we vigorously disagree—but because "[w]e must take the Legislature at its

word, respect its policy choices, and resist revising a statute under the guise of interpreting it." *Christus Health Gulf Coast v. Aetna, Inc.*, 397 S.W.3d 651, 654 (Tex. 2013). Even if we were convinced that the Legislature could not have intended to allow purchasers to receive "a full refund of all payments" made to the seller, the 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.'" *In re Allen*, 366 S.W.3d at 708 (quoting *Harbison v. Bell*, 556 U.S.180, 199 (2009) (Thomas, J., concurring) (quoting *Lamie v. United States Trustee*, 540 U.S. 526, 542 (2004)).

I agree with the Court's decision to reverse the Nguyens' award of attorney's fees and mental anguish damages, but I disagree that Morton is entitled to mutual restitution upon the rescission of the contract for deed. Because the Legislature has said that the Nguyen's are entitled to "a full refund of all payments made to the seller," I respectfully concur in part and dissent in part.

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_____

Jeffrey S. Boyd
Justice

OPINION DELIVERED: August 23, 2013

IN THE SUPREME COURT OF TEXAS

NO. 12-0601

CANUTILLO INDEPENDENT SCHOOL DISTRICT, PETITIONER,

v.

YUSUF ELIAS FARRAN, RESPONDENT

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

PER CURIAM

Yusuf Farran was employed as Executive Director of Facilities and Transportation with the Canutillo Independent School District. After he was fired, he sued the District for violation of the Texas Whistleblower Act, TEX. GOV'T CODE § 554.002, and for breach of contract. Because we agree with the District that the trial court properly granted its plea to the jurisdiction, we affirm in part and reverse in part the judgment of the court of appeals and dismiss the case.

According to Farran's evidence presented in opposition to the plea to the jurisdiction, he observed employee theft and falsification of time cards. He also observed that a contractor, Henry's Cesspool Services, was overpaid, did not dispose of grease-trap waste as specified in its contract, and violated state law regulating the use of government funds and city regulations governing waste disposal. Farran reported these improprieties to the District superintendent, assistant superintendent, internal auditor, and school board. Some school board trustees were displeased with the reports, and

one trustee told Farran that if he valued his job he should refrain from making accusations regarding the grease trap. Even after this threat, Farran continued to complain to the superintendent about the grease-trap issues.

In March 2009, after Farran's internal complaints to the District, the superintendent questioned Farran about personal phone calls he had made to another man. Farran thought the other man was having an inappropriate relationship with Farran's wife. The calls were of a threatening nature and were made by Farran and another District employee. Recordings of the calls had been sent to the police, but Farran denied making the calls on school equipment or during work hours. Farran was suspended. In May, the board voted to give Farran notice of termination for one or more of eight specified grounds, subject to a due process hearing. Farran requested a hearing. In July, Farran contacted the FBI regarding the conduct of Henry's Cesspool Services. The District became aware of this report. The due process hearing occurred in August. The hearing officer determined that good cause existed for termination and recommended that the board's initial termination decision be sustained. In September, the board accepted the hearing officer's recommendation, and Farran was fired.

The trial court granted the District's plea to the jurisdiction. The court of appeals held that the trial court erred in granting the plea as it related to Farran's whistleblower claim that he was fired for reporting financial improprieties that violated of the Texas Education Code and Texas Constitution. The court of appeals agreed with the trial court that Farran's other claims should be dismissed. ___ S.W.3d ___.

The District argues to us that Farran's complaints to the school board, superintendents, and internal auditor were not good-faith complaints of a violation of law to a "law enforcement authority" under the Whistleblower Act. We agree. There is no evidence that these officials had authority to enforce the allegedly violated laws outside of the institution itself, against third parties generally. *See Univ. of Houston v. Barth*, ___ S.W.3d ___, ___ (Tex. 2013); *Tex. A & M Univ.–Kingsville v. Moreno*, 399 S.W.3d 128, 130 (Tex. 2013); *Univ. of Tex. Sw. Med. Ctr. v. Gentilello*, 398 S.W.3d 680, 686 (Tex. 2013).

Farran only offered evidence that these school district officials were responsible for internal compliance with the laws. For example, he asserted that he reported to the superintendents because he believed those officials had authority to "ensure *the District* did not pay for services that were not actually provided, and to ensure compliance with the laws." He believed the laws he cited "authorized the District to regulate *its* use of public funds and to enforce all laws by causing the cessation of violations of laws committed *by the District and its employees*." He asserted that he believed the District "has a duty to *self regulate and self enforce* the laws he alleged were violated, and for this reason, he reported the violations to Defendant's School Board, Superintendents, and Auditor in the good faith belief the Defendant was authorized to regulate under or enforce the laws, and authorized to investigate a violation of the laws." He attached the District's written policies stating that the internal auditor duties included "[a]ssisting in the investigation of any suspected fraudulent activities *within the District*."

This evidence does not support an objective, good-faith belief that the school district officials to whom Farran complained had authority "to enforce, investigate, or prosecute violations of law

against third parties outside of the entity itself" or had "authority to promulgate regulations governing the conduct of such third parties." *Gentilello*, 398 S.W.3d at 686. "Authority of the entity to enforce legal requirements or regulate conduct within the entity itself is insufficient to confer law-enforcement authority status" under the Whistleblower Act. *Id.* Thus, the plea to the jurisdiction was well-taken, because "lodging an internal complaint to an authority whom one understands to be only charged with internal compliance, even including investigating and punishing noncompliance, is jurisdictionally insufficient under the Whistleblower Act." *Id.* at 687.

By cross-appeal, Farran makes two arguments not subsumed in the discussion above. First, he argues that the court of appeals erred in concluding that his report to the FBI was a report to a law enforcement authority that was actionable under the Whistleblower Act. We agree with the court of appeals that this claim fails because of a timing problem: there was legally insufficient evidence that the report to the FBI caused Farran's termination.

To establish a Whistleblower Act claim, the plaintiff must show that his report to a law enforcement authority caused him to suffer the complained-of adverse personnel action. *City of Fort Worth v. Zimlich*, 29 S.W.3d 62, 67 (Tex. 2000). "To show causation, a public employee must demonstrate that *after* he or she reported a violation of the law in good faith to an appropriate law enforcement authority, the employee suffered discriminatory conduct by his or her employer that would not have occurred when it did if the employee had not reported the illegal conduct." *Id.* (emphasis added). As noted above, and according to Farran, he had already been told, months prior to his report to the FBI, to refrain from making complaints about the grease-trap contractor if he valued his job. He continued to complain, he was suspended, and the board gave notice of its intent

to terminate him—all prior to the FBI report. To prevail on a theory that the FBI report caused his termination, Farran would have to show that, but for that report, the school district would have changed its mind and retained him. There is legally insufficient evidence from which a reasonable and fair-minded finder of fact could make such a finding. *See Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 228 (Tex. 2004) (holding that when parties submit evidence at plea to the jurisdiction stage, review of the evidence generally mirrors the summary judgment standard); *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 755 (Tex. 2007) ("An appellate court reviewing a summary judgment must consider whether reasonable and fair-minded jurors could differ in their conclusions in light of all the evidence presented."). On this record, Farran's own evidence showed that from the initiation of termination proceedings, prior to the FBI report, the District never wavered in its view that Farran should be terminated. According to Farran's own petition, the superintendent, months prior to the FBI report, had "sought to identify false and pretextual reasons to terminate Plaintiff's employment." Farran argued in his briefing to the trial court that "[t]he minor acts for which he was placed on suspension and the subsequent addition of unrelated grounds for the proposed termination"—all occurring before he contacted the FBI—"are evidence the District intended to discharge Mr. Farran based on pretext from the date [the superintendent] suspended him." Farran was given the opportunity persuade the District to change its mind at a hearing, but the effort failed. The hearing officer found good cause for his termination and the board proceeded to fire him. Farran himself claimed that at the due process hearing he was unable to present evidence on his whistleblower claims, although the hearing officer addressed the grease-trap issues and concluded that they were unrelated to the board's initial termination decision.

Regardless, the record is devoid of evidence that the board would have been persuaded to change its mind but for the report to the FBI, that the report had any influence on the hearing officer's recommendation that the initial termination decision be sustained, or that the report otherwise played a role in the board's preliminary or final termination decisions.

Farran also argues that the court of appeals erred in concluding that his breach of contract claim failed because he did not first pursue this claim with the Commissioner of Education. We agree with the court of appeals on this issue. Farran's contract claim was based on an employment contract provision stating that he could only be terminated for cause. School district employees like Farran, alleging a breach of an employment contract where facts are in dispute, generally must exhaust administrative remedies by bringing an appeal to the Commissioner. *See* TEX. EDUC. CODE § 7.057(a)(2)(B) (providing for appeal to the Commissioner of claims of alleged violations of "a provision of a written employment contract between the school district and a school district employee"); *see also Ollie v. Plano Indep. Sch. Dist.*, 383 S.W.3d 783, 792 (Tex. App.—Dallas 2012, pet. denied); *Larsen v. Santa Fe Indep. Sch. Dist.*, 296 S.W.3d 118, 128 (Tex. App.—Houston [14th Dist.] 2009, pet. denied); *Ysleta Indep. Sch. Dist. v. Griego*, 170 S.W.3d 792, 795 (Tex. App.—El Paso 2005, pet. denied (citing *Mission Indep. Sch. Dist. v. Diserens*, 188 S.W.2d 568, 570 (Tex. 1945))); *Gutierrez v. Laredo Indep. Sch. Dist.*, 139 S.W.3d 363, 367 (Tex. App.—San Antonio 2004, no pet.); *Washington v. Tyler Indep. Sch. Dist.*, 932 S.W.2d 686, 688 (Tex. App.—Tyler 1996, no writ). Farran argues that his contract claim did not require exhaustion because it was based on a Whistleblower Act violation. To be sure, the Whistleblower Act has its own statutory remedies and procedures that do not require exhaustion with the Commissioner under the Education Code, but

as explained above, Farran has no cognizable Whistleblower Act claim. To the extent he sought relief under a separate common-law breach of contract cause of action, he failed to exhaust administrative remedies.

In sum, the trial court properly granted the plea to the jurisdiction. Accordingly, we grant the petition for review and, without hearing oral argument, affirm in part and reverse in part the court of appeals' judgment and dismiss the case. *See* TEX. R. APP. P. 59.1.

OPINION DELIVERED: August 30, 2013

IN THE SUPREME COURT OF TEXAS

NO. 12-0627

JUSTIN CURTIS NALL, ROBERT W. NALL, AND OLGA L. NALL, PETITIONERS,

v.

JOHN B. PLUNKETT, RESPONDENT

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

PER CURIAM

This case presents an issue of summary judgment procedure. John Plunkett sued Justin Nall, Robert Nall, Olga Nall, and Justin Kowrach for personal injuries suffered at a New Year's Eve party at the Nalls' residence. Plunkett pled causes of action against the Nalls for negligence based on an undertaking theory and for premises liability. The Nalls moved for summary judgment as to Plunkett's negligence claim on the ground that they owed no duty to Plunkett under the facts pled in his petition. The trial court rendered judgment in favor of the Nalls as to "all issues except those relating to premises liability." Plunkett appealed, arguing that summary judgment was improper because the Nalls' summary judgment motion addressed only social host liability and not the negligent-undertaking theory. The court of appeals agreed and reversed the summary judgment. 374 S.W.3d 584, 586–87. We hold that the Nalls' summary judgment motion specifically addressed the

negligent-undertaking claim by arguing that our decision in *Graff v. Beard*, 858 S.W.2d 918, 921 (Tex. 1993), forecloses the assumption of any duty by a social host under the facts of this case. Because Plunkett did not argue that summary judgment was improper on the merits, we do not reach any substantive issues related to the summary judgment. *See* TEX. R. APP. P. 53.4. Accordingly, we reverse the court of appeals' judgment and reinstate the trial court's judgment.

Plunkett attended Justin Nall's New Year's Eve party at a home that is owned by his parents, Robert and Olga Nall. Plunkett alleges that the Nalls hosted the party and, knowing that alcohol would be consumed at the house, required all attendees who remained at the house after midnight to spend the night. Plunkett contends that the Nalls failed to confiscate car keys of those who remained after midnight or take any other actions to keep attendees from leaving. The petition states that Robert and Olga went to bed after midnight but before 2:00 a.m., without ensuring that those still in attendance would remain until they were safe to drive. Shortly after 2:00 a.m., Kowrach and a friend attempted to leave in the friend's vehicle. Plunkett alleges that he attempted to convince Kowrach not to leave, as they were both intoxicated. As Plunkett stood on the running board of the vehicle and attempted to pull the keys from the ignition, Kowrach pressed the accelerator, gathered speed, then hit the brakes. The sudden braking and Plunkett's momentum propelled him head first into the ground, lodging his head under a parked car. Plunkett suffered traumatic brain damage as a result of his injuries and will require medical care for the rest of his life.

Plunkett sued the Nalls and Kowrach. Plunkett alleged that the Nalls were liable for "common law negligence," "fail[ing] to exercise due care in their undertaking" to protect guests, and for premises liability. The Nalls moved for summary judgment, arguing that they owed no duty to

Plunkett. The trial court granted the motion as to all claims except for the premises liability claim, which Plunkett eventually nonsuited. The trial court then severed Plunkett's claims against the Nalls from his claims against Kowrach. Plunkett appealed. The only issue briefed by Plunkett on appeal was whether the trial court erred by granting summary judgment on Plunkett's undertaking claim based on the Nalls' alleged failure to address that claim.

A divided court of appeals reversed and remanded, holding that the trial court erred by granting summary judgment because the Nalls failed to address Plunkett's negligent-undertaking theory in their motion. 374 S.W.3d at 586. The court of appeals construed Plunkett's petition as alleging a claim for negligence based on an undertaking theory and the Nalls' summary judgment motion as arguing only that summary judgment was proper as to a negligence claim based on social host liability. *Id.* at 586–87.

This procedural issue was the only issue argued by Plunkett on appeal and the only issue addressed by the court of appeals. *See id.* at 585. We review a grant of summary judgment de novo. *Exxon Corp. v. Emerald Oil & Gas Co.*, 331 S.W.3d 419, 422 (Tex. 2010). In a summary judgment motion under Rule 166a(c) of the Texas Rules of Civil Procedure, a movant "shall state the specific grounds therefor," and a defendant who conclusively negates at least one of the essential elements of a cause of action is entitled to summary judgment. TEX. R. CIV. P. 166a(c). A trial court cannot grant summary judgment on grounds that were not presented. *See, e.g.*, *FDIC v. Lenk*, 361 S.W.3d 602, 609 (Tex. 2012); *see also G & H Towing Co. v. Magee*, 347 S.W.3d 293, 297 (Tex. 2011) (per curiam) ("Granting a summary judgment on a claim not addressed in the summary judgment motion therefore is, as a general rule, reversible error."). "Issues not expressly presented to the trial court

by written motion, answer or other response shall not be considered on appeal as grounds for reversal." TEX. R. CIV. P. 166a(c). We have also noted that "[a]n exception is required should a non-movant wish to complain on appeal that the grounds relied on by the movant were unclear or ambiguous." *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 342 (Tex. 1993); *see also D.R. Horton-Tex., Ltd. v. Markel Int'l Ins. Co.*, 300 S.W.3d 740, 743 (Tex. 2009) ("A non-movant must present its objections to a summary judgment motion expressly by written answer or other written response to the motion in the trial court or that objection is waived."). However, even when a non-movant fails to except, the court of appeals cannot "read between the lines" or infer from the pleadings any grounds for granting the summary judgment other than those grounds expressly set forth before the trial court. *McConnell*, 858 S.W.2d at 343.

Like the court of appeals, we construe Plunkett's petition as alleging two causes of action against the Nalls: (1) "common law negligence" based on the Nalls' failure to "exercise due care in their undertaking" (the negligent-undertaking claim), and (2) premises liability. The critical inquiry concerning the duty element of a negligent-undertaking theory is whether a defendant acted in a way that requires the imposition of a duty where one otherwise would not exist. *See Torrington Co. v. Stutzman*, 46 S.W.3d 829, 838–39 (Tex. 2000); *see also Osuna v. S. Pac. R.R.*, 641 S.W.2d 229, 230 (Tex. 1982) ("Having undertaken to place a flashing light at the crossing for the purpose of warning travelers, the railroad was under a duty to keep the signal in good repair, even though the signal was not legally required."). In *Torrington*, we held that a jury submission for a negligence claim predicated on a negligent-undertaking theory requires a broad-form negligence question accompanied by instructions detailing the essential elements of an undertaking claim. *Torrington*,

46 S.W.3d at 838–39. Accordingly, the broad-form submission for a typical negligence claim and a negligent-undertaking claim is the same, except that an undertaking claim requires the trial court to instruct the jury that a defendant is negligent only if: (1) the defendant undertook to perform services that it knew or should have known were necessary for the plaintiff's protection; (2) the defendant failed to exercise reasonable care in performing those services; and either (a) the plaintiff relied upon the defendant's performance, or (b) the defendant's performance increased the plaintiff's risk of harm. *Id.*; *see also* RESTATEMENT (SECOND) OF TORTS § 324A (providing the rule for liability to a third person for negligent performance of an undertaking).

The Nalls' summary judgment motion stated the issue addressed as: "Whether [the Nalls] have any duty to [Plunkett] in the factual scenario plead by [Plunkett]." The Nalls' "short answer" was that "Texas does not recognize social host liability, and [the Nalls] do not have any duty to [Plunkett] in this case." Plunkett did not file any exception to the Nalls' motion. The court of appeals construed the Nalls' motion as addressing Plunkett's negligence claim only as a social-host-liability claim and not as a negligent-undertaking claim. 374 S.W.3d at 586. We construe the Nalls' motion, however, as specifically moving for summary judgment on the duty element of Plunkett's negligence claim, making a two-part argument that addressed the absence of a duty in both the social host context and the undertaking context. First, the Nalls correctly pointed out that, under Texas law, a host has no duty to prevent a guest who will be driving from becoming intoxicated or to prevent an intoxicated guest from driving.[1] *See Graff*, 858 S.W.2d at 918. Second, the Nalls

[1] The portion of the Nalls' summary judgment motion that addressed this point was introduced by the following heading: "No statutory or common law duty is owed by a social host."

addressed the undertaking theory asserted by Plunkett in light of *Graff*.[2] Specifically, the Nalls argued:

> [Plunkett] places a great amount of emphasis on the alleged "rule" of the Nall hosts that required a guest who was still at the home at midnight to spend the night. The court in *Graff v. Beard* also discussed the scenario wherein a home owner attempts to *assume that duty* and the problems inherent in trying to decide scope of duty in that context. The Supreme Court refuses to recognize the assumption of the duty argument in the case of a social host.

We hold that the Nalls' summary judgment motion specifically addressed the negligent-undertaking claim by arguing that *Graff* forecloses the assumption of any duty (i.e., an undertaking) by a social host. Therefore, the court of appeals erred by reversing the trial court's judgment on procedural grounds.

Whether the Nalls were entitled to summary judgment based on the merits of the argument above is not at issue in this appeal, and we do not address it. Texas Rule of Appellate Procedure 53.4 provides that a party may obtain a remand to the court of appeals to address issues or points *briefed in that court* but not decided by that court, or we may address those issues in the interest of judicial economy. TEX. R. APP. P. 53.4. As we previously noted, Plunkett briefed only the procedural issue on appeal to the court of appeals. He did not argue that a genuine issue of material fact precluded summary judgment on the merits.[3] We conclude that Plunkett waived the issue of whether summary judgment was proper on the merits in this case by failing to brief it in the court of appeals. *See id.*

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[2] The portion of the Nalls' summary judgment motion that addressed this point was introduced by the following heading: "Absent a legal right to restrain a guest, a host owes no duty to a guest to do so."

[3] Plunkett's brief at the court of appeals provided that the issue was a "legal one—sufficiency of pleadings to support a cause of action."

Accordingly, we grant the Nalls' petition for review, and without hearing oral argument, we reverse the court of appeals' judgment and reinstate the trial court's judgment. *See* TEX. R. APP. P. 59.1.

OPINION DELIVERED: June 28, 2013

IN THE SUPREME COURT OF TEXAS

NO. 12-0628

MARC H. NATHAN, PETITIONER,

v.

STEPHEN WHITTINGTON, RESPONDENT

ON PETITION FOR WRIT OF MANDAMUS

PER CURIAM

We must decide in this case whether a statute that "suspends the running" of a "statute of limitations" applies to a statute of repose that otherwise "extinguishes" the plaintiff's cause of action. The trial court held that it does not and granted the defendant's motion for summary judgment. The court of appeals, with one justice dissenting, held that it does and reversed. We hold that the suspension statute does not apply to a statute of repose, so we reverse the judgment of the court of appeals and reinstate the trial court's summary judgment.

Stephen Whittington initially filed suit in Nevada and prevailed on his claims against a former business partner, Evan Baergen. To collect on the judgment, he then filed another suit in Nevada, against both Baergen and Marc Nathan, the petitioner in the present case. In the second suit, Whittington alleged that Baergen had fraudulently transferred assets to Nathan in violation of the Nevada Uniform Fraudulent Transfer Act (Nevada UFTA). Whittington filed the second suit in May 2008, just under four years after the date he alleged the fraudulent transfer occurred in May 2004.

Six months later, in November 2008, the Nevada court held that it lacked personal jurisdiction over Nathan and dismissed Whittington's claims. Less than sixty days later, in January 2009, Whittington filed the present suit, in a Texas court, under the Texas UFTA (TUFTA), again alleging that Baergen had fraudulently transferred assets to Nathan. Nathan moved for summary judgment, arguing that TUFTA's four-year statute of repose extinguished Whittington's claim. *See* TEX. BUS. & COM. CODE § 24.010(a)(1) (1993). The trial court agreed and granted Nathan's motion for summary judgment.

Whittington appealed, and the court of appeals reversed and remanded. The majority held that section 16.064(a) of the Texas Civil Practice & Remedies Code suspended the expiration of TUFTA's statute of repose and allowed Whittington to file this new suit within sixty days after the Nevada court dismissed the second Nevada suit for lack of jurisdiction. *Whittington v. Nathan*, 371 S.W.3d 399, 403 (Tex. App—Houston [1st Dist.] 2012). One justice dissented, on the ground that section 16.064(a) suspends the running of a "statute of limitations," not of a statute of repose like the TUFTA provision that extinguished Whittington's claim. *Id.* (Brown, J., dissenting).

We review the trial court's summary judgment de novo. *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010). To resolve this case, we must construe both TUFTA's section 24.010 and section 16.064(a) of the Civil Practice & Remedies Code. We also review issues of statutory construction de novo. *Loaisiga v. Cerda*, 379 S.W.3d 248, 254–55 (Tex. 2012). Our objective is to give effect to the Legislature's intent, and we do that by applying the statutes' words according to their plain and common meaning unless a contrary intention is apparent from the statutes' context. *Molinet v. Kimbrell*, 356 S.W.3d 407, 411 (Tex. 2011).

In TUFTA section 24.010, entitled "Extinguishment Of Cause Of Action," the Legislature has provided that

> a cause of action with respect to a fraudulent transfer or obligation under this chapter is extinguished unless action is brought . . . within four years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant.

TEX. BUS. & COM. CODE § 24.010(a)(1). The parties and the court of appeals all agreed that this provision is a statute of repose, rather than a statute of limitations. "[W]hile statutes of limitations operate procedurally to bar the enforcement of a right, a statute of repose takes away the right altogether, creating a substantive right to be free of liability after a specified time." *Methodist Healthcare Sys. of San Antonio, Ltd., v. Rankin*, 307 S.W.3d 283, 287 (Tex. 2010) (quoting *Galbraith Eng'g Consultants, Inc. v. Pochucha*, 290 S.W.3d 863, 866 (Tex. 2009)). Statutes of repose are of an "absolute nature," and their "key purpose . . . is to eliminate uncertainties under the related statute of limitations and to create a final deadline for filing suit that is not subject to any exceptions, except perhaps those clear exceptions in the statute itself." *Id.* at 286–87. Unlike statutes of limitations, which are intended primarily to encourage diligence on the part of plaintiffs, statutes of repose may serve other purposes and may run from some event other than when the cause of action accrued. *See Nelson v. Krusen*, 678 S.W.2d 918, 926 (Tex. 1984) (Robertson, J., concurring).

Although we have not previously addressed this issue, other Texas courts have, and like the parties and the court of appeals in this case, they have agreed that the provision is a statute of repose. *See Janvey v. Democratic Senatorial Campaign Comm.*, 793 F. Supp. 2d 825, 830–31 n.5 (N.D. Tex.

2011) (citing cases and stating "the few Texas intermediate appellate courts to expressly consider the matter view the time-bar provision as a statute of repose"); *see also Zenner v. Lone Star Striping & Paving, L.L.C.*, 371 S.W.3d 311, 315 n.1 (Tex. App.—Houston [1st Dist.] 2012, pet. denied) ("Entitled 'Extinguishment of Cause of Action,' section 24.0010 [sic] is a statute of repose, rather than a statute of limitations.").

But TUFTA is a uniform act, so its provisions must "be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among states enacting it." TEX. BUS. & COM. CODE § 24.012. We will therefore independently review the issue, to ensure that our construction of section 24.010 is as consistent as possible with the constructions of other states that have enacted a Uniform Fraudulent Transfer Act containing a similar provision.

We have found that some courts, including the high courts of several states, have referred to this UFTA provision as a "statute of limitations,"[1] while others have referred to it as a "statute of repose."[2] *See K-B Bldg. Co. v. Sheesley Constr., Inc.*, 833 A.2d 1132, 1133 n.1 (Pa. Super. Ct. 2003) (noting that its "review of decisions of other jurisdictions reveals that [the provision] is referred to as both a statute of limitations and a statute of repose"). But in most of the opinions in which the court referred to the provision as a statute of limitations, including all of those of the states' high

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[1] *See Peacock Timber Transp., Inc. v. B.P. Holdings, LLC*, 115 So. 3d 914, 919–20 (Ala. 2012); *Kobritz v. Severance*, 912 A.2d 1237, 1241 n.3 (Me. 2007); *Cavadi v. DeYeso*, 941 N.E.2d 23, 26 (Mass. 2011); *Gulf Ins. Co. v. Clark*, 20 P.3d 780, 782 (Mont. 2001); *Norwood Grp., Inc. v. Phillips*, 828 A.2d 300, 303 (N.H. 2003); *SASCO 1997 NI, LLC v. Zudkewich*, 767 A.2d 469, 471–73 (N.J. 2001); *Investors Title Ins. Co. v. Herzig*, 785 N.W.2d 863, 877 (N.D. 2010); *Duffy v. Dwyer*, 847 A.2d 266, 269–71 (R.I. 2004); *State ex rel. Dep't of Revenue v. Karras*, 515 N.W.2d 248, 249 (S.D. 1994); *Freitag v. McGhie*, 947 P.2d 1186, 1188 (Wash. 1997).

[2] *See LaRosa v. LaRosa*, 482 Fed. Appx. 750, 753 (4th Cir. 2012); *Klein v. Capitol One Fin. Corp.*, No. 4:10-CV-00629-EJL, 2011 WL 3270438, at *7–8, *7 n.5 (D. Idaho July 29, 2011) (mem. op.); *Moore v. Browning*, 50 P.3d 852, 858–59 (Ariz. Ct. App. 2002); *First Sw. Fin. Servs. v. Pulliam*, 912 P.2d 828, 830 (N.M. Ct. App. 1996).

courts, the courts did not actually consider or address the issue. Instead, they simply referred to the provision as a statute of limitations without actually concluding that it was a statute of limitations as opposed to a statute of repose.

In the absence of any uniformity among the other states, we have also considered the comments of the National Conference of Commissioners on Uniform State Laws, which promulgated the model UFTA. We note first that their Prefatory Notes to the model UFTA also refer to the provision as a "statute of limitations." UNIF. FRAUDULENT TRANSFER ACT, 7A pt.II U.L.A. 7 (2006) (Prefatory Note) ("The new Act also includes a statute of limitations that bars the right rather than the remedy on expiration of the statutory periods prescribed."). Because of this, a Pennsylvania intermediate appellate court decided to label the provision as a statute of limitations, even though it recognized that "[t]he language of the provision, which involves the extinguishment of a cause of action rather than a limitation on the action, would appear to be labeled properly as a statute of repose." *K-B Bldg. Co.*, 833 A.2d at 1133 n.1.

Considering the actual language of TUFTA section 24.010 and the Commissioners' comments to UFTA section 9 on which it is modeled, we agree with the parties and the court of appeals in this case that it is a statute of repose, rather than a statute of limitations. By its own terms, the provision does not just procedurally bar an untimely claim, it substantively "extinguishes" the cause of action. As the Commissioners' Prefatory Note explains (despite its reference to a "statute of limitations"), the provision "bars the right rather than the remedy on expiration of the statutory periods prescribed." " UNIF. FRAUDULENT TRANSFER ACT, 7A pt.II U.L.A. 7 (2006) (Prefatory Note). And the Commissioners' comments to section 9 explain that "[i]ts purpose is to make clear

that lapse of the statutory periods prescribed by the section bars the right and not merely the remedy." *Id.* at 195, § 9 cmt. 1. This language is nearly identical to our definition of a statute of repose. *See Rankin*, 307 S.W.3d at 287 ("[W]hile statutes of limitations operate procedurally to bar the enforcement of a right, a statute of repose takes away the right altogether, creating a substantive right to be free of liability after a specified time." (quoting *Galbraith*, 290 S.W.3d at 866)). Unlike a statute of limitations, the provision "extinguishes" the underlying cause of action. We do not perceive strong uniformity among the states in their interpretation of this provision, and we see no need to compromise the statute of repose jurisprudence of cases like *Galbraith* and *Rankin* to follow states that have merely referred to the provision as a statute of limitations without actually deciding the issue.

In addition to agreeing that the TUFTA provision is a statute of repose, the parties also agree that, unless section 16.064(a) applies, the statute of repose extinguished Whittington's claim before he filed this suit. In section 16.064, entitled "Effect Of Lack Of Jurisdiction," the Legislature has suspended the running of a "statute of limitations" for sixty days, if a trial court dismisses a claim for lack of jurisdiction:

> (a) The period between the date of filing an action in a trial court and the date of a second filing of the same action in a different court suspends the running of the applicable statute of limitations for the period if:
>
> (1) because of lack of jurisdiction in the trial court where the action was first filed, the action is dismissed or the judgment is set aside or annulled in a direct proceeding; and
>
> (2) not later than the 60th day after the date the dismissal or other disposition becomes final, the action is commenced in a court of proper jurisdiction.

TEX. CIV. PRAC. & REM. CODE § 16.064(a) (1985).

By its own terms, section 16.064(a) applies only to a "statute of limitations." In *Galbraith*, we interpreted a similar statute, which (at that time) provided that a plaintiff who joins a responsible third party as a defendant "is not barred by limitations." 290 S.W.3d at 865–66 (construing former TEX. PRAC. & REM. CODE § 33.004(e)).[3] We acknowledged that, generally, the term "limitations" could refer to the restrictions that both statutes of limitations and statutes of repose impose, but we held that former section 33.004(e) applied only to statutes of limitations, and not to a statute of repose. *Id.* at 869. As we explained, "[b]ecause application of the revival statute in this instance effectively renders the period of repose indefinite, a consequence clearly incompatible with the purpose for such statutes, we conclude that the Legislature intended for the term 'limitations' in section 33.004(e) to refer only to statutes of limitations." *Id.*

Applying section 16.064 to TUFTA's statute of repose would raise the same concern we identified in *Galbraith*: because a trial court may dismiss a case for lack of jurisdiction long after the statute of repose extinguishes the cause of action, application of section 16.064 would frustrate the certainty that the statute of repose provides. "Like the designation of a responsible third party in another lawsuit, the final dismissal of another lawsuit may come 'months or years' after the statute of repose deadline." *Whittington*, 371 S.W.3d at 407 (Brown, J., dissenting) (citing *Galbraith*, 290 S.W.3d at 867). It is true that under section 16.064, unlike under former section 33.004 in *Galbraith*, the plaintiff must bring suit (albeit in the wrong court) before the limitations period expires. But if

[3] *See* Act of May 4, 1995, 74th Leg., R.S., ch. 136, 1995 Tex. Gen. Laws 972–73, *amended by* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 4.04, sec. 33.004(e), 2003 Tex. Gen. Laws 855–56, *repealed by* Act of May 24, 2011, 82d Leg., R.S., ch. 203, § 5.02, sec. 33.004(e), 2011 Tex. Gen. Laws 759.

section 16.064 applies to the TUFTA statute of repose, the defendant does not know if the suit will be dismissed, or if it will later be refiled in another court (even after the statute has extinguished the cause of action), or if it will proceed in the original court.

As we have said before, statutes of repose are of an absolute nature and address concerns beyond the certainty of the litigants:

> The Legislature could reasonably conclude that the general welfare of society, and various trades and professions that serve society, are best served with statutes of repose that do not submit to exceptions even if a small number of claims are barred through no fault of the plaintiff, since "the purpose of a statute of repose is to provide 'absolute protection to certain parties from the burden of indefinite potential liability.'" The whole point of layering a statute of repose over the statute of limitations is to "fix an outer limit beyond which no action can be maintained." One practical upside of curbing open-ended exposure is to prevent defendants from answering claims where evidence may prove elusive due to unavailable witnesses (perhaps deceased), faded memories, lost or destroyed records, and institutions that no longer exist.

Rankin, 307 S.W.3d at 287 (citations omitted).

We acknowledge that TUFTA's statute of repose may work an inequitable hardship on Whittington in this case. Whittington brought a timely UFTA claim in Nevada, and he refiled the claim in Texas within sixty days after the Nevada court dismissed it for lack of jurisdiction. But the Legislature has balanced this hardship against the benefits of the certainty that a statute of repose provides by extinguishing claims upon a specific deadline. The task of balancing these equities belongs to the Legislature, not to this Court. As we have noted, the Legislature has chosen to suspend the running of statutes of limitations, not of statutes of repose.

Because TUFTA's section 24.010 is a statute of repose, and section 16.064 applies only to statutes of limitations, the latter does not save or revive Whittington's claim. Accordingly, without

hearing oral argument, TEX. R. APP. P. 59.1, we grant Nathan's petition for review, reverse the court of appeals' judgment, and reinstate the trial court's judgment of dismissal.

OPINION DELIVERED: August 30, 2013

IN THE SUPREME COURT OF TEXAS

NO. 12-0718

STATE OF TEXAS, PETITIONER,

v.

$1,760.00 IN UNITED STATES CURRENCY, 37 "8" LINER MACHINES, RESPONDENT

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

PER CURIAM

This is a civil forfeiture case involving the seizure of thirty-seven gaming machines, commonly known as "eight-liners," by the State of Texas after the Tarrant County Sheriff's Department obtained and executed a warrant to search the Magic Games Game Room owned by Sammy Dean Barnes. The Texas Penal Code excludes from the definition of "gambling device" certain contrivances that reward players "exclusively with noncash merchandise prizes, toys, or novelties, or a representation of value redeemable for those items." TEX. PENAL CODE § 47.01(4)(B). Barnes challenges the seizure, arguing that his eight-liners fell within the statutory exclusion. The State contends that Barnes's eight-liners cannot fall within that exclusion because the eight-liners awarded tickets that could be redeemed for non-immediate rights of replay, which the State argues

is an intangible reward precluding application of the statutory exclusion. We agree with the State. Accordingly, we reverse the court of appeals' judgment and reinstate the trial court's judgment.

The Tarrant County Sheriff's Department obtained a search warrant for Magic Games Game Room after an investigation yielded information that the eight-liners were awarding players tickets that they could redeem for future play on another day—referred to as non-immediate rights of replay. Upon execution of the search warrant, the Sheriff's Department seized thirty-seven eight-liners and $1,760 in cash from an automated teller machine (ATM) on the premises.[1]

Following the seizure, the State initiated forfeiture proceedings under article 18.18 of the Texas Code of Criminal Procedure in the justice court, which ultimately ordered forfeiture of the eight-liners. *See* TEX. CODE CRIM. PROC. art. 18.18. Barnes appealed to the county court at law for a trial de novo. At trial, Barnes testified that the eight-liners accepted cash, which the machine converted into points that were used for play. When a player redeemed points from an eight-liner upon completion of play, the eight-liner dispensed a ticket for every five hundred points won. Players could use the tickets to either (1) redeem store merchandise that did not exceed a wholesale value of $5, or (2) receive credits to replay another machine, which were implemented electronically by an attendant from a central location without having to convert the tickets back into cash. Barnes's establishment allowed players to return at a later date to redeem the tickets for replays on the eight-liners. It is undisputed that the tickets had no cash value and were never exchanged for cash for replay.

[1] Because Barnes does not claim ownership of the cash seized from the ATM, it is not at issue in this appeal.

After a trial de novo, the county court ordered the eight-liners forfeited to the State. The court of appeals reversed, holding that the eight-liners fell within the exclusion to the definition of "gambling device" in section 47.01(4)(B) of the Penal Code because non-immediate rights of replay could be considered "novelties" under the exclusion, which the court of appeals defined as a "new event." 372 S.W.3d 277, 285–86. The State petitioned this Court for review, arguing that the court of appeals erred by construing the term "novelties" to mean a "new event" rather than small, tangible goods similar in form to "noncash merchandise prizes" and "toys," which are the two terms that precede "novelties" in section 47.01(4)(B). *See* TEX. PENAL CODE § 47.01(4)(B). The State avers that, under its proposed construction of "novelties," a reward of a non-immediate right of replay prevents the statutory exclusion from applying to Barnes's eight-liners. We agree.

The issue is one of statutory construction, which we review de novo. *Tex. Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 635 (Tex. 2010). Our primary objective when interpreting a statute is to give effect to the Legislature's intent. *Molinet v. Kimbrell*, 356 S.W.3d 407, 411 (Tex. 2011). Legislative intent is best expressed by the plain meaning of the text unless the plain meaning leads to absurd results or a different meaning is supplied by legislative definition or is apparent from the context. *Tex. Lottery Comm'n*, 325 S.W.3d at 635.

The Penal Code defines "gambling device" as:

> any electronic, electromechanical, or mechanical contrivance not excluded under Paragraph (B) that for a consideration affords the player an opportunity to obtain anything of value, the award of which is determined solely or partially by chance, even though accompanied by some skill, whether or not the prize is automatically paid by the contrivance.

TEX. PENAL CODE § 47.01(4). The Penal Code broadly defines "things of value" as "any benefit" but specifically excludes "an unrecorded and *immediate* right of replay not exchangeable for value." *Id.* § 47.01(9) (emphasis added). The parties do not dispute that the eight-liners fall within the Penal Code's general definition of "gambling device." The eight-liners awarded players tickets that were redeemable for either noncash store merchandise or *non-immediate* rights of replay—both clearly benefits and thus "things of value" under the statute. *See id*. Instead, the dispositive issue in this case requires construction of the exclusion under section 47.01(4)(B), which provides that the term "gambling device" does not include:

> any electronic, electromechanical, or mechanical contrivance designed, made, and adapted solely for bona fide amusement purposes if the contrivance rewards the player exclusively with noncash merchandise prizes, toys, or novelties, or a representation of value redeemable for those items, that have a wholesale value available from a single play of the game or device of not more than 10 times the amount charged to play the game or device once or $5, whichever is less.

Id. § 47.01(4)(B).

As we noted in *Hardy v. State*, 102 S.W.3d 123 (Tex. 2003), the exclusion in section 47.01(4)(B) applies only if the eight-liners reward players "exclusively with noncash merchandise prizes, toys, or novelties, or a representation of value redeemable for those items." *Id.* at 131 (quoting TEX. PENAL CODE § 47.01(4)(B)). The pertinent facts surrounding the nature of the reward are undisputed in this case. The eight-liners issued tickets (i.e., "representations of value") that could be redeemed for either store merchandise or non-immediate rights of replay. The critical inquiry is whether non-immediate rights of replay qualify as "noncash merchandise prizes, toys, or novelties." TEX. PENAL CODE § 47.01(4)(B).

In *Hardy*, we held that eight-liners that awarded players tickets that were exchangeable for either gift certificates redeemable at local retailers or cash to play other machines did not fall within the exclusion in section 47.01(4)(B). *Hardy*, 102 S.W.3d at 131–33. We concluded that gift certificates redeemable at local retailers did not qualify as a noncash merchandise prize, toy, or novelty item because the gift certificates operated the same as legal tender. *Id.* at 132. For similar reasons, we held that eight-liners that dispense tickets redeemable for cash, even when the cash can be used only for additional play, do not meet the exclusion. *Id.* We reasoned that an award of cash, regardless of its subsequent use, precludes application of the statutory exclusion because the tickets were no longer redeemable *exclusively* for noncash merchandise prizes, toys, or novelties. *Id.* We left open the possibility, however, that additional play could be accomplished by some other method that did not violate section 47.01(4). *Id.*

In this case, we recognize that awards of additional play were accomplished electronically rather than through a cash conversion like in *Hardy*. Nevertheless, we apply the same analysis under section 47.01(4)(B): Is a non-immediate right of replay a noncash merchandise prize, toy, or novelty item? While "novelty" can be defined as a "new event," as the court of appeals noted, 372 S.W.3d at 285, we conclude that the context of section 47.01(4) indicates that the Legislature intended a meaning of novelty consistent with the other terms of the statute. Thus, while the method of awarding additional play in this case differs from that in *Hardy*, the result remains the same.

The Penal Code does not define "novelties." Undefined terms in a statute are typically given their ordinary meaning. *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011). However, we will not give an undefined term a meaning that is out of harmony or inconsistent with

other terms in the statute. *In re Hall*, 286 S.W.3d 925, 929 (Tex. 2009); *see also Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 750–51 n.29 (Tex. 2006) (applying the traditional canon of construction *noscitur a sociis*—or "it is known by its associates"—to construe the last term within a series). "[I]f a different, more limited, or precise definition is apparent from the term's use in the context of the statute, we apply that meaning." *Hall*, 286 S.W.3d at 929. Therefore, when an undefined term has multiple common meanings, the definition most consistent within the context of the statute's scheme applies. *See id.* (applying the dictionary's second definition of "detention" as the term is used in the Juvenile Justice Code); *see also Combs*, 340 S.W.3d at 441 ("It is a fundamental principle of statutory construction and indeed of language itself that words' meanings cannot be determined in isolation but must be drawn from the context in which they are used.").

In addition to the definition of "novelty" as a "new event," many dictionaries define "novelty" as a small manufactured article, object, or toy. *See, e.g.*, AMERICAN HERITAGE COLLEGE DICTIONARY 934 (3d. ed. 2000) (defining "novelty" as "a small mass-produced article, such as a toy or trinket."). For instance, the third definition in Webster's Third New International Dictionary—the same dictionary the court of appeals relied on—defines "novelty" as "a small manufactured article intended mainly for decoration or adornment and marked by an unusual or novel design." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1546 (2002). The context of section 47.01(4) indicates that the Legislature intended "novelty" to mean other types of tangible articles similar to "noncash merchandise prizes" and "toys"—not a "new event" as the court of appeals defined the term. Under this definition, we hold that non-immediate rights of replay are not novelties.

Therefore, we hold that Barnes's eight-liners do not fall within the exclusion in section 47.01(4)(B) because the distributed tickets were not redeemable *exclusively* for noncash merchandise prizes, toys, or novelties. *See* TEX. PENAL CODE § 47.01(4)(B). The court of appeals erred when it held otherwise. Accordingly, we grant the State's petition for review, and without hearing oral argument, we reverse the judgment of the court of appeals and reinstate the judgment of the county court at law. *See* TEX. R. APP. P. 59.1.

OPINION DELIVERED: June 28, 2013

IN THE SUPREME COURT OF TEXAS

NO. 12-0744

IN THE INTEREST OF E.C.R., CHILD

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

Argued April 23, 2013

CHIEF JUSTICE JEFFERSON delivered the opinion of the Court

We require the State to overcome significant burdens before removing a child from his parent. These impediments are essential to protect the parent's fundamental liberty interest in the companionship, care, custody, and management of her children.[1] But "[j]ust as it is imperative for courts to recognize the constitutional underpinnings of the parent-child relationship, it is also essential that emotional and physical interests of the child not be sacrificed merely to preserve that right." *In re C.H.*, 89 S.W.3d 17, 26 (Tex. 2002).[2]

[1] *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 27 (1981); *see In re E.R.*, 385 S.W.3d 552, 563 (Tex. 2012) ("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.'") (quoting *Santosky v. Kramer*, 455 U.S. 745, 758-59 (1982)); *see also Holick v. Smith*, 685 S.W.2d 18, 21 (Tex. 1985) (noting that "involuntary termination statutes are strictly construed in favor of the parent").

[2] *See also* TEX. FAM. CODE § 153.001(a)(2) ("The public policy of this state is to . . . provide a safe, stable, and nonviolent environment for the child.").

The Family Code allows a court to terminate a parent's rights to her child if the child has been in the State's custody for at least nine months, and the State proves, by clear and convincing evidence, that the parent failed to comply with a court order that specified what she had to do to get her child back. TEX. FAM. CODE § 161.001(1)(O). The provision applies, however, only if the child was removed from the parent under Family Code Chapter 262 for "abuse or neglect of the child." *Id*. We must decide whether abuse or neglect includes placing the child's physical health or safety at substantial risk, as outlined below. Because we conclude that it does, and because the parent's abuse or neglect of another child is relevant to that determination, we reverse in part the court of appeals' judgment and remand the case to that court.

I. Background

After M.R. was seen punching and dragging her four-year-old daughter, Y.C., by her ponytail down the street, a witness called the authorities. M.R.'s eight-month-old son, E.C.R., was not present during this incident. The police found that Y.C. had fresh bruising on her face, dried blood inside her nose, cuts on her forehead and lips, and multiple scrapes. The police arrested M.R., who denied causing the injuries but later pleaded guilty to bodily injury to a child, a third-degree felony. The Department of Family and Protective Services received a referral of physical abuse of Y.C., who was sent to live with her father. After its investigation, the Department placed E.C.R., whose paternity was undetermined, with foster parents.

The Department took possession of E.C.R. under Family Code section 262.104, which authorizes possession without a court order if circumstances would lead a person of ordinary prudence and caution to believe that the child faced "an immediate danger to [his] physical health

or safety." TEX. FAM. CODE § 262.104. The next day, the Department filed a petition seeking conservatorship of E.C.R. and termination of M.R.'s parental rights. The petition was supported by a six-page affidavit recounting the circumstances necessitating E.C.R.'s removal. The affidavit described the allegations of physical abuse of Y.C. and also noted that M.R. had a prior CPS case involving physical abuse of an older son, who was in the permanent managing conservatorship of foster parents. M.R. told caseworker Cyntera Donatto that she had twice attempted suicide while spending three days in jail for the incident involving Y.C. After being released from jail, M.R. slept on the streets and left E.C.R. with her boyfriend at his home. M.R. told Donatto that the boyfriend physically abused her and was not stable. A criminal background check revealed that he had been arrested seven times over the past decade for theft, burglary, driving with an invalid license, and evading arrest. The day after she met with M.R., Donatto learned that M.R. had again been incarcerated.

Donatto observed E.C.R. and noted that, unlike Y.C., there were no evident signs that E.C.R. had been physically abused. He appeared clean, healthy, and developmentally on target. But his mother's history of abusing her other children, her fragile mental state, and her criminal case and incarceration persuaded Donatto that E.C.R. should not be left in M.R.'s care. Because E.C.R.'s paternity was unknown, the Department sought to be named his temporary managing conservator.

That day, the trial court found that E.C.R. had been removed pursuant to section 262.104 and that he faced a continuing danger to his physical health or safety if returned to M.R. The trial court also found that the nature of the emergency and the continuing danger to E.C.R.'s welfare made his

return to M.R. impossible or unreasonable. The court set the matter for a full adversary hearing within fourteen days.

After that hearing the trial court found sufficient evidence to satisfy a person of ordinary prudence and caution that:

> (1) there was a danger to the physical health or safety of the child which was caused by an act or failure to act of the person entitled to possession and for the child to remain in the home is contrary to the welfare of the child; (2) the urgent need for protection required the immediate removal of the child and makes efforts to eliminate or prevent the child's removal impossible or unreasonable; and (3) notwithstanding reasonable efforts to eliminate the need for the child's removal and enable the child to return home, there is a substantial risk of a continuing danger if the child is returned home.

The court appointed the Department temporary managing conservator and ordered M.R. to comply with the service plan. *See* TEX. FAM. CODE §§ 263.101–.106. The court warned M.R. that her failure to do so could result in the termination of her parental rights. *See id*. §§ 161.001(1)(O), 263.106.

At a subsequent status hearing, the trial court signed additional temporary orders setting the conditions for E.C.R.'s return to M.R. M.R. had to complete a psychiatric examination and follow all recommendations; complete a psychological examination and follow all recommendations; participate in counseling, including individual, group, or family therapy sessions; complete parenting classes; complete random drug tests; remain drug free; refrain from engaging in criminal activity; maintain stable housing; maintain stable employment; successfully complete domestic violence and anger management classes; and complete all services outlined in the Family Service Plan. The court found that M.R. reviewed and understood the service plan and was advised that unless she was

willing and able to provide E.C.R. with a safe environment within the time specified in the plan, her parental rights could be terminated.

Almost a year later, the trial court held a termination hearing. M.R. gave limited testimony. She admitted being served with citation and receiving deferred adjudication for 0causing injury to a child, but she denied ever telling the caseworker that E.C.R. was not living in a safe environment. She provided the names of two men who might be E.C.R.'s father. She admitted having a prior CPS case that went to final orders, and that she no longer had custody of that child.

The Department representative testified that E.C.R. was removed because of the risk of physical abuse based on M.R.'s abuse of Y.C. The representative also stated that M.R. had completed some of the court-ordered requirements, but she had not satisfied the "big" ones. She failed to undergo a psychiatric evaluation or participate in psychotherapy. The Department also presented evidence that M.R. did not obtain employment, a violation of both the Family Service Plan and the conditions of her community supervision, and she had not lived in a home for six months.

The trial court terminated M.R.'s rights under subsection O of Family Code section 161.001(1), finding that such termination was in E.C.R.'s best interest. M.R. appealed, challenging the sufficiency of the evidence supporting termination under that subsection and the best interest finding. As to the former, her argument was straightforward. She did not dispute her failure to comply with the provisions of a court order that specifically established the actions necessary for E.C.R. to be returned to her and that E.C.R. had been in the Department's conservatorship for more than nine months. Instead, she argued that termination under subsection O was improper because

E.C.R. was removed because of *risk* of abuse based on her conduct toward his sibling, but not for actual abuse or neglect.

The court of appeals agreed, holding that M.R.'s abuse of Y.C. was not evidence that M.R. abused or neglected E.C.R. 390 S.W.3d 22, 27. Instead, "[f]or a trial court to terminate parental rights under section 161.001(1)(O), it must find that the child who is the subject of the suit was removed as a result of the abuse or neglect of that specific child." *Id*. The court noted that "the Family Service Plan and [the caseworker's] testimony both show that [the Department] became involved as a result of M.R.'s abuse of E.C.R.'s sibling, a factor that the court could not consider in reaching a finding under section 161.001(1)(O)." *Id*. at 28. The court reversed the portion of the trial court's judgment terminating M.R.'s parental rights and rendered judgment denying the Department's termination petition.[3] *Id*. at 30. A divided court voted against en banc reconsideration. *Id*. (Keyes, J., dissenting).

We granted the petition for review. 2013 Tex. LEXIS 112 (Feb. 15, 2013).

[3] The court of appeals refused to consider the Department's cross-points asserting alternative bases for termination. 390 S.W.3d at 29–30 (holding that "a parental rights termination order can be upheld only on grounds both pleaded by [the Department] and found by the trial court") (quoting *Vasquez v. Texas Dep't of Protective & Regulatory Servs.*, 190 S.W.3d 189, 194 (Tex. App.—Houston [1st Dist.] 2005, pet. denied)). *But see id.* at 47 (Keyes, J., dissenting) (stating that "predicate acts under section 161.001(1) raised by [the Department] and supported by the evidence, but not expressly found by the trial court" should be considered by appellate court). The Department contends this was error. Because we hold that the Department conclusively proved grounds for termination under subsection O, we do not reach this issue.

II. The Department proved grounds for termination under subsection 161.001(1)(O) as a matter of law.

Family Code section 161.001(1) identifies multiple grounds for involuntarily terminating parental rights. Subsection O authorizes termination if the court finds, by clear and convincing evidence, that a parent has:

> failed to comply with the provisions of a court order that specifically established the actions necessary for the parent to obtain the return of the child who has been in the permanent or temporary managing conservatorship of the Department of Family and Protective Services for not less than nine months as a result of the child's removal from the parent under Chapter 262 for the abuse or neglect of the child.

TEX. FAM. CODE § 161.001(1)(O).

We last considered subsection O in *In re J.F.C.*, 96 S.W.3d 256, 277 (Tex. 2002), an appeal of a judgment terminating the parents' right to their three children. In that case, the Department received a referral alleging that the father had sexually abused two of the children, but the ensuing investigation revealed no evidence of abuse. *In re J.F.C.*, 57 S.W.3d 66, 68 (Tex. App.—Waco 2001), *rev'd*, 96 S.W.3d 256 (Tex. 2002). A year later, the Department received information that the parents "had drug problems, were physically abusive to one another, and may have been physically abusing the children." *Id.* The Department investigated and found bruises on one of the children, as well as corroboration of drug use in the home. *Id.* The Department did not remove the children, because it concluded they were not in immediate danger. *Id.* In weekly home visits over the next seven months, the Department found no evidence of abuse. *Id.* The Department learned, however, that the parents were not participating in their required counseling and continued to have conflicts among themselves. *Id.* Subsequently, the Department received a report that the mother had

handled one of the children roughly; the Department confirmed that the child (the same one who had bruises previously) had marks and scratches on his body. *Id*. The Department found that the parents' emotional health was deteriorating, and the children were not attending daycare. *Id*. The parents continued to fight and faced substantial marital problems and financial hardships. *Id*. The Department removed the children from the home and sued for temporary conservatorship. *Id*. The trial court approved a Family Service Plan outlining the requirements the parents had to satisfy to avoid termination of their rights. *Id*. at 68-69. Primarily because the parents failed to comply with the Plan, the Department amended its petition to seek termination. *Id*. at 69.

The trial court terminated the parents' rights. *Id*. at 70. A divided court of appeals reversed after determining that the charge permitted the jury to find that the parents' rights should be terminated without finding that termination would be in the children's best interest. *J.F.C.*, 96 S.W.3d at 260. In this Court, the parents argued, among other things, that the charge failed to require that the same ten jurors agree on the specific grounds for termination. *Id*. at 277. Because the question included more than one course of parental conduct justifying termination, they argued that their rights may have been terminated even though fewer than ten jurors agreed on the basis for termination. *Id*.

We held that even assuming the submission was improper, any error was harmless, because the Department had conclusively proved that the parents rights should be terminated under subsection O:

> It is undisputed that both parents failed to comply with numerous, material provisions of court orders that specifically required their compliance to avoid restriction or termination of their parental rights.

. . . .

> The evidence establishes as a matter of law that the parents failed to comply with the court's orders specifying the actions the parents had to take for the [Department] to return the children to the parents. The record also conclusively establishes that the children were removed from their parents under Chapter 262 of the Family Code, and it is undisputed that they were in the [Department's] custody for more than nine months after their removal. Accordingly, the parental conduct described in subsection 161.001(1)(O) of the Family Code was established as a matter of law. Any error in failing to submit a specific instruction on juror agreement regarding parental conduct was thus harmless.

Id. at 277-79. We reversed the court of appeals' judgment and rendered judgment terminating the parents' rights. *Id*. at 285.

At least one appellate court has interpreted subsection O in a similar fashion, holding that termination was warranted upon proof of "immediate danger to the physical health or safety of the child"—the emergency removal standard under chapter 262. *In re M.L.J.*, No. 02-07-0178-CV, 2008 Tex. App. LEXIS 3218, at *14-15 (Tex. App.— Fort Worth May 1, 2008, pet. denied) (mem. op.); *see also* TEX. FAM. CODE §§ 262.101–.102, .104(a)(1)–(2). In *M.L.J.*, the parents argued—as M.R. does here—that subsection O was inapplicable because their child was not removed for actual abuse or neglect, but only because of the risk of abuse or neglect. The court of appeals rejected this contention. *See M.L.J.*, 2008 Tex. App. LEXIS 3218, at *14-18. The Department's investigator testified that the child was removed from the parents, who were both intellectually disabled, not just because of the parents' "lack of skills" but also because they refused to seek help caring for their child. *Id*. at *16. A psychologist corroborated his testimony, stating that the mother had reported that the father had once punched her and once shook one of the children. *Id*. at *17. The

psychologist also noted that the mother had difficulty accepting that she needed help caring for her children, and that a small child faced a high degree of risk if left in the parents' care. *Id*. at *17–18.

The court of appeals held that the investigator's testimony "'would lead a person of ordinary prudence and caution to believe that there is an immediate danger to the physical health or safety of [the child].'" *Id*. at *18 (quoting TEX. FAM. CODE § 262.104(a)(1)–(2)). The court concluded that the evidence supported termination under subsection O. *Id.*; *see also In re D.R.J.*, 395 S.W.3d 316, 324 (Tex. App.—Fort Worth Feb. 7, 2013, no pet.) (Gardner, J., concurring) ("This court has previously held that evidence was sufficient to establish removal for 'abuse or neglect' based upon a CPS investigator's personal knowledge of facts that would lead a person of ordinary prudence to believe that there is 'an immediate danger to the physical health or safety of the child' as required for removal without a court order under family code section 262.104(a)(1), (2).") (citing *In re M.L.J.*).

Conversely, other courts have held that removal due to risk of abuse or neglect does not satisfy O's requirements. *See, e.g.*, *In re C.B.*, 376 S.W.3d 244, 252 (Tex. App.—Amarillo 2012, no pet.); *Mann v. Dep't of Family and Protective Servs.*, No. 01-08-01004-CV, 2009 Tex. App. LEXIS 7326, at *20-21 (Tex. App.—Houston [1st Dist.] Sept. 17, 2009, no pet.) (mem. op.); *In re S.A.P.*, 169 S.W.3d 685, 706–07 (Tex. App.—Waco 2005, no pet.) (holding that father's rights could not be terminated under subsection O because child was removed due only to risk of abuse based on parents' prior history).

In *C.B.*, the court of appeals considered a case involving a mother who "admitted to recent and chronic methamphetamine use" and who was involved in, and exposed C.B. to, an abusive

relationship with her boyfriend, also a methamphetamine user who kept the drug in a bedside cabinet in their shared home. *C.B.*, 376 S.W.3d at 251. The boyfriend had threatened the mother's life and repeatedly abused her in C.B.'s presence. *Id*. at 251-52. Nonetheless, the court held that termination under subsection O was not proper because although "[t]he affidavit portrays a volatile home environment and behavior by the mother and her paramour capable of resulting in abuse or neglect of a two-year-old child, . . . § 161.001(1)(O) requires actual occurrence of abuse or neglect to justify termination of parental rights." *Id*. at 252. Even applying the definitions of abuse and neglect in a related chapter, the court concluded that subsection O's standard had not been satisfied. *Id*. at 250. "Abuse" under chapter 261 includes a parent's current use of a controlled substance,[4] yet the court found no evidence that the mother's methamphetamine use caused physical, mental, or emotional harm to C.B., a statutory requirement. *Id*. Nor had C.B. been the victim of neglect: "[A] pattern of violence directed toward the mother by her paramour would carry some risk that a two-year-old child in the home may suffer harm, but this record does not support a conclusion that C.B. was subjected to 'a substantial risk of immediate harm.'" *Id*. (quoting TEX. FAM. CODE § 261.001(4)(B)(i)). The court held that the trial court's temporary orders were not relevant, because while they justified initial and continued removal of C.B., they contained "no findings that C.B. was actually abused or neglected." *Id*. at 250–51.

In *Mann*, the Department removed a days-old baby from his mother due to a risk of physical abuse, based on the mother's abuse of a sibling. *Mann*, 2009 Tex. App. LEXIS 7326, at *1–2. The

[4] *See* TEX. FAM. CODE § 261.001(1)(I).

mother failed to complete the necessary court-ordered services, and the trial court terminated her rights under subsection O. *Id*. at *3–11. The court of appeals reversed, holding that there was no evidence that the child had actually been abused or neglected. *Id*. at *16–17. Risk was not enough; the mother's abusive conduct toward a sibling "do[es] not provide evidence that [the mother] abused or neglected [the removed child]." *Id*. at *20. Thus, the court held that the evidence was legally insufficient to support termination under subsection O. *Id*. at *20-21.

In this case, the same court of appeals applied *Mann* to reach the same conclusion. 390 S.W.3d at 27 (holding that "M.R.'s abuse of Y.C. cannot be considered evidence that M.R. abused or neglected E.C.R. under section 161.001(1)(O)"). The court disregarded the trial court's temporary orders finding "'danger to [E.C.R.'s] physical health or safety'" and "'a substantial risk of a continuing danger if the child is returned home,'" because they were based on the risk of abuse, rather than "specific allegations of neglect or abuse" of E.C.R. *Id*. at 27–29.

We agree that subsection O requires proof of abuse or neglect,[5] but we disagree that those terms can never be read to include risk. We consider their use and meaning in context of the Family Code removal provisions and the Legislature's definitions of "abuse" and "neglect" in related chapters.

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[5] *See, e.g.*, *In re A.A.A.*, 265 S.W.3d 507, 515 (Tex. App.—Houston [1st Dist.] 2008, pet. denied) (holding that subsection O requires proof of abuse or neglect, which should be determined on a case-by-case basis); *see also D.F. v. Tex. Dep't of Family & Protective Servs.*, 393 S.W.3d 821, 828 (Tex. App.—El Paso 2012, no pet.) (concluding that subsection O requires proof of abuse or neglect); *In re M.N.*, No. 11-10-00129-CV, 2011 Tex. App. LEXIS 1924, at *9 (Tex. App.—Eastland Mar. 17, 2011, no pet.)(mem. op.) (same); *In re S.N.*, 287 S.W.3d 183, 190 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (same); *In re M.L.J.*, No. 2-07-178-CV, 2008 Tex. App. LEXIS 3218, at *14 (Tex. App.—Fort Worth May 1, 2008, pet denied) (mem. op.) (same); *In re S.A.P.*, 169 S.W.3d 685, 705-06 (Tex. App.—Waco 2005, no pet.) (same); *In re M.B.*, No. 07-04-0334-CV, 2004 Tex. App. LEXIS 11209, at *7 (Tex. App.—Amarillo Dec. 14, 2004, no pet.)(mem. op.) (same).

The preceding chapter, titled "Investigation of Report of Child Abuse or Neglect," requires that "abuse" and "neglect" be reported to the authorities, and the failure to do so carries criminal penalties. TEX. FAM. CODE §§ 261.101(a), .103(a), .109. The terms are defined broadly and nonexclusively,[6] but only "[i]n this chapter." *Id.* § 261.001, (1), (4). Both definitions give examples of abusive or neglectful conduct, and both definitions explicitly include risk: abuse includes not just actual physical injury, but a "genuine threat of substantial harm from physical injury"; neglect includes placing a child in or failing to remove a child from a situation that requires actions or judgment beyond his capabilities and that results in "a substantial risk of immediate harm to the child" or a situation in which the child would be exposed to "a substantial risk of sexual conduct harmful to the child." *Id.* § 261.001(1)(C), (4)(B)(i), (4)(B)(iv). Both definitions also include language that permits the consideration of harm to another child in determining whether abuse or neglect has occurred. *See, e.g.*, *id.* § 261.001(1)(C) ("genuine threat of substantial harm"), (4)(B)(v) ("neglect" includes exposing a child to situations in which another child faces certain sexual crimes, like abuse and trafficking).

Once the Department receives a report of abuse or neglect, it must promptly and thoroughly investigate. *Id.* § 261.301(a). If the Department believes that the child's immediate removal is

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[6] *See* TEX. GOV'T CODE § 311.005(13) ("'Includes' and 'including' are terms of enlargement and not of limitation or exclusive enumeration, and use of the terms does not create a presumption that components not expressed are excluded."); *Tex. West Oaks Hosp., LP v. Williams*, 371 S.W.3d 171, 179 (Tex. 2012) (holding that Legislature's use of the term "including" meant that statutory definition was nonexclusive); *see also Samantar v. Yousuf*, 130 S.Ct. 2278, 2287 (2010) (observing that "use of the word 'include' can signal that the list that follows is meant to be illustrative rather than exhaustive") (citing 2A N. SINGER & J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 47.7, p. 305 (7th ed.2007) ("[T]he word 'includes' is usually a term of enlargement, and not of limitation" (some internal quotation marks omitted)); *Fed. Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 99–100 (1941) (holding that "the term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle").

necessary to avoid further abuse or neglect, it must file a petition or take other action under chapter 262 for the child's temporary care and protection. *Id.* § 261.302(d).

Chapter 262, titled "Procedures in Suit by Governmental Entity to Protect Health and Safety of Child," details the circumstances under which a governmental entity may file a suit affecting the parent-child relationship or take possession of a child without a court order. *Id.* § 262.001(a). The statute provides that "[i]n determining the reasonable efforts that are required to be made with respect to preventing or eliminating the need to remove a child from the child's home or to make it possible to return a child to the child's home, the child's health and safety is the paramount concern." *Id.* § 262.001(b). The Department, a law enforcement officer, or a juvenile probation officer may take possession of a child without a temporary restraining order if the child faces an immediate danger to his physical health or safety; has been a victim of sexual abuse; is in the possession of someone who is using a controlled substance, if it poses an immediate danger to the child's physical health or safety; or is in the possession of someone who has permitted him to remain on premises used for methamphetamine manufacture. *Id.* § 262.104(a)–(b). If the Department petitions for possession of a child without prior notice and a hearing, it must submit an affidavit stating, among other things, "facts sufficient to satisfy a person of ordinary prudence and caution" that the child faces an immediate danger to his health or safety, or that the child has been a victim of neglect or sexual abuse, and that continuation in the home would be contrary to the child's welfare. *Id.* § 262.101. The trial court may issue a temporary restraining order only if it finds that one of those conditions has been satisfied.

Within fourteen days after the Department has taken possession of the child, the trial court must hold a full adversary hearing. *Id*. § 262.201(a). Following the hearing, the trial court must order the child returned to his parent unless the court finds sufficient evidence to satisfy a person of ordinary prudence and caution that: there was a danger to the child's physical health or safety that was caused by an act or failure to act of the person entitled to possession, and for the child to remain in the home is contrary to his welfare; the urgent need for protection required the immediate removal of the child and reasonable efforts, consistent with the circumstances and providing for the child's safety, were made to eliminate or prevent the child's removal; and reasonable efforts have been made to enable the child to return home, but there is a substantial risk of a continuing danger if the child is returned home. *Id*. § 262.201(b). Continued removal is warranted only if the child faces a continuing danger to his physical health or safety. *Id*. § 262.201(b)–(c).

The standard used repeatedly throughout chapter 262 is "danger to the physical health or safety of the child." That phrase is also centered on risk, rather than just a history of actual abuse or neglect: the Legislature has defined it to include "exposure of the child to loss or injury that jeopardizes the physical health or safety of the child without regard to whether there has been an actual prior injury to the child." *Id*. § 101.009; *see also id*. § 101.001(a) ("Definitions in this subchapter apply to this title."). In determining whether the child faces a continuing danger to his physical health or safety, at each stage of the proceedings the court may consider whether the child's household includes a person who has: "(1) abused or neglected another child in a manner that caused serious injury to or the death of the other child; or (2) sexually abused another child." *Id*.

§§ 262.102(b) (temporary restraining order), 262.107(b) (initial hearing), 262.201(d) (full adversary hearing).

Although chapter 261's "abuse" and "neglect" definitions do not govern in chapter 262, they surely inform the terms' meanings. *See, e.g.*, *Brown v. Darden*, 50 S.W.2d 261, 263 (Tex. 1932) ("Whenever a legislature has used a word in a statute in one sense and with one meaning, and subsequently uses the same word in legislating on the same subject-matter, it will be understood as using it in the same sense, unless there be something in the context or the nature of things to indicate that it intended a different meaning thereby."). So while subsection O requires removal under chapter 262 for abuse or neglect, those words are used broadly. Consistent with chapter 262's removal standards, "abuse or neglect of the child" necessarily includes the risks or threats of the environment in which the child is placed. Part of that calculus includes the harm suffered or the danger faced by other children under the parent's care. If a parent has neglected, sexually abused, or otherwise endangered her child's physical health or safety, such that initial and continued removal are appropriate, the child has been "remov[ed] from the parent under Chapter 262 for the abuse or neglect of the child." *See* TEX. FAM. CODE §§ 161.001(1)(O), 262.101, .102, .104, .107, .201.[7]

Here, the Department's evidence in support of removal included an affidavit showing that the department received a referral of physical abuse of Y.C. A witness had seen M.R. punching Y.C.

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[7] *Cf.* TEX. FAM. CODE § 161.001(1)(E) (authorizing termination if parent engages in conduct that "endangers the physical or emotional well-being of *the child*") (emphasis added); *In re J.O.A.*, 283 S.W.3d 336, 345 (Tex. 2009) (holding that "the endangering conduct may include the parent's actions before the child's birth, while the parent had custody of older children, including evidence of drug usage"); *Tex. Dep't of Human Servs. v. Boyd*, 727 S.W.2d 531, 533 (Tex. 1987) (holding that conduct that "'endangers . . . the child'" did not require that actions "be directed at the child or that the child actually suffers injury") (quoting former TEX. FAM. CODE § 15.02(1)(E)).

and dragging her by her hair. Y.C. had sustained injuries. M.R. denied the abuse, but she was arrested and charged with intentional bodily injury to a child. She had been involved in a prior CPS case involving physical abuse of her older son, who was in the foster parents' permanent conservatorship. She left E.C.R. with her boyfriend, who was not E.C.R.'s father, had an extensive criminal history, and had physically abused her. She was incarcerated and unable to care for E.C.R. This affidavit, even if not evidence for all purposes, shows what the trial court relied on in determining whether removal was justified. That court found sufficient evidence to satisfy a person of ordinary prudence and caution that E.C.R. faced an immediate danger to his physical health or safety, that the urgent need to protect him required his immediate removal, and that he faced a substantial risk of a continuing danger if he were returned home—findings unchallenged by M.R.[8] This evidence and these findings establish that E.C.R. was removed from M.R. under chapter 262 for abuse or neglect. *See, e.g.*, *In re J.S.G.*, No. 14-08-00754-CV, 2009 Tex. App. LEXIS 3224, at *18-20 (Tex. App.—Houston [14th Dist.] May 7, 2009, no pet.) (mem. op.) (relying on caseworker's affidavit in support of the Department's removal request, as well as trial court's temporary orders concluding that the children faced a danger to their physical health or safety and a substantial risk

[8] *See, e.g.*, *Dancy v. Daggett*, 815 S.W.2d 548, 549 (Tex. 1991) (holding that mandamus relief was appropriate because trial court's temporary orders were not subject to interlocutory appeal); *In re Steed*, No. 03-08-00235-CV, 2008 Tex. App. LEXIS 3652, at *2 n.3 (Tex. App.—Austin May 22, 2008, orig. proceeding) ("Because temporary orders in a suit affecting a parent-child relationship are not subject to interlocutory appeal under the family code, mandamus review is appropriate."), *mand. denied*, 255 S.W.3d 613, 615 (Tex. 2008, orig. proceeding) ("[W]e are not inclined to disturb the court of appeals' decision."). *But see* TEX. FAM. CODE § 262.112(b) ("In any proceeding in which an expedited hearing is held under Subsection (a), the department, parent, guardian, or other party to the proceeding is entitled to an expedited appeal on a ruling by a court that the child *may not* be removed from the child's home.") (emphasis added).

of a continuing danger if returned home, to conclude that the evidence established that the children were removed "as a result of neglect specific to them by" the mother); *see also D.F. v. Tex. Dep't of Family & Protective Servs*., 393 S.W.3d 821, 830-31 (Tex. App.—El Paso 2012, no pet.) (noting that trial court's finding of immediate danger to child's physical health or safety or that they were neglected or abused supported finding of neglect); *In re S.N.*, 287 S.W.3d 183, 190 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (holding that affidavit, family service plan, and temporary orders showing danger to physical health or safety and "'substantial risk of continuing danger'" supported finding that children were removed under chapter 262 for neglect); *In re A.A.A.*, 265 S.W.3d 507, 516 (Tex. App.—Houston [1st Dist.] 2008, pet. denied) (considering affidavit in support of removal and trial court's temporary orders finding "'continuing danger to the physical health or safety of the child if returned to the parent'" as evidence that child was removed because of neglect).

M.R. does not dispute that she "failed to comply with numerous, material provisions of court orders that specifically required . . . compliance to avoid restriction or termination of parental rights." *J.F.C.*, 96 S.W.3d at 277. As in *J.F.C.*, the record conclusively establishes that E.C.R. was removed from M.R. under Chapter 262 of the Family Code for abuse or neglect, and it is undisputed that he was in the Department's custody for more than nine months after his removal. The parental conduct described in subsection 161.001(1)(O) of the Family Code was thus established as a matter of law.

III. A reasonable factfinder could have formed a firm belief or conviction that termination was in E.C.R's best interest.

M.R. also challenges the sufficiency of the evidence supporting the best interest finding. In reviewing this finding, we consider, among other evidence, the *Holley*[9] factors. *In re E.N.C.*, 384 S.W.3d 796, 807 (Tex. 2012). Many of the reasons supporting termination under subsection O also support the trial court's best interest finding. *See In re C.H.*, 89 S.W.3d 17, 28 (Tex. 2002) (holding that same evidence may be probative of both section 161.001(1) grounds and best interest). M.R. pleaded guilty to causing injury to a child, a third degree felony. She twice attempted suicide while incarcerated on that charge, and there was evidence that she was mentally unstable. She no longer has custody of any of her four children. Her oldest was taken into Department custody several years earlier after a referral of physical abuse, and the trial court terminated her parental rights. E.C.R. lives in the same foster home with M.R.'s youngest child, a baby who was born after E.C.R. was taken into custody. M.R. has a history of homelessness, and at the time of the hearing, she had not lived in a home for six months. She has not been employed at any time since E.C.R. was taken into custody, jeopardizing her parental rights and violating the conditions of her community supervision. Although she told the child advocate she was unable to work due to pregnancy, she was unable to provide documentation substantiating that claim, nor did she explain her inability to work at all during the fourteen months the case was pending. When E.C.R. came into care, he was behind on

[9] *See Holley v. Adams*, 544 S.W.2d 367, 371-72 (Tex. 1976). These factors include: (1) the child's desires; (2) the child's present and future emotional and physical needs; (3) any present or future emotional and physical danger to the child; (4) the parental abilities of the individuals seeking custody; (5) the programs available to assist the individuals seeking custody to promote the child's best interest; (6) the plans for the child by the individuals or agency seeking custody; (7) the stability of the home or proposed placement; (8) the parent's acts or omissions which may indicate that the existing parent-child relationship is improper; and(9) any excuse for the parent's acts or omissions. *Id*.

his immunizations. He has done "very well" in foster care, and his foster parents are meeting his physical and emotional needs. The Department's long term goal for E.C.R. is unrelated adoption, although there was no evidence that his foster family would, or would not, adopt him. *C.H.*, 89 S.W.3d at 28 ("Evidence about placement plans and adoption are, of course, relevant to best interest."). But "the lack of evidence about definitive plans for permanent placement and adoption cannot be the dispositive factor." *Id*. Rather, we examine the entire record to decide best interest, "even if the agency is unable to identify with precision the child's future home environment." *Id*. We conclude that there is evidence from which a fact-finder could have formed a firm belief or conviction that termination of M.R.'s parental rights was in E.C.R.'s best interest.

M.R. also challenged the factual sufficiency of the evidence supporting the best interest finding, a question that the court of appeals must decide. *See* TEX. CONST. art. V, § 6(a). We remand to that court for consideration of the issue.

IV. Conclusion

We reverse in part the court of appeals' judgment and remand to that court for further proceedings. TEX. R. APP. P. 60.2(d).

Wallace B. Jefferson
Chief Justice

OPINION DELIVERED: June 14, 2013

IN THE SUPREME COURT OF TEXAS

NO. 12-0836

IN THE INTEREST OF J.M. AND Z.M., MINOR CHILDREN

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

PER CURIAM

In this parental termination case, we determine whether a motion for new trial and notice of appeal combined in one document can invoke appellate jurisdiction. The court of appeals determined that the combined filing at issue in this appeal did not confer appellate jurisdiction and therefore failed to reach the merits of the appeal. Because the combined filing was titled a notice of appeal and expressed the party's intent to appeal to the court of appeals, we conclude the document was a bona fide attempt to invoke appellate jurisdiction. Accordingly, we reverse the judgment of the court of appeals and remand for the court to consider the merits of the appeal.

Kimberly Spencer is the mother of J.M. and Z.M. The Department of Family and Protective Services (DFPS) petitioned to terminate Spencer's parental rights. At the conclusion of the trial, the trial court ordered the termination of Spencer's parent-child relationship with the children. Before the trial court signed the termination order, Spencer's trial counsel filed a "Motion for New Trial or, in the Alternative, Notice of Appeal." Two days after filing this document, Spencer's trial counsel

filed a motion to withdraw, citing Spencer's desire to appeal and the fact that he "does not do appellate work." The motion to withdraw reiterated that the "Motion for New Trial and Notice of Appeal has been filed," but that no hearing had been set. Less than a month later, the trial court signed the termination order, granted the motion to withdraw, and appointed appellate counsel. The district clerk forwarded Spencer's "Motion for New Trial or, in the Alternative, Notice of Appeal" to the appellate court as a notice of appeal, but the court of appeals dismissed the suit for want of jurisdiction, holding that Spencer's combined filing was not a bona fide attempt to invoke its appellate jurisdiction. __ S.W.3d __, __. We disagree.

The Legislature has given precedence to appeals involving the termination of the parent-child relationship over other civil cases and made such appeals subject to the Texas Rules of Appellate Procedure for accelerated appeals. TEX. FAM. CODE § 109.002(a). In an accelerated appeal, the appellant must file a notice of appeal within 20 days after the trial court signs its judgment or order. TEX. R. APP. P. 26.1(b). A party generally perfects its appeal by filing a written notice of appeal with the trial court clerk, TEX. R. APP. P. 25.1(a), but if (as here) a notice of appeal is prematurely filed, it is "deemed filed on the day of, but after, the event that begins the period for perfecting the appeal." TEX. R. APP. P. 27.1(a). Filing a notice of appeal invokes the court of appeal's jurisdiction over the parties to the trial court's judgment or order. TEX. R. APP. P. 25.1(b).

In cases challenging the validity of a notice of appeal, "this Court has consistently held that a timely filed document, even if defective, invokes the court of appeals' jurisdiction." *Sweed v. Nye*, 323 S.W.3d 873, 875 (Tex. 2010). The primary "factor which determines whether jurisdiction has been conferred on the appellate court is not the form or substance of the bond, certificate or affidavit,

but whether the instrument was filed in a bona fide attempt to invoke appellate court jurisdiction." *Warwick Towers Council of Co-Owners v. Park Warwick, L.P.*, 244 S.W.3d 838, 839 (Tex. 2008) (quotation marks omitted). As long as "the appellant timely files a document in a bona fide attempt to invoke the appellate court's jurisdiction, the court of appeals, on appellant's motion, must allow the appellant an opportunity to amend or refile the instrument required by law or our Rules to perfect the appeal." *Grand Prairie Indep. Sch. Dist. v. S. Parts Imports, Inc.*, 813 S.W.2d 499, 500 (Tex. 1991); *see also* TEX. R. APP. P. 44.3 ("A court of appeals must not . . . dismiss an appeal for formal defects or irregularities in appellate procedure without allowing a reasonable time to correct or amend the defects or irregularities."); TEX. R. APP. P. 42.3 (providing that a court may dismiss an appeal for want of jurisdiction "after giving ten days' notice to all parties").

Spencer's "Motion for New Trial or, in the Alternative, Notice of Appeal" indicated that Spencer was attempting to invoke the appellate court's jurisdiction. The document stated that Spencer "wishes to appeal this case to" the court of appeals; further, it was partly entitled a notice of appeal. Nothing in our Rules of Appellate Procedure or our jurisprudence prevents a party from combining a notice of appeal with a motion for new trial (or filing both the motion and notice simultaneously).

The court of appeals here focused on the motion for new trial portion of the filing and relied on *In re K.A.F.*, 160 S.W.3d 923 (Tex. 2005), to conclude that the motion for new trial was not a bona fide attempt to invoke appellate jurisdiction. __ S.W.3d at __. In *K.A.F.*, we indeed held that a combined filing of a motion for new trial and a motion to modify judgment did not qualify as a substitute for a notice of appeal, but there neither portion of the combined filing addressed the

appellate court. 160 S.W.3d at 928. Here, the notice of appeal portion addresses the appellate court. Moreover, giving effect to the notice of appeal portion does not render the motion for new trial portion meaningless: the trial court retained plenary power over the case to grant or deny the motion for new trial. TEX. R. CIV. P. 329b(d) ("The trial court, regardless of whether an appeal has been perfected, has plenary power to grant a new trial or to vacate, modify, correct, or reform the judgment within thirty days after the judgment is signed."). If the trial court does not grant the motion for new trial by the time its plenary power expires, the case is still within the appellate court's jurisdiction.

In sum, Rule of Appellate Procedure 25.1 provides that an appeal is perfected and the appellate court's jurisdiction is invoked when a written notice of appeal is filed with the trial court clerk. TEX. R. APP. P. 25.1. We have held that a party complies with Rule 25.1 by making a bona fide attempt to invoke appellate jurisdiction. *Warwick Towers*, 244 S.W.3d at 839. The present filing expressed an intent to appeal to the court of appeals and was partially entitled a notice of appeal, which constituted a bona fide attempt to invoke appellate jurisdiction upon its filing with the trial court clerk. Therefore, we reverse the judgment of the court of appeals and remand to the court of appeals for further proceedings consistent with this opinion.

Opinion Delivered: March 15, 2013

IN THE SUPREME COURT OF TEXAS

NO. 12-0907

ANTHONY L. MCCALLA AND CHERYL A. MCCALLA, PETITIONERS,

v.

BAKER'S CAMPGROUND, INC., KELLI GRAVES, AND KOURTNIE GRAVES, RESPONDENTS

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

PER CURIAM

The sole question in this case is whether a settlement agreement that includes all the terms necessary for the contract's enforcement is an enforceable contract as a matter of law, even if some of its terms seem to imply that the parties contemplate forming an additional contract in the future. We hold that such a contract is enforceable.

Respondents Baker's Campground, Inc. and Kelli and Kourtnie Graves (collectively Baker's Campground) are successors-in-interest to 380 acres of land once owned by Baker (now deceased). Petitioners the McCallas entered into a lease agreement with Baker. The lease contained an option that allowed the McCallas to buy the land if Baker decided to sell it. Even as this lease was ongoing, Baker leased the land to the Davises (who are not involved in the present litigation). The McCallas brought suit against Baker and the Davises to void the Davises' lease and to exercise the McCallas'

option to buy the land. The McCallas obtained a favorable jury verdict that would have allowed the McCallas to exercise the option to buy the land.

After the jury verdict but before judgment was rendered, the McCallas and Baker entered into settlement negotiations. They ultimately produced the settlement agreement that is the basis of the present lawsuit. The agreement provided that the McCallas and Baker released each other from any claims related to the lawsuit. The McCallas also agreed to purchase land identified as "the 380 acres more or less of land which was the subject of the litigation" for $470,000. The McCallas only became obligated to buy the land if the Davises' lease was finally "declared null and void as a matter of law" in the course of the litigation. If the Davises' lease was found to be void, the McCallas would then have 60 days to close on the purchase. The parties agreed "to execute any documents that [were] reasonable and necessary to carry out the terms and provisions of this Agreement." The contract stated that it "shall be binding upon . . . the parties . . . ."

The McCallas signed on a line under these terms. Additional handwritten terms underneath these signature lines are initialed by the McCallas, and Baker signed underneath these handwritten additions. The handwritten additions include provisions that "I will agree to $470,000 purchase price above" and that "I agree to enter an agreement as discussed above."

After entering into this settlement agreement, the McCallas and Baker told the trial court that they had reached an agreement but that they did not want to disclose the terms of the agreement. The McCallas' attorney stated that they "have settled all matters as between them," and Baker's attorney "confirm[ed] with everything he just said." Accordingly, the trial court entered a take-nothing verdict in Baker's favor.

The trial court entered judgment against the Davises based on the jury verdict. The court of appeals ultimately found that the Davises' lease was "unconscionable and unenforceable, not void." *Ski River Dev., Inc. v. McCalla*, 167 S.W.3d 121, 128 (Tex. App.—Waco 2005, pet. denied).

The McCallas promptly attempted to exercise their right to buy the property under the settlement agreement, but Baker's Campground declined to sell the property. Instead, Baker's Campground brought a declaratory judgment action to void the settlement agreement. The trial court rendered a partial summary judgment for the McCallas, finding that the settlement agreement was an enforceable contract. The trial court then rendered a final judgment for the McCallas based upon stipulated facts. The final judgment incorporated the partial summary judgment and found that the McCallas owned the property and were due the profits Baker's Campground had made on the property after the settlement agreement was breached.

The court of appeals reversed and remanded to the trial court. ___ S.W.3d ___. The court found that, because the settlement agreement's handwritten terms said that "I *will* agree" and "I agree to enter *an* agreement" (emphases added), the agreement was ambiguous as to whether it was a presently binding contract or merely an agreement to agree. *Id.* at ___. Because the settlement agreement was ambiguous, the court held that determining its enforceability was a fact issue that should not have been determined by summary judgment. *Id.*

Assuming arguendo that the settlement agreement was an agreement to enter into a future contract, the court of appeals erred in finding that the settlement agreement's enforceablity was a question of fact rather than a question of law. Agreements to enter into future contracts are enforceable if they contain all material terms. *Fort Worth Ind. Sch. Dist. v. City of Fort Worth*, 22

S.W.3d 831, 846 (Tex. 2000); *Radford v. McNeny*, 104 S.W.2d 472, 474–75 (Tex. 1937). After all, the reason agreements to enter into future contracts are often unenforceable is that courts have no way to determine what terms would have been agreed to after negotiation. *Id.* at 474. This concern is not present when the agreement to enter into a future contract already contains all the material terms of the future contract.

Here, the settlement agreement did contain all the material terms of the future contract. The material terms of a contract are determined on a case-by-case basis. *T.O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 221 (Tex. 1992). Here, the settlement agreement involves the settlement of a lawsuit and the sale of real property. The settlement agreement contained a general release, a description of the real property to be sold, the timeline for closing the real property sale, the identities of the transferor and transferee of the real property, and the price of the real property. The agreement did not indicate that these or any other terms remained open for negotiation. If a court was trying to enforce the settlement agreement, it could find all the terms necessary for its enforcement. *See Fort Worth Ind. Sch. Dist*, 22 S.W.3d at 846. Therefore, the agreement contains all material terms and is an enforceable contract.

Accordingly, the settlement agreement was an enforceable contract as a matter of law, and we reverse the court of appeals' judgment. However, Baker's Campground also argues that the trial court granted more relief to the McCallas than the McCallas requested in their summary judgment motion by finding breach of the settlement agreement and failing to consider Baker's Campground's affirmative defenses. Baker's Campground presented these issues to the court of appeals, but the court of appeals did not reach them. ___ S.W.3d at ___ ("Because of our disposition of the second

issue, we need not address the remaining issues."). The McCallas concede in their Reply Brief to this Court that "the question of breach of that agreement and [Baker's Campground's] affirmative defenses . . . have not yet been properly adjudicated by the trial court." Because the McCallas concede these issues were not "properly adjudicated," we see no reason to remand the case to the court of appeals to consider these issues. Instead, we remand the case to the trial court for further proceedings consistent with this opinion.

OPINION DELIVERED: August 23, 2013